

No. 12-17803

**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.

Appeal from the United States District Court
for the Northern District of California
Case No. CV-09-2143-RS
The Honorable Richard Seeborg, United States District Judge

***AMICI CURIAE* BRIEF BY BRADY CENTER TO PREVENT GUN VIOLENCE
AND MAJOR CITIES CHIEFS ASSOCIATION
IN SUPPORT OF DEFENDANTS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure Rule 26.1, counsel for the undersigned states:

The *Amici Curiae* Brady Center to Prevent Gun Violence and Major Cities Chiefs Association are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation is a holder of stock.

Dated: March 14, 2013

Respectfully Submitted,

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CONSENT TO FILE

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *amici* received consent from all parties to file this brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amici*, its members, or its counsel, contributed money intended to fund preparation of this brief.

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STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Brady Center to Prevent Gun Violence is the nation's largest non-partisan, nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous *amicus curiae* briefs in cases involving firearms regulations, including *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Amicus* brings a broad and deep perspective to the issues raised by this case and has a compelling interest in ensuring that the Second Amendment does not impede reasonable governmental action to prevent gun violence.

Amicus Major Cities Chiefs Association ("MCCA") is a professional association representing the largest cities in the United States and Canada. MCCA membership comprises chiefs and sheriffs of the 70 largest law enforcement agencies in the United States and Canada. Together they serve more than 76.5 million people (68 million U.S., 8.5 million Canada) with a combined sworn workforce of 177,150 (159,300 U.S., 17,850 Canada) officers.

SUMMARY OF ARGUMENT

Even as it upheld the individual's right to possess a firearm for self-defense, the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), also acknowledged two important limitations to its holding that are particularly relevant in this case. First, the Court emphasized that the Second Amendment right was not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Second, the Court noted that nothing in its analysis "suggest[s] the invalidity of laws regulating the storage of firearms to prevent accidents." *Id.* at 632.

The Supreme Court has recognized the importance of, and even explicitly endorsed, local legislatures devising reasonable firearms regulations as "solutions to social problems that suit local needs and values." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 (2010). As the legislative body charged with establishing policies, ordinances, and resolutions in response to the needs of the City and County of San Francisco, the San Francisco Board of Supervisors made a policy choice to enact modest and reasonable regulations to promote gun safety and reduce the public health risk of catastrophic injury and loss of life from firearms. The Board did so against the backdrop of a national epidemic of gun violence, and with a watchful eye on the significant body of research and evidence indicating the

dramatic risks to public health from loaded and unlocked firearms in the home and enhanced lethality ammunition.

San Francisco Police Code § 4512 (the “Safe Storage Ordinance”) and § 613.10(g) (“the Ammunition Ordinance”) both reflect modest and reasonable regulations intended to reduce the risk of loss of life or serious injury from accidental shootings and suicide attempts. Both of these regulations were carefully drafted to accomplish this significant governmental interest while also preserving the constitutional right of law-abiding, responsible San Francisco residents—as clarified by the Supreme Court in *McDonald* and *Heller*—to have an operable firearm in the home for self-defense.

San Francisco’s Ordinances both serve its substantial interest in public safety, and impose no more than a minimal burden on residents’ right to keep and bear arms in their homes for self-defense.

ARGUMENT

This Court should affirm the District Court’s denial of a preliminary injunction against enforcement of the Safe Storage and Ammunition Ordinances. Both Ordinances are permissible regulations that do not substantially burden the Second Amendment rights of San Francisco residents. Even if this Court concludes that the Second Amendment right to self-defense in the home is implicated by these Ordinances, it should affirm the District Court’s decision

because the Ordinances are substantially related to the City's interest in limiting firearms-related deaths and injuries.

I. SAN FRANCISCO'S SAFE STORAGE ORDINANCE DOES NOT INFRINGE THE SECOND AMENDMENT RIGHT TO SELF-DEFENSE.

The Safe Storage Ordinance requires that any handgun kept in a residence must be stored in a locked container or disabled with a trigger lock when not carried on the person of an adult. The Board of Supervisors adopted several legislative findings in support of the Ordinance, including: (1) firearms injuries have a significant public health impact both nationally and locally; (2) having a loaded or unlocked gun in the home is associated with an increased risk of gun-related injury and death, particularly among children; and (3) there is broad consensus among medical professionals, police chiefs, gun control advocates, and gun rights groups that safe storage practices promote health and safety. S.F. Police Code § 4511.

A. Firearms In the Home Raise the Risk of Injury and Death From Accidental and Intentional Shootings.

Numerous studies have quantified the number of Americans, children in particular, living under the same roof as firearms that are kept loaded and unlocked. One study has estimated that one out of three handguns in America is kept loaded and unlocked. Philip J. Cook & Jens Ludwig, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Guns in America: National Survey on Private Ownership*

and Use of Firearms, May 1997, at 7, available at <http://www.ncjrs.gov/pdffiles/165476.pdf>. Another study found that 2.6 million children in America are living in homes with firearms stored unlocked and either loaded or unloaded with ammunition nearby. Mark A. Schuster et al., *Firearm Storage Patterns in U.S. Homes with Children*, 90 Am. J. Pub. Health 588, 590 (Apr. 2000), available at http://www.rand.org/content/dam/rand/pubs/reprints/2005/RAND_RP890.pdf. Fully 28.8% of parents with children 12 years or younger, and 41.7% of parents with children ages 13 to 17, keep an unlocked firearm in the home. Renee M. Johnson et al., *Are Household Firearms Stored Less Safely in Homes with Adolescents*, 160 Archives of Pediatric & Adolescent Med. 788, 789 (2006). Another study reported that 73% of children under age 10 were aware of the location of their parents' firearms, and 36% admitted that they had handled the weapons. Frances Baxley & Matthew Miller, *Parental Misperceptions About Children and Firearms*, 160 Archives of Pediatric & Adolescent Med. 542, 544-45 (2006), available at <http://archpedi.ama-assn.org/cgi/reprint/160/5/542.pdf>.

These statistics are particularly alarming when considered along with the fact that access to loaded and unlocked firearms in the home drastically heightens the risk of both accidental and intentional shootings and injuries. One study found that 89% of childhood unintentional shooting injuries, defined to include both non-fatal and fatal wounds, occur in the home, mostly when children are playing with a

loaded gun in their parents' absence. Guohua Li et al., *Factors Associated with the Intent of Firearm-Related Injuries in Pediatric Trauma Patients*, 150 *Archives of Pediatric & Adolescent Med.* 1160, 1162 (1996). Another study concluded that 50% of firearms-related deaths among children occurred at the home of the victim, and 40% at the home of a friend or relative, and these occurred when children had access to loaded guns. Boston Children's Hospital, *Firearm Safety, 2005-2006*, available at <http://www.childrenshospital.org/az/Site905/mainpageS905P0.html>. Using nationally representative mortality data, yet another study estimated that persons who died from accidental shootings were more than three times as likely to have a gun in their home; the incidence of deaths from accidental shooting was even higher if there was more than one gun in the home. Douglas J. Wiebe, *Firearms in US Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 *Accident Analysis & Prevention* 711, 713-14 (2003).

Households with firearms, in particular loaded and unlocked handguns, demonstrate higher rates of suicide than households without firearms. *See, e.g.*, Arthur L. Kellermann et al., *Suicide In the Home In Relation to Gun Ownership*, 327 *New Engl. J. Med.* 467, 470-72 (1992); David A. Brent et al., *The Presence and Accessibility of Firearms In the Homes of Adolescent Suicides, A Case-Control Study*, 266 *JAMA* 2989 (1991); David A. Brent et al., *Firearms and Adolescent Suicide, A Community Case-Control Study*, 147 *Am. J. Diseases of*

Child. 1066, 1066-71 (1993). In 2004, the third leading cause of death nationwide among youth aged 10 to 24 was suicide, and the risk of suicide is five times greater in homes with guns. Ctrs. For Disease Control & Prevention, U.S. Dep't of Health & Human Servs., Web-Based Injury Statistics Query and Reporting System (WISQARS), <http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html>. The higher rates of suicide associated with those households that own firearms are not unique to a particular gender or age group: men, women, and children all have higher suicide rates when living with guns. *See, e.g.*, Matthew Miller et al., *Firearm Availability and Suicide and Unintentional Firearm Deaths Among Women*, 79 J. Urb. Health 26 (2002); Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths, Suicide, and Homicide Among 5-14 Year Olds*, 52 J. of Trauma: Injury, Infection, & Critical Care 267 (2002).

Adolescent suicide victims are more than twice as likely to have had a gun in their home as compared to those who unsuccessfully attempted suicide. Brent et al., *supra*, 266 JAMA 2989 (1991). Another study estimated that adult suicide victims were more than three times as likely to have a gun in their home. Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 Annals of Emergency Med. 771 (2003). More than 75% of guns used by youth in suicide attempts and unintentional injuries were kept in the home of the victim, a relative, or a friend.

David C. Grossman et al., *Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm*, 153 *Archives of Pediatric & Adolescent Med.* 875, 875 (1999), available at <http://archpedi.ama-assn.org/cgi/reprint/153/8/875>. A study conducted on adolescent suicide and firearms concluded that 87.8% of adolescent suicide victims who lived in a home with a gun died by firearms, while only 18.8% of suicide victims that did not live in a home with a gun died by firearms. Brent et al., *supra*, 147 *Am. J. of Diseases of Child.* at 1068.

The frequency with which handguns are used for self-defense in the home is vastly outnumbered by fatalities from unintentional shootings, crimes, and suicides associated with keeping a gun in the home. One study concluded that there are four unintentional shootings, seven criminal assaults or homicides, and eleven attempted or completed suicides for each time a gun kept in the home is used in self-defense. Arthur L. Kellerman et al., *Injuries and Deaths Due to Firearms in the Home*, 45 *J. Trauma: Injury, Infection, & Critical Care* 263 (1998).

These studies confirm the Board of Supervisors' findings, summarized in Appellees' Answering Brief, regarding the significant risks to public health and safety from loaded and unlocked firearms in the home.

B. The Safe Storage Ordinance Does Not Substantially Burden the Right to Self-Defense.

The City submitted significant evidence in the District Court that the Safe Storage Ordinance did not impose any meaningful impediment on citizens' ability to defend themselves. The Ordinance applies only to handguns, not long guns, and only requires locking handguns that are not being carried, so gun owners could choose to keep loaded and unlocked weapons with them in their homes at any time. S.F. Police Code § 4511(7)(a). Lockboxes allow quick and easy access during times when a gun owner chooses not to carry the handgun. S.F. Police Code § 4511(7)(c) ("Portable lockboxes can store loaded weapons such that they are always within easy reach on counters, tables or nightstands. Such safely stored weapons are more quickly and easily retrieved for use in self-defense than unlocked guns that have been hidden away in seldom-used locations."); *see* Garza Decl. ¶¶ 2-7, ER 92-93.

Moreover, the City rightly pointed out that opponents of locked storage requirements could not demonstrate any actual impairment of the right to self-defense. Webster Decl. ¶¶ 62-63 (no empirical studies supported Appellants' view that locked storage of guns actually impaired self-defense or endangered gun owners), ER 88-89.

Appellants' exaggerated theory that safe storage requirements may impair the right to self-defense is further strained by the fact that parties on both sides of

the perennial “gun control” debate agree that firearms should be stored safely to prevent accidents or unauthorized access. *See, e.g.*, Webster Decl. ¶ 41, ER 79; S.F. Police Code § 4511(6). For example, firearms manufacturers’ instruction manuals explicitly require keeping firearms locked and unloaded. Smith and Wesson’s instruction manual states:

You must always secure your firearm and ammunition separately so that they are not accessible to children and/or other unauthorized persons. NEVER KEEP AMMUNITION IN THE SAME LOCATION AS THE FIREARM. Store each in a separate and secure place. . . . FOR YOUR SAFETY AND THE SAFETY OF OTHERS, IT IS IMPERATIVE THAT YOU KEEP YOUR FIREARM LOCKED AND UNLOADED IN A SECURE PLACE. THE AMMUNITION SHOULD BE STORED IN A SEPARATE, SECURE LOCATION WHEN IT IS NOT IN USE. . . . ALWAYS SECURE YOUR FIREARM IN A MANNER THAT WILL PREVENT UNAUTHORIZED ACCESS. Whenever your firearm is not in use, keep it unloaded and locked.

Smith & Wesson Safety & Instruction Manual, S&W SD9 VE™ Pistol, at 5, 7 (2012), available at http://www.smith-wesson.com/wcsstore/SmWesson2/upload/other/S&W_SD9VE%20&%20SD40VE%20Manual_03_30_12.pdf (emphasis in original); *see also* Smith & Wesson Safety & Instruction Manual, M&P Shield Pistols™, at 5, 7 (2012), available at http://www.smith-wesson.com/wcsstore/SmWesson2/upload/other/M&P_Shield_Manual_04-02-2012.pdf.

Similarly, Beretta’s instruction manual cautions:

It is your responsibility to ensure that children under the age of 18 or other unauthorized persons do not gain access to your firearm. **To reduce the risk of accidents involving children, unload your firearm, lock it and store the ammunition in a separate locked location.** . . . Always store the pistol UNLOADED, magazine empty, manual safety engaged . . . and the hammer decocked

Beretta PX4 Storm, Full Size, 9mm User Manual, at 48, 82, available at <http://www.berettausa.com/products/px4-storm-full-size-9mm/> (emphasis in original).

The National Rifle Association (“NRA”) also supports the kind of safe storage practices covered by the City’s Safe Storage Ordinance. The NRA’s Gun Safety Rules, available on its website, recommend that gun owners “[s]tore guns so they are not accessible to unauthorized persons. . . . Dozens of gun storage devices, as well as locking devices that attach directly to the gun, are available.” Nat’l Rifle Ass’n (“NRA”) Gun Safety Rules, available at <http://training.nra.org/nra-gun-safety-rules.aspx>. The NRA similarly instructs parents to “[s]tore guns so that they are inaccessible to children and other unauthorized users. Gun shops sell a wide variety of safes, cases, and other security devices.” Nat’l Rifle Ass’n, NRA Information For Parents, available at <http://eddieagle.nra.org/information-for-parents.aspx>.

This broad societal consensus on the importance of safe storage practices supports the conclusion that the City's Safe Storage Ordinance does not substantially burden the right to self-defense protected by the Second Amendment.

C. The Safe Storage Ordinance Does Not Violate Appellants' Second Amendment Rights.

This Court has yet to define the standard of scrutiny that applies to laws regulating handguns after the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In denying Appellants' motion for a preliminary injunction, the District Court cited to the concurring opinion in *Nordyke v. King*, 681 F.3d 1041, 1045 (9th Cir. 2012) (O'Scannlain, J., concurring). ER 6-7. Under that approach, which incorporates the vacated *Nordyke* panel opinion, "only regulations which substantially burden the right to keep and bear arms trigger heightened scrutiny" under the Second Amendment. *Id.* See also *United States v. DeCastro*, 682 F.3d 160, 164 (2d Cir. 2012) ("[H]eightedened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment . . ."). The Safe Storage Ordinance represents permissible regulation of the Second Amendment right to self-defense under this approach, because it does not substantially burden the Second Amendment right to possess a handgun for self-defense in the home.

Alternatively, even if this Court were to conclude that the Safe Storage Ordinance is subject to heightened scrutiny, San Francisco's interest in reducing

the incidence of death or serious injury from shootings in the home easily justifies any modest burden on Second Amendment rights that the Ordinance imposes. As summarized by Appellees, the First, Third, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits have adopted a “sliding scale” approach that bases the degree of Second Amendment scrutiny on the “severity of the burden the law imposes.”

(Appellees’ Answering Br. at 19, citing *Heller v. District of Columbia*, 670 F.3d 1244, 1253, 1260 (D.C. Cir. 2011) (“*Heller II*”).) Under this approach, regulations that do not impose a substantial burden on Second Amendment rights are subject to intermediate scrutiny, and such regulations will be upheld so long as they are “substantially related to an important governmental objective.” *Heller II*, 670 F.3d at 1258 (citations omitted).

As described above, independent studies have confirmed that safe storage practices, including keeping firearms stored unloaded, locked, and separated from ammunition, have been correlated with significantly reduced incidents involving unintentional accidents and suicides attempts among adolescents and children. *See, e.g.*, David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 JAMA 707 (2005); Lisa Hepburn et al., *The Effect of Child Access Prevention Laws on Unintentional Child Firearm Fatalities, 1979-2000*, 61 J. Trauma 423, 426 (2006) (state laws requiring firearms to be inaccessible to children were associated with lower rates of unintentional

deaths among children caused by firearms in California). *See also* Webster Decl. ¶¶ 40-43, 54-55, ER 79-80, 85.

As recently as last week, the American Medical Association’s Journal of Internal Medicine published a study designed to evaluate whether “more firearm laws in a state are associated with fewer gun fatalities.” Eric W. Fleegler et al., *Firearm Legislation and Firearm-Related Fatalities in the United States*, JAMA Intern. Med. at E1 (Mar. 6, 2013), available at <http://archinte.jamanetwork.com/article.aspx?articleid=1661390>. The study compared data on gun-related deaths reported to the Centers for Disease Control and Prevention to data on firearm regulation in the 50 states compiled by the Brady Center. Applying a variety of statistical measures, the study found “an association between the legislative strength of a state’s firearm laws—as measured by a higher number of laws—and a lower rate of firearm fatalities. The association was significant for firearm fatalities overall and for firearm suicide and homicide deaths, individually.” *Id.* at E8.

The record below, as well as the literature cited in this brief, fully supports San Francisco’s judgment that the Safe Storage Ordinance furthered an important governmental interest in reducing public health and safety risks from accidental shootings and suicide attempts. The Ordinance accordingly satisfies intermediate

scrutiny and the District Court's denial of a preliminary injunction should be affirmed.

II. SAN FRANCISCO'S AMMUNITION ORDINANCE DOES NOT INFRINGE THE SECOND AMENDMENT RIGHT TO SELF-DEFENSE.

The Ammunition Ordinance prohibits licensed firearms and ammunitions dealers within San Francisco from selling enhanced lethality ammunition, which is defined 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, Winchester Black Talon, Speer Gold Dot, Federal Hydra-Shok, Hornady XTP, Eldorado Starfire, Hollow Point Ammunition and Remington Golden Sabre ammunition; or
- (3) Is designed to fragment upon impact (including, but not limited to, Black Rhino bullets and Glaser Safety Slugs).

S.F. Police Code § 613.10(g). The Ordinance neither prohibits San Francisco residents from possessing or using enhanced lethality ammunition, nor precludes them from purchasing such ammunition outside city limits or from online retailers. More fundamentally, the Ordinance does not restrict to any degree San Francisco residents' ability to purchase, possess, or use standard, fully jacketed ammunition for self-defense.

A. Enhanced Lethality Ammunition Further Enhances the Risk of Injury and Death From Accidental and Intentional Shootings in the Home.

There is widespread recognition of the devastating effect of enhanced lethality ammunition. *See, e.g., Police Code – Storage and Enhanced Lethality Ammunition Findings: Hearing Before S.F. Bd. of Supervisors Pub. Safety Comm.*, Sept. 15, 2011 (testimony of Dr. Randi Smith, trauma surgeon S.F. Gen. Hosp.), available at http://sanfrancisco.granicus.com/ViewPublisher.php?view_id=44; Craig S. Bartlett, *Clinical Update: Gunshot Wound Ballistics*, 408 *Clinical Orthopaedics & Rel. Res.* 28, 36 (2003) (bullets that expand on impact more than quadruple the amount of tissue that is injured); George McCormick II et al., *Wounding Effects of the Winchester Black Talon Bullet*, 17 *Am. J. Forensic Med. & Pathology* 124, 127-28 (1996) (“Black Talon” bullets resemble the teeth of a circular saw blade upon impact and are designed to cut deeply through tissue); *see also* Pierre Thomas, *Winchester to Cut Sales of Hollow-Tip Bullet*, *Wash. Post*, Nov. 23, 1993, at A1 (manufacturer announced intention to limit sales of Black Talon ammunition to law enforcement agencies only).

These properties significantly *compound* the risks of death or serious injury from accidental shootings or suicide attempts. By purpose and design, enhanced lethality ammunition greatly increases the likelihood that a wound will be fatal. Use of such ammunition is mandated in many jurisdictions for hunting and in

animal slaughterhouse operations for that very reason. *See* Pls.’ Request for Judicial Not. in Support of Judgment on Plds., Exs. Q, S, ER 286-87, 289.

In light of the substantial public health risks posed by enhanced lethality ammunition, other jurisdictions have also chosen to regulate discrete classes of ammunition that are particularly harmful. *See* City Opp. to Pls.’ Mot. For P.I., at 18-19 (listing examples of laws and regulations in other jurisdictions), ER 118-19. Thirty-one states and the District of Columbia impose regulations on ammunition that falls within the ambit of “no sporting purpose.” Legal Community Against Gun Violence, *Regulating Guns in America* 57 (2008), available at <http://smartgunlaws.org/regulating-guns-in-america-an-evaluation-and-comparative-analysis-of-federal-state-and-selected-local-gun-laws>. Expanding bullets, designed to expand on impact in order to “increase the damage to a human body or other target,” S.F. Police Code § 613.10(g)(2), have been banned for use in international armed conflict since 1899. *See* Hague Declaration (IV, 3) Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 187 Consol. T.S. 459.¹ And New Jersey goes so far as to ban possession of hollow point ammunition, except for a narrow exception for self-defense use in the home. N.J. Stat. Ann. § 2C:39-3(f)(1), (g)(2).

¹ The United States adheres to the prohibitions of the Hague Declaration, though it is not a signatory to the treaty. International and Operational Law Department, U.S. Army, *Operational Law Handbook* 27 (2012).

B. The Ammunition Ordinance Does Not Substantially Burden the Right to Self-Defense.

Heller guaranteed law-abiding, responsible citizens the constitutional right to an *operable* handgun in the home for self-defense. The Court made clear that this right does not extend to every conceivable form of firearm, much less every conceivable type of ammunition. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (noting that *Heller* “recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose’”). So long as law-abiding, responsible citizens have the ability to obtain and use ammunition sufficient to make a handgun fully functional for self-defense in the home, the Second Amendment right is preserved.

The Ammunition Ordinance does not in any way affect the ability of San Francisco residents to possess an operable firearm in the home for self-defense. It is no more than a modest limitation on the *sale* of ammunition designed to cause maximum damage to the human body. First, San Francisco residents are free to purchase conventional ammunition, which is entirely suitable for the purpose of self-defense. *See* S.F. Police Code § 613.9.5(4). Appellants have not presented any evidence that ammunition falling outside of the Ordinance’s scope is

insufficient for the purpose of self-defense in the home.² Second, residents may still purchase the type of enhanced lethality ammunition covered by the Ordinance from gun shops or sellers outside the city limits.

In sum, San Francisco neither prohibits residents from possessing the enhanced lethality ammunition covered by the Ordinance, nor subjects them to civil or criminal penalties for the use of such ammunition. The absence of any punishment is particularly telling in light of the majority's discussion in *Heller* regarding eighteenth century ammunition storage laws. *See Heller*, 554 U.S. at 633-34. Such laws, which imposed minor civil penalties on violators, enjoyed a presumption of validity that the Court refused to extend to the District of Columbia's complete ban on handguns, which subjected violators to significant criminal penalties. *Id.* San Francisco's Ammunition Ordinance presents even less of a burden on the Second Amendment right than the storage laws approvingly referenced by the *Heller* Court. *See id.*

C. The Ammunition Ordinance Does Not Violate Appellants' Second Amendment Rights.

As noted, the Ammunition Ordinance preserves reasonable alternatives for residents who seek to possess fully operable firearms for self-defense in the home.

² Indeed, as the City rightly pointed out in its brief to this Court, all the NRA could muster in response on this issue was that San Francisco residents will have to fire more shots of conventional ammunition to stop an attacker. *See Appellees' Answering Br.* at 39 n.18.

See DeCastro, 682 F.3d at 168 (no substantial burden if “adequate alternatives remain for law abiding citizens” to use their firearms for self-defense); *Nordyke v. King*, 644 F.3d 776, 787 (“[W]hen deciding whether a restriction on gun sales substantially burdens Second Amendment rights, we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes.”), *vacated*, 664 F.3d 774 (9th Cir. 2011). Because the Ammunition Ordinance does not substantially burden Appellants’ Second Amendment rights, it readily complies with the standard set forth in the *Nordyke* panel opinion and the Second Circuit’s *DeCastro* decision.

Alternatively, the Ammunition Ordinance passes the test under intermediate scrutiny. The San Francisco Board of Supervisors made a legislative judgment that the Ammunition Ordinance appropriately balances the City’s interest in reducing the public health and safety risks of gun accidents and suicide attempts against the preservation of citizens’ right to self-defense in the home. San Francisco emphasized below that its Ammunition Ordinance was intended to reduce the likelihood of shootings resulting in death or major injury. City Opp. to Pls.’ Mot. For Judgment on Plds., at 16 (June 7, 2012), ER 375; S.F. Police Code § 613.9.5(6). The Board of Supervisors found that enhanced lethality ammunition was more likely than conventional ammunition to kill or seriously wound a shooting victim. S.F. Police Code § 613.9.5(2). Accordingly, in order to lower the

likelihood of serious injury or death from shootings in the home, the Board of Supervisors chose to adopt modest limits on the sale of the most dangerous types of ammunition.

Moreover, even if the Ammunition Ordinance has the incidental effect of making it more difficult or more expensive to obtain a particular type of ammunition, that alone is not enough to invalidate the regulation as unconstitutional. *Nordyke*, 644 F.3d at 787-88 (“[A] law does not substantially burden a constitutional right simply because it makes the right more expensive or more difficult to exercise.”). The Ordinance is no more than a limited and permissible regulation on the sale of enhanced lethality ammunition. The right of law-abiding, responsible San Francisco residents to possess an operable firearm for self-defense in their homes remains intact.³

The Ammunition Ordinance is substantially related to San Francisco’s interest in reducing the rates of fatality and serious injury from shootings in the home, and therefore does not violate the Second Amendment.

³ Appellants also argue that hollow point ammunition—but not other types of enhanced lethality ammunition—is in “widespread use for self-defense” (Appellants’ Opening Br. at 44.) Appellants’ contention does not invalidate the Ammunition Ordinance. Like the ban on semiautomatic rifles and large capacity magazines in *Heller II*, the Ammunition Ordinance does not “effectively disarm individuals.” 670 F.3d at 1262. It is therefore subject, at most, to intermediate scrutiny. *See id.* at 1261. Because the Ordinance is substantially related to San Francisco’s objective of reducing deaths and serious injuries from accidental shootings or suicide attempts, it does not violate the Second Amendment.

CONCLUSION

For all the reasons discussed herein, the *amici* respectfully submit that the District Court's order should be affirmed.

Dated: March 14, 2013

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(B) & (C) and Ninth Circuit Rule 32-1, this *amici* brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,678 words.

Dated: March 14, 2013

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