

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPANOLA JACKSON, et al.,

Plaintiffs/Appellants,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, et al.

Defendants/Appellees.

No. 12-17803

U.S. District Court No. 3:09-cv-02143-RS

SUPPLEMENTAL EXCERPTS OF RECORD

On Appeal from the United States District Court
for the Northern District of California

The Honorable Richard Seeborg

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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. SAN FRANCISCO
VETERAN POLICE OFFICERS ASSOCIATION

SUMMONS IN A CIVIL CASE

CASE NUMBER:

CV 09

2143

PJH

V.

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

TO: (Name and address of Defendant)

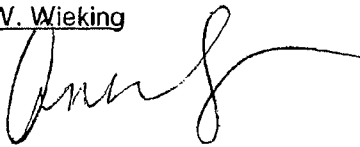
CITY AND COUNTY OF SAN FRANCISCO, MAYOR GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY;
POLICE CHIEF HEATHER FONG, in her official capacity, and Does 1-10.

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

C. D. Michel
TRUTANICH - MICHEL, LLP
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

Richard W. Wieking
CLERK



(BY) DEPUTY CLERK
ANNA SPRINKLES

MAY 15 2009

DATE _____

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SER001

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U.S. DISTRICT COURT
SAN FRANCISCO, CALIFORNIA

7 Attorneys for Plaintiffs
8

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

PJH

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

CASE NO. **CV 09 2143**
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

18 Plaintiffs

19 vs.

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

23 Defendants.
24

25 Plaintiffs, by and through their undersigned attorneys, bring this Complaint
26 for Declaratory and Injunctive Relief against the above-named Defendants, their
27 employees, agents, and successors in office, and in support thereof allege the
28 following upon information and belief:

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

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

17 Plaintiffs

18 vs.

19 CITY AND COUNTY OF SAN
20 FRANCISCO, MAYOR GAVIN
NEWSOM, in his official capacity;
21 POLICE CHIEF HEATHER FONG,
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22 10,

23 Defendants.
24

) CASE NO.
) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF**

25 Plaintiffs, by and through their undersigned attorneys, bring this Complaint
26 for Declaratory and Injunctive Relief against the above-named Defendants, their
27 employees, agents, and successors in office, and in support thereof allege the
28 following upon information and belief:

INTRODUCTION

1
2 1. Plaintiffs bring this suit to challenge the validity of San Francisco Police
3 Code §§ 4512, 1290, and 613.10(g) enacted by Defendant City and County of San
4 Francisco and enforced by its Mayor, Gavin Newsom, and its Chief of Police,
5 Heather Fong¹ (collectively, "CITY"). Each of these code sections violates
6 Plaintiffs' right to keep and bear arms under the Second Amendment to the United
7 States Constitution and, in particular, their right to defend themselves and others by
8 exercising that right within their own homes.

9 2. San Francisco Police Code § 4512 (hereafter, "Section 4512") requires that
10 handguns kept within the home be stored in a *locked* container or *disabled* with a
11 trigger lock. Thus, Section 4512 requires Plaintiffs and other city residents to
12 render and keep their handguns inoperable and, in effect, useless for self-defense
13 purposes.

14 3. The United States Supreme Court recently struck down a similar "trigger
15 lock" ordinance in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818, 171 L.
16 Ed. 637, 680 (2008), holding "the District's requirement (as applied to respondent's
17 handgun) that firearms in the home be rendered and kept inoperable at all times . . .
18 makes it impossible for citizens to use them for the core lawful purpose of self-
19 defense and is hence unconstitutional."

20 4. CITY's requirement that handguns in the home be stored in a locked
21 container or disabled with a trigger lock likewise makes it impossible for city
22 residents, including Plaintiffs, to use their handguns for the core lawful purpose of
23 self-defense – particularly in urgent, life-threatening situations when the need to
24 exercise the Constitutional right to self-defense is most acute. As the Supreme
25 Court in *Heller* recognized, in such life-threatening situations, one has little time –
26 if any – to fumble around in the dark and remove a trigger lock or open and

27
28 ¹ Police Chief Heather Fong is retiring; Plaintiffs will substitute in her
successor when one is in place.

1 retrieve a handgun from a safe to ward off a violent attack. As in *Heller*, CITY's
2 requirements here violate Plaintiffs' right to defend themselves against such attacks
3 by exercising their Second Amendment right to keep and bear arms.

4 5. In addition, San Francisco Police Code § 1290's blanket prohibition
5 against the "discharge [of] any firearms" within the City and County of San
6 Francisco – with no exception for self-defense discharges within the home –
7 violates Plaintiffs' right to keep and bear arms in defense of self and others as
8 guaranteed by the Second Amendment. Section 1290 punishes and deters the
9 exercise of that right.

10 6. Plaintiffs also challenge on Second Amendment grounds CITY's ban on
11 the sale, lease or transfer of ammunition that "serves no sporting purpose," or is
12 designed to expand or fragment upon impact. (San Francisco Police Code
13 § 613.10(g), hereafter "Section 613.10(g).") Self-defense is not a "sport." Section
14 613.10(g)'s ban is, in effect, a ban on self-defense ammunition and thus prohibits
15 city residents, including Plaintiffs, from purchasing ammunition used for self-
16 defense – the same ammunition used by law enforcement for defense of self and
17 others. Banning the sale of ammunition specifically designed for self-defense
18 violates Plaintiffs' right to keep and bear arms under the Second Amendment and
19 defeats its "core lawful purpose of self-defense."

20 7. Moreover, Section 613.10(g)'s ban on the sale/purchase of any and all
21 ammunition that "serves no sporting purpose" is vague and overbroad, and fails to
22 adequately inform Plaintiffs or anyone about which ammunition is in fact banned,
23 in violation of Plaintiffs' rights to Due Process under the Fifth Amendment.

24 8. Accordingly, Plaintiffs seek declaratory and injunctive relief to invalidate
25 and halt CITY's enforcement of Sections 4512, 1290, and 613.10(g).

26 ///

27 ///

28 ///

1 **JURISDICTION and VENUE**

2 9. Jurisdiction of this action is founded on 28 U.S.C. § 1331 in that this
3 action arises under the Constitution and laws of the United States, and under 28
4 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983 in that this action seeks to redress the
5 deprivation, under color of the laws, statutes, ordinances, regulations, customs and
6 usages of the State of California and political subdivisions thereof, of rights,
7 privileges or immunities secured by the United States Constitution and by Acts of
8 Congress. The Court has supplemental jurisdiction over Plaintiffs' state law claims
9 asserted herein under 28 U.S.C. § 1367 because such claims arise out of the same
10 case or controversy as the federal claims.

11 10. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28
12 U.S.C. §§ 2201 and 2202.

13 11. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2),
14 because a substantial part of the events or omissions giving rise to the claims
15 occurred in this district.

16 **INTRADISTRICT ASSIGNMENT**

17 12. Pursuant to Civil Local Rule 3-2(c), this action arises in the County of
18 San Francisco because a substantial part of the events or omissions giving rise to
19 the claims occurred in that County. Pursuant to Civil Local Rule 3-2(d), this action
20 should be assigned to either the San Francisco or Oakland Division.

21 **PARTIES**

22 13. Plaintiff Espanola Jackson is a seventy-four-year-old woman who resides
23 in San Francisco. She is an African American civil rights activist who owns
24 handguns and keeps them in her home for self-defense and other lawful purposes.

25 14. Plaintiff Paul Colvin is an eighty-four-year-old resident of San Francisco,
26 who owns handguns and keeps them in his home for self-defense and other lawful
27 purposes. Due to his age, Plaintiff Colvin finds opening a gun safe or unfastening
28 a trigger lock to be difficult.

1 15. Plaintiff Thomas Boyer is a resident of San Francisco. He is a gay civil
2 rights activist and an officer of the San Francisco Chapter of Pink Pistols, an
3 organization that represents the interests of gay, lesbian, bisexual and
4 transgendered firearms owners, with specific emphasis on self-defense issues, in
5 over 32 states with 40 chapters. Mr. Boyer owns handguns and keeps them in the
6 home for self-defense and other lawful purposes.

7 16. Plaintiff Larry Barsetti is a resident of San Francisco. He is a retired
8 police officer and Secretary of the San Francisco Veteran Police Officer's
9 Association. He, as well as many other veteran police officers, owns handguns and
10 keeps them in the home for self-defense and other lawful purposes.

11 17. Plaintiff David Golden is a resident of San Francisco who owns handguns
12 and keeps them in the home for self-defense and other lawful purposes. He has
13 been harassed by city agencies regarding the manner of storage of firearms in his
14 home.

15 18. Plaintiff Noemi Margaret Robinson is a female homeowner in San
16 Francisco who owns handguns and keeps them in the home for self-defense and
17 other lawful purposes.

18 19. Plaintiff National Rifle Association of America, Inc. (hereafter "NRA")
19 is a non-profit association incorporated under the laws of New York, with its
20 principal place of business in Fairfax, Virginia. The NRA has a membership of
21 approximately 4 million persons. NRA members reside in the City and County of
22 San Francisco, including Plaintiff David Golden. The purposes of the NRA
23 include protection of the right of citizens to have firearms for the lawful defense of
24 their families, persons, and property, and to promote public safety and law and
25 order. The NRA brings this action on behalf of itself and its members, some of
26 whom reside in, and others of whom travel through, the City and County of San
27 Francisco.

28 20. Plaintiff San Francisco Veteran Police Officers Association is an

1 organization that represents the interests of veteran police officers in the City and
2 County of San Francisco. Many of these veteran police officers own handguns and
3 live within the City and County of San Francisco, including Plaintiff Larry Barsetti.

4 21. Each of the individual Plaintiffs identified above are citizens and
5 taxpayers of the City and County of San Francisco who seek to keep their handguns
6 within the home in a manner ready for immediate use to protect themselves and
7 their families from attack by violent intruders, as is their right under the Second
8 Amendment to the United States Constitution – a right the CITY now denies them
9 by enforcing Sections 4512, 1290, and 613.10(g).

10 22. Each of the associational Plaintiffs identified above has individual
11 members who, like the named individual Plaintiffs, are citizens and taxpayers of
12 the City and County of San Francisco who have an acute interest in keeping their
13 handguns within the home in a manner ready for immediate use to protect
14 themselves and their families, but are prevented from doing so by CITY's
15 enforcement of Sections 4512, 1290, and 613.10(g), and thus have standing to seek
16 declaratory and injunctive relief to halt that enforcement; the interests of these
17 members are germane to their respective associations' purposes; and neither the
18 claims asserted nor the relief requested herein requires that these members
19 participate in this lawsuit individually.

20 23. Defendant City and County of San Francisco is a municipal corporation
21 acting as such by and under state law. Defendant City and County of San
22 Francisco is a "person" acting under color of state law within the meaning of 42
23 U.S.C. § 1983, and principally responsible for implementing and enforcing
24 Sections 4512, 1290, and 613.10(g).

25 24. Defendant Gavin Newsom is the current mayor and chief executive
26 officer of Defendant City and County of San Francisco. Defendant Newsom is an
27 agent, servant, and/or employee of Defendant City and County of San Francisco,
28 acting under color of state law as that phrase is used in 42 U.S.C. § 1983,

1 responsible for enforcing Sections 4512, 1290 and 613.10(g). Defendant Newsom
2 is sued in his official capacity.

3 25. Defendant Heather Fong (or her successor in office) is the Chief of
4 Police of Defendant City and County of San Francisco. Defendant Fong is an
5 agent, servant, and/or employee of Defendant City and County of San Francisco,
6 acting under color of state law as that phrase is used in 42 U.S.C. § 1983,
7 responsible for enforcing Sections 4512, 1290 and 613.10(g). Defendant Fong (or
8 her successor in office) is sued in her official capacity.

9 **GENERAL ALLEGATIONS**

10 26. In August of 2007, Defendant Newsom signed into law and CITY began
11 enforcing San Francisco Police Code § 4512, which provides in pertinent part: “No
12 person shall keep a handgun within a residence unless the handgun is stored in a
13 locked container or disabled with a trigger lock that has been approved by the
14 California Department of Justice.” (A copy of San Francisco Police Code § 4512 is
15 attached hereto as Exhibit “A” and incorporated herein.)

16 27. Under CITY’s policy, a person may not keep a working handgun in the
17 home for emergency use – at least not one that is readily accessible and unsecured
18 by locking devices, which is by definition what is required in an emergency. In
19 short, the CITY’s policy renders a person’s handgun useless in a self-defense
20 emergency, just as it renders one’s right to keep and bear arms in the home for self-
21 defense meaningless. Moreover, CITY’s trigger lock requirement has no exception
22 for self-defense use, subjecting anyone who uses a handgun in self-defense in the
23 home to possible arrest and prosecution.

24 28. On June 26, 2008, the United States Supreme Court held in *District of*
25 *Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008), that “the District’s ban on
26 handgun possession in the home violates the Second Amendment, as does its
27 prohibition against rendering any lawful firearm in the home operable for
28 immediate self-defense.”

1 29. The *Heller* decision invalidated CITY's policy under San Francisco's
2 Section 4512 that prohibits the rendering of lawful handguns in the home operable
3 for immediate self-defense by requiring all handguns to be stored in a locked
4 container or disabled with a trigger lock.

5 30. In addition to rendering Plaintiffs' handguns inoperable within the home
6 for immediate self-defense, CITY prohibits the sale of ammunition intended for use
7 in self-defense situations, pursuant to Section 613.10(g). Thus, in the unlikely
8 event that Plaintiffs have sufficient time to render their handguns operable to ward
9 off attacks within their homes, CITY requires them to do so only with ammunition
10 suitable for "sporting purposes," rather than ammunition specifically designed for
11 use in self-defense emergencies. This further limits the ability of Plaintiffs to
12 adequately and safely defend themselves and their families within the sanctity of
13 their own homes, as is their right under the Second Amendment.

14 31. CITY also prohibits the discharge of any firearm within city limits,
15 pursuant to Section 1290, without any exception for self-defense, thereby
16 subjecting Plaintiffs and others within the city to criminal charges for discharging a
17 firearm within their homes in defense of themselves or others.

18 32. To date, CITY has failed to repeal and continues to enforce Sections
19 4512, 1290 and 613.10(g) despite the Supreme Court's ruling in *Heller* that the
20 Second Amendment guarantees the right of individuals to keep and bear arms and,
21 specifically, to keep handguns in the home operable for immediate self-defense.

22 33. Plaintiffs Espanola Jackson, Paul Colvin, Thomas Boyer, Larry Barsetti,
23 David Golden, and Noemi Margaret Robinson, are responsible law-abiding adults
24 qualified to own firearms under the laws of the United States and the laws of the
25 State of California. Plaintiffs seek to lawfully possess handguns in their homes in
26 an operable state for immediate self-defense use, along with handgun ammunition
27 intended for use in defense of self or others.

28 34. Plaintiffs seek to exercise their rights to defend themselves, their homes

1 and families by keeping firearms in the home, including handguns, available for
2 immediate use by assembling them, removing trigger locks, removing them from
3 locked storage containers, and loading them with the appropriate ammunition and,
4 if necessary, discharging them in defense of self or others. CITY's policies under
5 Sections 4512, 1290 and 613.10(g) prevent them from doing so and otherwise
6 criminalize the exercise of Plaintiffs' Second Amendment rights.

7 35. Because CITY has not repealed and continues to enforce Sections 4512,
8 1290 and 613.10(g), Plaintiffs continue to face the potential for criminal
9 prosecution by exercising their Constitutional right to keep a handgun in the home
10 that is operable for immediate self-defense, to use ammunition suitable for that
11 purpose and, if necessary, to discharge the handgun in defense of themselves or
12 others.

13 36. Because CITY has not repealed and continues to enforce Sections 4512,
14 1290 and 613.10(g), Plaintiffs are subjected to irreparable harm in that they are
15 unable to keep their handguns within the home in a manner ready for immediate
16 use to protect themselves and their families from attack by violent intruders. But
17 for these provisions, Plaintiffs would forthwith, at any time they deem it reasonable
18 and necessary, keep their handguns in their residences without being stored in a
19 locked container or disabled with a trigger lock; would forthwith purchase
20 ammunition designed for self-defense use without regard to whether it serves any
21 sporting purpose; and would discharge their firearms if threatened with imminent
22 deadly force consistent with the laws of the State of California.

23 **DECLARATORY JUDGMENT ALLEGATIONS**

24 37. There is an actual and present controversy between the parties hereto in
25 that Plaintiffs contend that CITY's policy of forbidding residents from possessing
26 handguns in an operable condition, loaded with suitable ammunition, and available
27 for immediate use in self-defense is unlawful, and presents an ongoing,
28 unnecessary – and dangerous – burden on Plaintiffs' right to self-defense under the

1 Second Amendment, as does the threat of prosecution for discharging a firearm in
2 self-defense. CITY denies these contentions. Plaintiffs desire a judicial
3 declaration of their rights and CITY's duties, namely, that CITY's policies under
4 Sections 4512, 1290 and 613.10(g) violate Plaintiffs' Second Amendment rights.
5 Plaintiffs should not have to face criminal prosecution by CITY for exercising their
6 Constitutional right to keep and bear arms to defend themselves and their families
7 or, alternatively, give up those rights in order to comply with the CITY ordinances
8 challenged herein.

9 **INJUNCTIVE RELIEF ALLEGATIONS**

10 38. If an injunction does not issue enjoining CITY from enforcing Sections
11 4512, 1290 and 613.10(g), Plaintiffs will be irreparably harmed. Plaintiffs are
12 presently and continuously injured by these laws insofar as they preclude them
13 from effectively exercising their Second Amendment right to defend themselves
14 and their families within the sanctity of their own homes. Sections 4512 and
15 613.10(g) deny Plaintiffs the right to keep and bear handguns in the home that are
16 immediately usable for self-defense and loaded with ammunition suitable for that
17 purpose – or to keep and use such firearms and ammunition in that manner and for
18 that purpose without fear of criminal prosecution under those sections and Section
19 1290.

20 39. If not enjoined by this Court, CITY will continue to enforce Sections
21 4512, 1290 and 613.10(g) in derogation of Plaintiffs' Second Amendment rights.

22 40. Plaintiffs have no plain, speedy, and adequate remedy at law. Damages
23 are indeterminate or unascertainable and, in any event, would not fully redress any
24 harm suffered by Plaintiffs as a result of being unable to access an operable
25 handgun loaded with appropriate ammunition for the defense of themselves and
26 their families.

27 41. Finally, the “irreparable harm” and unascertainable “damage” that could
28 result from CITY's ongoing violation of Plaintiffs' Constitutional right to keep and

1 bear arms in defense of themselves and their families – within the sanctity of their
2 own homes – includes severe physical injury and death.

3 42. Accordingly, injunctive relief is appropriate.
4

5 **FIRST CLAIM FOR RELIEF: VALIDITY OF SFPC § 4512**
6 **Violation of the Second Amendment Right to Keep and Bear Arms**
7 (U.S. Const., Amend.’s II and XIV)

8 43. Paragraphs 1-42 are realleged and incorporated herein by reference.

9 44. The Fourteenth Amendment to the United States Constitution provides in
10 part: “No State shall make or enforce any law which shall abridge the privileges or
11 immunities of citizens of the United States; nor shall any State deprive any person
12 of life, liberty, or property, without due process of law” The Second
13 Amendment is applicable to the States and political subdivisions thereof through
14 the Fourteenth Amendment.

15 45. The Second Amendment to the United States Constitution provides: “A
16 well regulated militia, being necessary to the security of a free State, the right of
17 the people to keep and bear arms, shall not be infringed.” The Supreme Court of
18 the United States has interpreted the Second Amendment to at a minimum
19 guarantee the right of responsible, law-abiding adults to keep firearms in their
20 dwellings in a condition suitable for immediate self-defense.

21 46. The Fourteenth Amendment to the United States Constitution extends that
22 guarantee through its Due Process Clause so as to apply against state and local
23 government entities, including CITY.

24 47. CITY’s enactment and enforcement of Section 4512, which mandates all
25 handguns kept in the home be stored in a locked container or disabled with a
26 trigger lock, precludes Plaintiffs from keeping a handgun in the home that is
27 operable for immediate self-defense.

28 48. CITY’s continued enforcement of Section 4512 under color of state law

1 impermissibly infringes upon the right of the people, including Plaintiffs herein, to
2 keep and bear arms as guaranteed by the Second Amendment to the United States
3 Constitution.

4 49. As a direct and proximate result of CITY’s violation of Plaintiffs’ Second
5 Amendment rights, Plaintiffs have suffered irreparable harm, including the loss of
6 their Constitutional rights, entitling them to declaratory and injunctive relief, under
7 42 U.S.C. §§ 2201 and 2202.

8 50. Plaintiffs seek such equitable and other relief, precluding CITY from
9 prohibiting the keeping of handguns in an operable condition for immediate self-
10 defense and other lawful purposes. Other than this action for injunctive and
11 declaratory relief, Plaintiffs have no clear, speedy and effective remedy for
12 deprivation of their rights, privileges and immunities.

13

14 **SECOND CLAIM FOR RELIEF: VALIDITY OF SFPC § 613.10(g)**

15 **Violation of the Second Amendment Right to Keep and Bear Arms**

16 (U.S. Const., Amend.’s II and XIV)

17 51. Paragraphs 1- 50 are realleged and incorporated herein by reference.

18 52. CITY’s enactment and enforcement of San Francisco Police Code
19 § 613.10(g), which bans the sale of any ammunition that “serves no sporting
20 purpose” or is designed to expand or fragment upon impact is contrary to and
21 infringes upon the Second Amendment right to keep and bear arms for defense of
22 self and others.

23 53. The ammunition specifically banned by Section 613.10(g) (hollow-point
24 and similar ammunition) is the very type of ammunition most suitable for self-
25 defense, especially in close quarters, e.g., within one’s home, because it has greater
26 stopping power and is less likely to pass through the intended target or ricochet off
27 hard surfaces and injure innocent bystanders. That is a primary reason such
28 ammunition is used – and preferred – by law enforcement. CITY recognizes this

1 fact, as is evident in the exception provided in Section 613.10(g) for the purchase
2 of “conventional hollow-point ammunition with a solid lead core when the
3 purchase is made for official law enforcement purposes.”

4 54. Prohibiting law-abiding residents from using the type of ammunition best
5 suited for self-defense conflicts with Plaintiffs’ right to self-defense, which is at the
6 core of the Second Amendment right to keep and bear arms, rendering the
7 ammunition ban unconstitutional.²

8

9 **THIRD CLAIM FOR RELIEF: VALIDITY OF SFPC § 1290**
10 **Violation of the Second Amendment Right to Keep and Bear Arms**
11 (U.S. Const., Amend.’s II and XIV)

12 55. Paragraphs 1- 54 are realleged and incorporated herein by reference.

13 56. CITY’s enactment and enforcement of San Francisco Police Code § 1290,
14 which criminalizes the discharge of any firearms within the City and County of San
15

15

16 ² San Francisco Police Code section 613.10(g) reads in full, as follows:

17 (g) The licensee shall not sell, lease or otherwise transfer to any person any
18 ammunition that:

19 (1) Serves no sporting purpose;

20 (2) Is designed to expand upon impact and utilize the jacket, shot or materials
21 embedded within the jacket or shot to project or disperse barbs or other objects
22 that are intended to increase the damage to a human body or other target
23 (including, but not limited to, Winchester Black Talon, Speer Gold Dot, Federal
24 Hydra-Shok, Hornady XTP, Eldorado Starfire, Hollow Point Ammunition and
25 Remington Golden Sabre ammunition; or

26 (3) Is designed to fragment upon impact (including, but not limited to, Black
27 Rhino bullets and Glaser Safety Slugs).

28 This subsection does not apply to conventional hollow-point ammunition with a
solid lead core when the purchase is made for official law enforcement purposes
and the purchaser is authorized to make such a purchase by the director of a
public law enforcement agency such as the Chief of the San Francisco Police
Department or the Sheriff of the City and County of San Francisco.

1 Francisco, without a self-defense exception, further threatens to punish Plaintiffs
2 for discharging any firearm, including a handgun lawfully used within the home for
3 self-defense, all in violation of Plaintiffs’ right to keep and bear arms under the
4 Second Amendment.³

5
6 **FOURTH CLAIM FOR RELIEF: VALIDITY OF SFPC § 613.10(g)**

7 **Violation of the Fifth Amendment Right to Due Process**

8 (U.S. Const., Amend. V and XIV)

9 57. Paragraphs 1-56 are realleged and incorporated herein by reference.

10 58. Section 613.10(g) bans the sale (and necessarily the purchase) of
11 ammunition that “[s]erves no sporting purpose” or is designed to expand or
12 fragment upon impact. This provision, on its face and as applied, is vague insofar
13 as it fails to give the person of ordinary intelligence a reasonable opportunity to
14 know what is prohibited, so that he or she may act accordingly.

15 59. Section 613.10(g) also fails to provide explicit standards for those who
16 must apply it, and thus impermissibly delegates basic policy matters to policemen,
17 judges, and juries for resolution on an ad hoc and subjective basis, with the
18 attendant dangers of arbitrary and discriminatory application of CITY’s sales ban.

19 60. Moreover, the provisions, in particular the undefined phrase, “serves no
20 sporting purpose,” inevitably leads citizens – both sellers and buyers of
21 ammunition – to steer far wider of the “unlawful zone” of conduct than if the
22 boundaries of the forbidden areas were clearly marked, thus further undermining
23

24 ³ Section 1290 reads, in full, as follows:

25 No person or persons, firm, company, corporation or association
26 shall fire or discharge any firearms or fireworks of any kind or
27 description within the limits of the City and County of San
28 Francisco. Provided, however, that public displays of fireworks
may be given with the joint written consent of the Fire Marshal and
the Chief of Police.

1 Plaintiffs’ ability to exercise their right to keep and bear arms under the Second
2 Amendment.

3 61. Section 613.10(g) also is overbroad, both on its face and as applied,
4 inasmuch as not all ammunition unsuitable for “sporting purposes” or designed to
5 expand or fragment upon impact is unsuitable for self-defense purposes, and thus
6 the provisions of Section 613.10(g) prohibit and/or deter protected conduct,
7 specifically activity (the purchase of ammunition) necessarily associated with the
8 right to keep and bear arms for self-defense under the Second Amendment.

9 62. The vague and overbroad provisions of Section 613.10(g) violate
10 Plaintiffs’ right to Due Process under the Fifth Amendment.

11

FIFTH CLAIM FOR RELIEF:

VALIDITY OF SFPC §§ 4512, 1290 and 613.10(g)

Violation of the Right to Self-Defense Under State Law

(Cal. Const., art. 1 § 1, Cal. Penal Code § 12026)

16 63. Paragraphs 1-62 are realleged and incorporated herein by reference.

17 64. Each of the municipal ordinances, Sections 4512, 1290 and 613.10(g),
18 challenged above under federal law also violates pertinent California laws. Those
19 California laws include: Article 1, section 1 of the California Constitution;
20 California Penal Code § 12026(b); and innumerable statutes, and the public policy
21 they express, authorizing the use of firearms in self-defense. California public
22 policy likewise implies the right to discharge handguns or other firearms for
23 defense of self, family, home and business. In particular, California law guarantees
24 the right of law-abiding responsible adults to acquire and possess lawful handguns
25 in their own homes and offices for defense of self, family, home and business, as
26 recognized in *Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th
27 895, 907-908.

28 65. California Constitution Article 1, § 1 guarantees certain inalienable rights,

1 among them the right to defend one's life, liberty, and property. Section 1
2 provides, in full, as follows:

3 § 1. Inalienable rights

4 All people are by nature free and independent and have inalienable rights.

5 Among these are enjoying and defending life and liberty, acquiring,
6 possessing, and protecting property, and pursuing and obtaining safety,
7 happiness, and privacy.

8 66. California Penal Code § 12026 (b) guarantees the right of law-abiding
9 responsible adults to acquire and possess lawful handguns in the sanctity of their
10 own homes and offices for lawful purposes, including the exercise of their
11 Constitutional right to self-defense under Article 1, Section 1, quoted above. Penal
12 Code section 12026, subdivision (b) reads in full:

13 No permit or license to purchase, own, possess, keep, or carry,
14 either openly or concealed, shall be required of any citizen of
15 the United States or legal resident over the age of 18 years who
16 resides or is temporarily within this state, and who is not within
17 the excepted classes prescribed by Section 12021 or 12021.1 of
18 this code [relating to certain persons convicted of crimes and to
19 narcotics addicts] or Section 8100 or 8103 of the Welfare and
20 Institutions Code [relating to persons with mental disorders], to
21 purchase, own, possess, keep, or carry, either openly or
22 concealed, a pistol, revolver, or other firearm capable of being
23 concealed upon the person within the citizen's or legal resident's
24 place of residence, place of business, or on private property
25 owned or lawfully possessed by the citizen or legal resident.

26 67. Implicit in Penal Code § 12026(b) guaranteeing the right of law-abiding
27 responsible adults to acquire and possess handguns in their homes and offices is
28 that those whom California law authorizes to possess handguns are entitled to

1 discharge them when in defense of self, family, home and business, and otherwise
2 exercise their rights under Article 1, Section 1 of the California Constitution.

3 68. As noted above in the claims for relief under federal law, the provisions
4 of Section 4512 render handguns inoperable and thus useless in self-defense
5 emergencies; Section 1290 prohibits the discharge of any firearm – with no
6 exception for self-defense use within the home or on private property (where Penal
7 Code § 12026 entitles one to possess a handgun); and Section 613.10(g) bans the
8 sale (and consequently the purchase and use) of ammunition designed specifically
9 for self-defense.

10 69. Therefore, San Francisco Police Code Sections 4512, 1290 and 613.10(g),
11 separately and/or in combination, infringe upon the right to self-defense recognized
12 and guaranteed by the Article 1, Section 1 of the California Constitution, in
13 conjunction with laws such as Penal Code § 12026(b) which make it clear that,
14 under California law, the right to self-defense contemplates and includes the lawful
15 use of handguns.

16 70. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief to
17 stop CITY's enforcement of these three sections.

18
19 **PRAYER**

20 WHEREFORE Plaintiffs pray for relief as follows:

- 21 1) For a declaration that San Francisco Police Code § 4512 infringes upon the
22 right to keep and bear arms protected by the Second Amendment, as incorporated
23 into the Fourteenth Amendment, by impermissibly forbidding residents from
24 keeping handguns in the home available for immediate use in defense of self and
25 others;
- 26 2) For a preliminary and permanent prohibitory injunction forbidding CITY
27 and its agents, employees, officers, and representatives, including Defendants
28 Mayor Newsom and Police Chief Fong, from enforcing, or attempting to enforce

1 San Francisco Police Code § 4512;

2 3) For a declaration that San Francisco Police Code § 613.10(g) infringes
3 upon the right to keep and bear arms protected by the Second Amendment, as
4 incorporated into the Fourteenth Amendment, by impermissibly forbidding dealers
5 from selling (and residents from purchasing) ammunition designed for use in
6 defense of self and others within the City and County of San Francisco;

7 4) For a declaration that San Francisco Police Code § 613.10(g) is, on its face
8 and as applied, vague and overbroad in violation of Plaintiffs' right to Due Process
9 under the Fifth Amendment, as incorporated into the Fourteenth Amendment.

10 5) For a preliminary and permanent prohibitory injunction forbidding CITY
11 and its agents, employees, officers, and representatives, including Defendants
12 Mayor Newsom and Police Chief Fong, from enforcing, or attempting to enforce
13 San Francisco Police Code §613.10(g);

14 6) For a declaration that San Francisco Police Code § 1290 infringes upon the
15 right to keep and bear arms protected by the Second Amendment, as incorporated
16 into the Fourteenth Amendment, by impermissibly forbidding the discharge of any
17 firearm within the City and County of San Francisco, without an exception for
18 otherwise lawfully discharging a firearm within the home or on private property for
19 the defense of self and others;

20 7) For a preliminary and permanent prohibitory injunction forbidding CITY
21 and its agents, employees, officers, and representatives, including Defendants
22 Mayor Newsom and Police Chief Fong, from enforcing, or attempting to enforce
23 San Francisco Police Code § 1290;

24 8) In the alternative, under Plaintiffs' Fifth Claim for Relief pursuant to
25 California law, for: (1) a declaration that San Francisco Police Code §§ 4512, 1290,
26 and/or 613.10(g) infringe upon the right to use a handgun in defense of self and
27 others guaranteed by Article 1, section 1 of the California Constitution, in
28 conjunction with California Penal Code § 12026 and related state laws; and (2) a

1 preliminary and permanent prohibitory injunction forbidding CITY and its agents,
2 employees, officers, and representatives, including Defendants Mayor Newsom and
3 Police Chief Fong, from enforcing, or attempting to enforce San Francisco Police
4 Code §§ 4512, 1290 and/or 613.10(g);

5 9) For remedies available pursuant to 42 U.S.C. § 1983 and for an award of
6 reasonable attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988,
7 California Code of Civil Procedure § 1021.5 (private attorney general statute)
8 and/or other applicable state and federal law;

9 10) For such other and further relief as may be just and proper.

10 Date: May 14, 2009

TRUTANICH • MICHEL, LLP

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12 

13 C. D. Michel
14 Attorney for Plaintiffs

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EXHIBIT A

SEC. 4512. HANDGUNS LOCATED IN A RESIDENCE TO BE KEPT IN A LOCKED CONTAINER OR DISABLED WITH A TRIGGER LOCK.

(a) Prohibition. No person shall keep a handgun within a residence owned or controlled by that person unless the handgun is stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice.

(b) Definitions.

(1) "Residence." As used in this Section, "residence" is any structure intended or used for human habitation including but not limited to houses, condominiums, rooms, in law units, motels, hotels, SRO's, time-shares, recreational and other vehicles where human habitation occurs.

(2) "Locked container." As used in this Section, "locked container" means a secure container which is fully enclosed and locked by a padlock, key lock, combination lock or similar locking device.

(3) "Handgun." As used in this Section, "handgun" means any pistol, revolver, or other firearm that is capable of being concealed upon the person, designed to be used as a weapon, capable of expelling a projectile by the force of any explosion or other form of combustion, and has a barrel less than 16 inches in length.

(4) "Trigger lock." As used in this Section, a "trigger lock" means a trigger lock that is listed in the California Department of Justice's list of approved firearms safety devices and that is identified as appropriate for that handgun by reference to either the manufacturer and model of the handgun or to the physical characteristics of the handgun that match those listed on the roster for use with the device under Penal Code Section 12088(d).

(c) Exceptions. This Section shall not apply in the following circumstances:

(1) The handgun is carried on the person of an individual over the age of 18.

(2) The handgun is under the control of a person who is a peace officer under Penal Code Section 830.

(d) Lost or Stolen Handguns. In order to encourage reports to law enforcement agencies of lost or stolen handguns pursuant to San Francisco Police Code Section 616, a person who files a report with a law enforcement agency notifying the agency that a handgun has been lost or stolen shall not be subject to prosecution for violation of Section 4512(a) above.

(e) Penalty. Every violation of this Section shall constitute a misdemeanor and upon conviction shall be punished by a fine not to exceed \$1,000.00 or by imprisonment in the county jail not to exceed six months, or by both.

(f) Severability. If any provision, clause or word of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision, clause, word or application of this Section which can be given effect without the invalid provision, clause or word, and to this end the provisions of this Section are declared to be severable.

(Added by Ord. 193-07, File No. 070683, App. 8/1/2007)

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

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

17 Plaintiffs

18 vs.

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

23 Defendants.

) CASE NO. C09-2143 PJH

) **NOTICE OF MOTION AND**
) **MOTION TO STAY PROCEEDINGS;**
) **MEMORANDUM OF POINTS**
) **AND AUTHORITIES IN SUPPORT**
) **THEREOF**

) Hearing Date: October 21, 2009

) Time: 9:00 a.m.

) Place: Courtroom 5, 17th Fl.

) Hon. Phyllis J. Hamilton

24
25 TO DEFENDANT CITY AND COUNTY OF SAN FRANCISCO, et al.:

26 PLEASE TAKE NOTICE that on October 21, 2009, at 9:00 a.m., or as soon
27 thereafter as the matter may be heard, before the Honorable Phyllis J. Hamilton in
28 Courtroom 5 of the above-referenced Court, located at 450 Golden Gate Avenue,

1 San Francisco, California, Plaintiffs will and hereby do move the Court to stay all
2 proceedings in this action pending a final decision by the United States Court of
3 Appeals for the Ninth Circuit following its en banc review of *Nordyke v. King*, 563
4 F.3d 439 (9th Cir. 2009), on the grounds that the current action is premised on the
5 decision in *Nordyke* and staying this case pending a decision in that action will
6 conserve judicial resources without causing Defendants prejudice.

7 The motion to stay is based on the memorandum of points and authorities,
8 below, the Declaration of C. D. Michel filed herewith, the pleadings, records and
9 papers filed herein, and such other evidence or argument as may be presented at or
10 by the hearing on the motion.

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 I. INTRODUCTION & PROCEDURAL POSTURE

13 Plaintiffs' Complaint for Declaratory and Injunctive Relief challenges,
14 primarily on Second Amendment grounds, the validity of three firearms-related
15 ordinances enacted by the City and County of San Francisco. Plaintiffs filed their
16 complaint on May 15, 2009, the month following the decision in *Nordyke v. King*,
17 563 F.3d 439 (9th Cir. 2009), wherein the court held that the Second Amendment
18 is incorporated by the Fourteenth and therefore applicable to state and local
19 government action. In short, Plaintiffs' main claims arise from Defendants' alleged
20 violations of Plaintiffs' Second Amendment rights, rights enforceable against
21 Defendants as a consequence of the *Nordyke* decision.

22 In response, on July 9, 2009, Defendants filed a 12(b)(1) motion to dismiss
23 Plaintiff's complaint for lack of subject matter jurisdiction. The hearing is set for
24 September 23, 2009.

25 On July 29, 2009, the Ninth Circuit Court of Appeals on its own motion
26 issued an order for *Nordyke* to be reheard en banc. By separate order on that date,
27 the Court advised the parties that en banc oral argument would take place during
28 the week of September 21, 2009. On August 21, 2009, the Court set the en banc

1 hearing for September 24. Thus, the law supporting Plaintiffs' case is in limbo.
2 Whether the *en banc* panel upholds, refines, or reverses the three-judge panel's
3 ruling on Second Amendment incorporation will seriously impact the instant
4 action, hence the need for a stay. (*See* Declaration of C.D. Michel, filed herewith,
5 and orders attached thereto.)

6 On August 24, 2009, Plaintiffs filed their AMENDED COMPLAINT FOR
7 DECLARATORY AND INJUNCTIVE RELIEF, in part, in response to concerns
8 raised in Defendants' motion to dismiss and to obviate the need for further briefing
9 or hearing on that motion.

10 **II. ARGUMENT**

11 **A. A Stay will Preserve Judicial Resources and Allow the Major**
12 **Issue in the Instant Action to be Resolved by an En Banc Panel**
of the Ninth Circuit Court of Appeals in the Near Future

13 With the Appellate Court decision to rehear *Nordyke*, en banc, the legal basis
14 for the instant action, Second Amendment incorporation, is once again an open
15 question. Part of the Appellate Court's Order of July 29, 2009, regarding en banc
16 review was a reminder that *Nordyke* cannot be cited as authority for any
17 proposition. Thus the initial inquiry by this Court in the instant action would be
18 whether or not the Second Amendment applies to the City and County of San
19 Francisco, i.e., whether it is incorporated by the Fourteenth Amendment to apply
20 against the states and their subdivisions. That is the primary question before the
21 Appellate Court in its en banc review of *Nordyke*, set for hearing September 24,
22 2009. Because the Appellate Court should resolve the issue of incorporation
23 within a few months thereafter, it would be a waste of judicial resources for this
24 court to engage in an identical inquiry regarding incorporation, or for the parties to
25 brief the issue. In short, a stay will prevent the waste of judicial resources in
26 litigating issues in the instant action that will undoubtedly be resolved shortly
27 following the Ninth Circuit's en banc review of the *Nordyke* opinion.

28 Granting a stay under these circumstances is well within this Court's

1 discretion. “The District Court has broad discretion to stay proceedings as an
2 incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 680,
3 706 (1997). In particular, district courts have authority under Federal Rule of Civil
4 Procedure 16(a)(3) to schedule proceedings in a case to “discourag[e] wasteful
5 pretrial activities.” As the Ninth Circuit has noted, “[a] trial court may, with
6 propriety, find it is efficient for its own docket and the fairest course for the parties
7 to enter a stay of an action before it, pending resolution of independent
8 proceedings which bear upon the case.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098,
9 1111 (9th Cir. 2005) (quoting *Leyva v. Certified Grocers of Calif.*, 593 F.2d 857,
10 863-64 (9th Cir. 1997)). The Second Amendment incorporation issue has been
11 fully briefed by the *Nordyke* parties; multiple amicus curiae briefs have been filed.
12 There can be no doubt that judicial resources would be preserved by waiting for the
13 Court of Appeals to resolve that issue.

14 **B. Defendants Do Not Oppose a Stay, Nor Will They Be**
15 **Prejudiced by the Stay**

16 When evaluating the propriety of a stay, the Court should also consider “the
17 possible damage which may result from the granting of a stay, the hardship or
18 inequity which a party may suffer in being required to go forward, and the orderly
19 course of justice measured in terms of the simplifying or complicating of issues,
20 proof, and questions of law which could be expected to result from a stay.” *CMAX,*
21 *Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

22 In this situation, a stay causes no prejudice to either party. In all likelihood
23 the appellate court decision will come down well before the issue would be briefed,
24 heard, and resolved in this action and, of course, would be controlling in any event.
25 Moreover, Plaintiffs, and not Defendants, are moving the Court to grant a stay.
26 The prejudice, if any, caused by this stay would fall only upon Plaintiffs, the parties
27 seeking declaratory and injunctive relief. Defendants will suffer no prejudice.

28

1 Finally, the only issue Plaintiffs are aware of that would warrant en banc
2 review in *Nordyke* is the decision that the Second Amendment to the United States
3 Constitution is incorporated by the Fourteenth Amendment and thus applicable to
4 the states and municipalities, i.e., to San Francisco. Because that issue is central to
5 Plaintiffs' case, and the Appellate Court's ruling will be controlling authority,
6 Plaintiffs see no benefit in proceeding with the instant action until a final decision
7 is rendered by the en banc panel in *Nordyke*. See Declaration of C.D. Michel at ¶
8 5.

9 Defendants, as indicated in the Joint Case Management Conference
10 Statement, do not oppose staying this action. See Declaration of C.D. Michel at ¶
11 6.

12 **III. CONCLUSION**

13 Based on the foregoing, Plaintiffs request that this Court grant its motion to
14 stay all proceedings in this action until thirty (30) days after a final decision by the
15 *en banc* panel following its review of *Nordyke v. King*.

16 Date: August 27, 2009

MICHEL & ASSOCIATES, LLP

17
18 /S/
19 _____
C. D. Michel
Attorney for Plaintiffs

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

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,

CASE NO.: CV-09-2143-PJH

**NOTICE OF MOTION AND
MOTION TO STAY PROCEEDINGS;
MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

Plaintiffs

vs.

CITY AND COUNTY OF SAN
FRANCISCO, MAYOR GAVIN
NEWSOM, IN HIS OFFICIAL
CAPACITY; POLICE CHIEF
HEATHER FONG, in her official
capacity, 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 TO STAY
PROCEEDINGS; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

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

Sherri Kaiser, Deputy City Attorney
City and County of San Francisco
Office of the City Attorney
City Hall 1 Drive Carlton B. Goodlett Place
San Francisco, CA 94102 - 4682

I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 27, 2009.

/S/
C. D. Michel
Attorney for Plaintiffs

1 C. D. Michel - S.B.N. 144258
Don B. Kates - S.B.N. 39193
2 Glenn S. McRoberts - SBN 144852
Hillary J. Green - S.B.N. 243221
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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, THOMAS BOYER,
12 LARRY BARSETTI, DAVID
GOLDEN, NOEMI MARGARET
13 ROBINSON, NATIONAL RIFLE
ASSOCIATION OF AMERICA,
14 INC. SAN FRANCISCO VETERAN
POLICE OFFICERS
15 ASSOCIATION,

16 Plaintiffs

17 vs.

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

22 Defendants.

) **CASE NO.: CV-09-2143-RS**
)
) **NOTICE OF MOTION AND MOTION**
) **FOR RELIEF FROM STAY**

) Date: July 22, 2010
) Time: 1:30 p.m.
) Courtroom: 3

23
24 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

25 Please take notice that Plaintiffs will make this motion for relief from the stay before this
26 court on July 22, 2010 at 1:30 p.m., or as soon thereafter as the matter can be heard, in Courtroom
27 No. 3 of the United States Courthouse located at 450 Golden Gate Avenue, 17th Floor, San
28 Francisco, California.

1 The motion for relief from stay is based on this Notice, the Motion and Memorandum of
2 Points and Authorities in support thereof submitted herewith, the Declaration of C.D. Michel
3 filed herewith, the pleadings, records, and papers filed herein, and any other such evidence or
4 argument as may be presented or heard by the Court on or before the motion.

5

6 Date: June 17, 2010

MICHEL & ASSOCIATES, PC

7

/s/

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C. D. Michel
Attorney for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs move this Court for relief of stay and an Order to lift the stay on the grounds that the stay is no longer justified. The stay was originally granted because this case begs the question of whether the Second Amendment of the United States Constitution is incorporated into the Fourteenth Amendment and thus restricts state and local governments from infringing on the constitutional right to keep and bear arms. Rather than litigate that issue in this case, the parties agreed that it was wiser to wait for that issue to be resolved by the Ninth Circuit *en banc* in *Nordyke v. King*, 575 F.3d 890 (9th Cir., 2009, *en banc* review granted).

But the *Nordyke* case was then itself stayed pending the resolution of the incorporation issue by the United States Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). A decision in the *McDonald* case will be issued by June 28, 2010, the end of the Supreme Court’s current session.

Since *McDonald* will resolve the incorporation issue, there is no longer any need to wait for *Nordyke* to be decided.

II. STATEMENT OF FACTS

On May 15, 2009, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief against Defendants on Second Amendment grounds, challenging the validity of three firearms-related ordinances enacted by the City and County of San Francisco. Specifically, the ordinances challenged are: (1) San Francisco Police Code (“SFPC”) § 4512 which prohibits the keeping of a handgun in a residence unless stored in a locked container or disabled with a trigger lock; (2) SFPC § 613.10(g), prohibiting the sale of ammunition which serves no sporting purpose; and (3) SFPC § 1290, which prohibits the discharge of any firearms within the limits of the City and County of San Francisco. (Declaration of C.D. Michel at ¶ 2).

Defendants filed a 12(b)(1) Motion to Dismiss Plaintiff’s Complaint for lack of subject matter jurisdiction on July 9, 2009. The hearing was set for September 23, 2009.

On August 24, 2009, Plaintiff’s filed a First Amended Complaint which made the Motion to Dismiss moot. (Declaration of C.D. Michel at ¶ 3).

1 On August 27, 2009, the Court held an Initial Case Management Conference whereby the
 2 parties stipulated to stay the case pending the resolution of whether the Second Amendment was
 3 to be incorporated against the states, which was to be considered in the Appellate Court in
 4 *Nordyke v. King*, on September 24, 2009. (Declaration of C.D. Michel at ¶ 4 - 7; *See* Exhibit A;
 5 Exhibit B; Exhibit C; Exhibit D).

6 Thereafter, *Nordyke* was itself stayed pending the United States Supreme Court ruling on
 7 the incorporation issue raised in *McDonald v. City of Chicago*. (Declaration of C.D. Michel at ¶
 8 8; *See* Exhibit E).

9 The United States Supreme Court will issue a decision resolving the Second Amendment
 10 incorporation issue *McDonald v. City of Chicago* (No. 08-1521) by the end of this Term.
 11 (Declaration of C.D. Michel at ¶ 10; *See* Exhibit F).

12 Upon the resolution of the Second Amendment incorporation issue, this Court is to be
 13 contacted immediately, the stay is to be lifted, and the Defendants shall have 20 days to respond
 14 to the Plaintiff's First Amended Complaint. (*See* Exhibit A).

15 III. ARGUMENT

16 A. Judicial Economy Warrants Relief from Stay Because The Issue Of 17 Incorporation, Upon Which The Stay Was Originally Based, Will Be Resolved

18 “[T]he power to stay proceedings is incidental to the power inherent in every court to
 19 control the disposition of the causes on its docket with economy of time and effort for itself,
 20 counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In the interests of
 21 judicial economy, “[a] trial court may, with propriety, find it is efficient for its own docket and
 22 the fairest course for the parties to enter a stay of an action before it, *pending the resolution of*
 23 *independent proceedings which bear upon the case.*” *Dependable Highway Express, Inc. v.*
 24 *Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir., 2007) (citing *Leyva v. Certified Grocers of*
 25 *California, Ltd.*, 593 F.2d 857, 863 (9th Cir., 1979)) (emphasis added).

26 The above captioned case has been stayed pending a decision from the Ninth Circuit *en*
 27 *banc* panel in *Nordyke v. King* 575 F.3d 890 (9th Cir., 2009). In turn, *Nordyke* is effectively
 28 stayed pending the United States Supreme Court's ruling in *McDonald v. City of Chicago* (No.

1 08-1521). The issue that warranted *en banc* review in *Nordyke* was the Ninth Circuit three judge
2 panel decision that the Second Amendment to the United States Constitution is incorporated by
3 the Fourteenth Amendment and thus applicable to the states. (Declaration of C.D. Michel at ¶ 9).

4 The question presented in *McDonald v. City of Chicago* is “[w]hether the Second
5 Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth
6 Amendment’s Privileges or Immunities or Due Process Clauses.” (See Exhibit F). This issue
7 will be decided before the end of the current United States Supreme Court Term.

8 Because the United States Supreme Court will have already addressed the incorporation
9 issue and determined whether the Second Amendment applies to the state and local governments,
10 there is no need for the stay to remain in effect until a *Nordyke* decision is issued.

11 Rather, the resolution of the Second Amendment incorporation issue as decided by the
12 United States Supreme Court alleviates the need to wait for the *Nordyke* decision, permits the
13 above captioned case to proceed without prejudicing the Defendant, and promotes judicial
14 economy.

15 **IV. CONCLUSION**

16 Plaintiff respectfully requests relief from the stay and an order to lift the stay to expedite the
17 disposition of the action.

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19 Date: June 17, 2010

MICHEL & ASSOCIATES, PC

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/S/
C. D. Michel
Attorney for Plaintiffs

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1 IN THE 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,)
6 LARRY BARSETTI, DAVID GOLDEN,)
7 NOEMI MARGARET ROBINSON,) CERTIFICATE OF SERVICE
8 NATIONAL RIFLE ASSOCIATION OF)
9 AMERICA, INC. SAN FRANCISCO)
10 VETERAN POLICE OFFICERS)
11 ASSOCIATION,)

9 Plaintiffs)

10 vs.)

11 CITY AND COUNTY OF SAN)
12 FRANCISCO, MAYOR GAVIN)
13 NEWSOM, IN HIS OFFICIAL)
14 CAPACITY; POLICE CHIEF HEATHER)
15 FONG, in her official capacity, and Does 1-)
10,)

14 Defendants.)

16 IT IS HEREBY CERTIFIED THAT:

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

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

20 NOTICE OF MOTION AND MOTION FOR RELIEF FROM STAY

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.

22 Wayne Snodgrass, Deputy City Attorney
23 Sherri Kaiser, Deputy City Attorney
24 sherri.kaiser@sfgov.org
25 City and County of San Francisco
26 Office of the City Attorney
27 City Hall 1 Drive Carlton B.
28 San Francisco, CA 94102

26 I declare under penalty of perjury that the foregoing is true and correct.
27 Executed on June 17, 2010.

28 _____/S/
C. D. Michel
Attorney for Plaintiffs'

CERTIFICATE OF SERVICE

I, Pamela Cheeseborough, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on March 7, 2013.

SUPPLEMENTAL EXCERPTS OF RECORD

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed March 7, 2013, at San Francisco, California.

s/Pamela Cheeseborough

Pamela Cheeseborough