

No. 12-17803

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ESPANOLA JACKSON et al.,

*Plaintiffs-Appellants,*

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

*Defendants-Appellees.*

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

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**BRIEF OF *AMICI CURIAE* FFLGUARD LLC AND GUN OWNERS OF  
CALIFORNIA, INC. IN SUPPORT OF APPELLANTS**

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**CORPORATE DISCLOSURE STATEMENT**

*FFLGuard LLC* has no parent corporations. It has no stock, thus no publicly held company owns 10% or more of its stock. Gun Owners of California, Inc. has no parent corporations. It has no stock, thus no publicly held company owns 10% or more of its stock.

Date: February 14, 2013

/s/ Don B. Kates  
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**IDENTITY OF THE *AMICI CURIAE******FFLGUARD***

*FFLGuard LLC* is a Delaware corporation located at 244 Fifth Ave., Suite 1960, New York, New York 10001. *FFLGuard* offers a cooperative compliance and legal defense program (“Program”) for Federal Firearms Licensees (“FFLs”), i.e., operators of gun stores, providing clients with lawyers, subject matter experts, professionals and para-professionals who are specialists in the area of firearms law and compliance. The Program provides FFLs cost-efficient access to these legal and firearms compliance specialists – providing educational training and rapid response services – with the focus as safeguarding the viability of the client’s license. This case falls squarely within the interest of *FFLGuard* and its clients who are firearms owners and licensed dealers. Of particular interest to amicus and its clients is the elimination of unconstitutional firearms and ammunition regulations.

Based on their long-term and wide experience rendering advice and litigating cases on firearms law issues, *FFLGuard* is well equipped to offer insights into the issues at bar and to contribute perspectives not set forth by the parties.



## **GUN OWNERS OF CALIFORNIA**

Gun Owners of California, Inc. (“GOC”) ([www.gunownersca.com](http://www.gunownersca.com)) was founded in 1974 by Senator H. L. “Bill” Richardson, who served in the California Senate for 22 years. GOC became a California non-profit corporation in 1982, is organized under Section 501(c)(4) of the Internal Revenue Code, and is located at 1831 Iron Point Road, Folsom, CA 95630. With offices in Sacramento, GOC is a leading voice in California in support of the right to self-defense and to keep and bear arms guaranteed by the Second Amendment to the United States Constitution. It monitors government activities at the national, state, and local levels that may affect the rights of the American public to choose to own firearms. The elimination of invalid gun regulations is of particular interest to GOC.

GOC has considerable experience and expertise in assisting the courts with its insights regarding the Second Amendment, having joined in amici curiae briefs in federal cases such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and state cases such as *Fiscal v. City & County of San Francisco*, 158 Cal. App. 4th 895 (1st Dist. 2008), and *Kasler v. Lockyer*, 23 Cal.4th 472 (2000).

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae certify that although amici’s counsel is affiliated with Appellants’ counsel as Of Counsel,

this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

The amici have sought the consent of all parties to the filing of the brief. All parties have consented.

## **ARGUMENT**

### **PRINCIPAL CONTENTIONS**

Amici contend that the ordinances challenged herein, San Francisco Police Code §§ 613.10(g) and 4512, violate the Second Amendment.

### **INTRODUCTION**

Amici remind the court that the City and County of San Francisco has tried and failed to ban handguns, not just once, but twice.<sup>1</sup> Besides reviling the altitudes engendered by the Second Amendment, each such attempt was accompanied by findings falsely attributing murder to gun ownership by sane, responsible, law-abiding adults. However, the City continually fails to recognize that ordinary citizens are not the ones perpetuating a cycle of violence,<sup>2</sup> but are rather the ones

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<sup>1</sup> See *Doe v. City & County of San Francisco*, 136 Cal.App. 3d 509, 186 Cal.Rptr. 380 (1982); see also *Fiscal*, 158 Cal.App.4th 895.

<sup>2</sup> See Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 Colo. L. Rev. 1081, 1081-1098. (1998);

who most greatly need the protections of the Second Amendment to properly confront violent criminals in self-defense.

With Sections 613.10(g) and 4512 that ban the purchase of hollow-point ammunition and require persons to keep a handgun in a locked container or disabled with a trigger lock unless carried, the City is again attempting to restrict the protections of the Second Amendment. In so doing, the City places its citizens in a position where they cannot acquire the most effective self-defense ammunition or readily access their firearm at times when they are most vulnerable to a criminal attack.

The comments of Cesare Beccaria, esteemed by our Founding Fathers, as translated by Thomas Jefferson and included in his book of historical quotations<sup>3</sup> are apropos:

The laws that forbid the carrying of arms ... disarm those  
only who are neither inclined nor determined to commit  
crimes.... *Such laws make things worse for the assaulted*

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*accord id.* at 1087-88 (summarizing a century of criminological studies stating, “virtually all individuals who become involved in life-threatening violent crime have prior involvement in many types of minor (and not so minor) offenses”).

<sup>3</sup> *The Commonplace Book of Thomas Jefferson* 4 (G. Chinard ed., 1926).

*and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.* They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.<sup>4</sup>

The same is true here of the City's policies that make it more difficult for residents to effectively use their firearms in self-defense. Beccaria's view is the one adopted by the Founding Fathers and enshrined in the Constitution. San Francisco's view and longstanding efforts to ban firearms and restrict the right to keep and bear arms are not.

**I. SECTION 613.10(G) BANS HOLLOW-POINT AMMUNITION, WHICH IS COMMONLY USED BY MILLIONS OF SHOOTERS THROUGHOUT THE UNITED STATES FOR SELF-DEFENSE, AND IS THUS UNCONSTITUTIONAL**

It is well established that the central purpose of the Second Amendment, and the right to arms it embodies, is self-defense. *District of Columbia v. Heller*,

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<sup>4</sup> Cesare Beccaria, *On Crimes and Punishments* 73 (David Young trans., Hackett Publg., 1986) (1819) (emphasis added), *cited in* Don Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comm. 87, 91 (1992).

554 U.S. 570, 636 (2008). Encompassed within this right to bear arms is the protected guarantee to “purchase and provide ammunition suitable for such arms,” without which a firearm would be rendered useless. *Id.* at 614 (citing *Andrews v. State*, 50 Tenn. 165, 178 (1871)).

The Second Amendment standard for determining whether certain firearms and ammunition fall under the Amendment’s protection asks whether it is “of the kind in common use....” *United States v. Miller*, 307 US 174, 179 (1939); accord *Heller*, 554 U.S. at 570.<sup>5</sup>

There can be little doubt that hollow-point ammunition is in common use. In fact, according to Dr. Martin Fackler, the founder and first director of the Armed Forces Wound Ballistics Laboratory, the City’s Findings that claim hollow-point ammunition is “ ‘not in general use’... reveals egregious ignorance of the facts.” E.R. III 230-31.<sup>6</sup> Hollow-point ammunition is among the most commonly used ammunition in the United States. And it is the *most common* type of ammunition for self-defense. E.R. III 231.

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<sup>5</sup> See also, *United States v. McCartney*, 357 F. App’x 73, 76 (9th Cir. 2009); *Kodak v. Holder*, 342 F.App’x 907, 908-09 (4th Cir. 2009).

<sup>6</sup> Dr. Fackler has testified as an expert in 211 cases involving wound ballistics and surgery, including two cases involving hollow-point ammunition in which he testified on behalf of San Francisco. E.R. III 230-31.

Hollow-point bullets are made from materials and manufactured in accordance with processes that have existed for over a century, and their development and use has a well documented history.<sup>7</sup> And its historical and common usage amongst hunters and ordinary persons for self-defense is widely known. *See* E.R. 230-31, 234-35. The abundance of hollow-point ammunition manufactured and sold throughout the United States also demonstrates its commonality and presence in the marketplace.<sup>8</sup> *FFLGuard*, a collection of federally licensed retailers and manufacturers, estimates that some *3.5 billion* hollow-point rounds are produced for private use by law-abiding citizens each year, accounting for roughly forty percent of the total ammunition market.

Moreover, the prohibited ammunition is designed and used for self-defense, the “central” Second Amendment interest expressly articulated by Justice Scalia in *Heller*. 544 U.S. at 628. “Hollow-point ammunition is commonly used by ...

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<sup>7</sup> *See* E.R. III 233-35 (statement of Stephen Helsley, retired employee of the California Department of Justice who spent six years as the Chief of Bureau of Forensic Services and twelve years as Assistant Director of the Division of Law Enforcement before authoring at least 50 articles on firearms issues, outlining a historical perspective on the creation, refinement, and production of “hollow pointing” bullets).

<sup>8</sup> *See* E.R. III 225 (letter to Board of Supervisors from the California Rifle & Pistol Association identifying 11 major ammunition manufacturers who produce expanding ammunition, referencing at least 33 different expanding point bullets for sale.)

citizens for self-defense.” E.R. III 262. Such ammunition is highly effective for use in self-defense, better protecting potential victims because of its ability to immediately incapacitate an aggressor.<sup>9</sup> In the “Ballistics” chapter from the book, *Science for Lawyers*, Lisa Steele describes that through expansion, a hollow-point bullet will increase its drag to remain in the target and increase the chance that the wound will stop an attacker. E.R. III 261. The bullet’s slower velocity and ability to collapse make it less likely to ricochet or go through standard building materials, thereby decreasing the risk of harm to bystanders. E.R. III 262, 265.<sup>10</sup> It is for these reasons that *FFLGuard* retailers regularly recommend hollow-point ammunition to their customers as the ammunition most suitable for self-defense.

The record and the ammunition market confirm that hollow-point ammunition is commonly used, not just for lawful purposes, but the core lawful purpose of self-defense. The City’s bare assertion to the contrary in its findings ordinance cannot overcome this reality. “[F]acts do not cease to exist because they

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<sup>9</sup> Non-hollow-point ammunition, by contrast, is less effective in incapacitating an attacker, even with a perfectly placed shot. *See* E.R. III 231 (in an extreme example, an attacker shot in the heart by a non-expanding bullet can still remain active for thirty to forty seconds, thus having enough time to stab or shoot the victim multiple times).

<sup>10</sup> Law enforcement throughout the Nation prefer hollow-point ammunition for these very reasons, noting its ability to quickly stop attackers and “minimize damage” or “ricochets and pass-throughs.” E.R. III 265, 273.

are ignored.” *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 857 (9th Cir. 2003).<sup>11</sup>

Because the ammunition the City prohibits is commonly used for lawful purposes, the City is foreclosed from barring its sale.

## **II. THE ORDINANCES LIMIT THE ABILITY OF LAW-ABIDING CITIZENS TO DEFEND THEMSELVES IN THEIR HOMES, AND HAVE A DISCRIMINATE IMPACT ON THE UNDERPRIVILEGED**

Historical research has compelled scholars (albeit many quite uncomfortably) to accept that the Founding Fathers held the right to arms in high esteem. For the Founding Fathers and the philosophers they revered, the right of ordinary people to arms was a sacred precept of liberal political thought.<sup>12</sup> As Thomas Paine so noted, “arms like laws discourage and keep the invader and plunderer in awe and preserve order in the world.... Horrid mischief would ensue were [the good] deprived of the use of them... the weak will become a prey to the

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<sup>11</sup> Quoting Aldous Huxley, *Proper Studies* 247 from *The Home Book of Quotations* 611 (10th ed.1967).

<sup>12</sup> Though numerous law review articles address the philosophical background, the most definitive treatment is still the opening chapters of then Howard University philosophy professor Stephen Halbrook’s *That Every Man Be Armed”: the Evolution of a Constitutional Right* (1984). See also Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599 (1981) and Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 Law & Contemp. Probs. 125 (1986).



strong.”<sup>13</sup>

As readily as a firearm can render an individual a victim when used in violent perpetration, so too can it prevent victimization when used in self-defense. The City’s ordinances limit the ability of its residents to avoid becoming victims, particularly those who have the greatest need to effectively defend themselves with a firearm.

**A. The City’s Policies Disproportionately Impact the Use of Arms by Virtuous Citizens**

The Second Amendment guarantees “the right of *the people* to keep and bear arms.” U.S. Const. amend. II (emphasis added). As historically understood by the tradition which gave rise to the Second Amendment, the right to arms was inextricably and multifariously linked to the virtuous citizenry.<sup>14</sup>

As such, ordinary citizens have protected Second Amendment rights to

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<sup>13</sup> *Writings of Thomas Paine* 56 (M. Conway ed. 1894).

<sup>14</sup> See, e.g., Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*; 73 Fordham L.Rev. 487, 492 (2004) (“Historians have long recognized that the Second Amendment [of the U.S. Constitution] was strongly connected to the republican ideologies of the Founding Era, particularly the notion of civic virtue.”); Robert Shalhope, “The Armed Citizen in the Early Republic”, 49 Law & Contemp. Probs. 125, 128-141 (1986); and Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 203, 231-33 (1983) [hereinafter cited as Original Meaning].

readily access firearms and purchase common ammunition that engenders one to effectively defend themselves. For it is not law-abiding citizens who commit violent crimes or behave irresponsibly with firearms. Rather, those who commit such crimes are typically aberrants who are either adjudicated as mentally ill or have long criminal records, or both.<sup>15</sup>

To this end, certain categories of persons including minors, convicted felons, certain violent misdemeanants, and those properly adjudicated as mentally ill do not have Second Amendment rights. But instead of focusing on the individuals most likely to behave irresponsibly, San Francisco's ordinances restrict law-abiding persons' access to handguns in self-defense and prevent them from purchasing the most effective self-defense ammunition for those firearms.

**B. The City's Ordinances Have A Discriminatory Impact on Those Who Have the Greatest Need for Self-Defense**

The practical effect of the ordinances is not to disarm criminals (who will not obey them), but to leave ordinary victims – often those whose self-defense

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<sup>15</sup> See e.g., Wade C. Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 Homicide Studies 160 (1998) (psychological studies of juvenile murderers variously find 80-100% are psychotic or have psychotic symptoms), Elliott, *supra* (collecting studies), Robin, *supra* 47-48, Don B. Kates and Clayton Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings Law Journal 1339 (2009) (collecting studies); see also Sheilagh Hodgins, *Mental Disorder, Intellectual Deficiency, and Crime*, 49 Arch. Gen Psychi. 476 (1992) (collecting studies).

needs are the most acute – defenseless. Those responsible for the drafting and enactment of the City’s ordinances are among the least likely to find themselves in a situation of needing to immediately access a handgun and use hollow-point ammunition in self-defense. Indeed, affluent politicians and city officials are often more adequately protected from the harms of violent perpetrators by living in safer, even secured communities. It is the underprivileged who find themselves without many of the protections enjoyed by those more fortunate, such as residences that are offset from the street, security patrolled areas, alarm systems installed in a home, or gated access to a property.

Those charged with enforcing the laws also enjoy greater protections than those who must abide by the laws. Police officers in their homes can rest securely with their handguns unlocked and loaded with effective self-defense ammunition they can lawfully purchase in the City. *See* Addend. 43.

From the perch of safety, it is difficult to see the self-defense limitation for others who may find themselves living in more dangerous areas or in more trepid conditions. But consider a single woman living in an apartment with a bedroom window facing an alley or street. It is not difficult to imagine a scenario in which she would benefit from having unimpeded access to a handgun and effective self-defense ammunition.

San Francisco residents, who are restricted in their ability to effectively defend their own lives, cannot turn to the City for recourse if a tragedy befalls them or their family as a result of the City's policies. The City, while reducing the ability of residents to effectively defend themselves, has *no* duty to protect its residents—only to patrol and apprehend felons after they kill or injure.

[A police department and its officers are] not liable for injury caused by failure to enforce any enactment [nor for] failure to provide police protection or to provide sufficient police protection [nor for] the failure to make an arrest or the failure to retain an arrested person in custody.

Cal. Gov't. Code §§ 821, 845, 846.

Those statutes represent a simple fact: no matter how dedicated the American police force may be, less than one million officers cannot protect more than 300 million Americans. Police might intervene in crimes they observe – so criminals take care to strike when police aren't observing. In less than 3% of crimes do police arrive in time even to arrest offenders, much less protect victims.<sup>16</sup>

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<sup>16</sup> David Kopel, Paul Gallant, and Joanne Eisen, *911 Is a Joke...or Is It? Let's Find Out*, Tech Central Station (2005), available at [http://www.ideasinactiontv.com/tcs\\_daily/2005/01/911-is-a-joke-or-is-it-lets-findout.html](http://www.ideasinactiontv.com/tcs_daily/2005/01/911-is-a-joke-or-is-it-lets-findout.html) (citing William Spelman and Dale K. Brown, *Calling the Police: Citizen Reporting of a Serious Crime* xxxiv (1981)).

Consequently, firearms play a unique role in human society as they are a tool of defense that allow the average citizen to defend themselves against victimization by violent criminals. The police and the City cannot come to the immediate, defensive rescue of all persons placed in harms way and should not enact ordinances that reduce the ability of its citizens, particularly those with the greatest self-defense needs, to effectively defend themselves in their homes.

### CONCLUSION

*Heller* enshrined the sanctity of defending one's castle when it proclaimed, "[a]nd whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635.

Appurtenant to the right to bear arms is the right to purchase ammunition in common use for lawful purposes and particularly for the core, lawful purpose of self-defense. San Francisco's ordinances unduly restrict ordinary citizens from readily accessing lawful firearms within the sanctity of their own homes and deny them the ability to choose ammunition best suited for self-defense.

San Francisco may consider the right to arms as outdated, or a right of the past, but its policies cannot reflect this view. Per *Heller*'s final remarks, "the enshrinement of constitutional rights necessarily takes certain policy choices off

the table.” *Id.* at 636. It is not the City’s place to rewrite the Second Amendment or declare its protections extinct.

Accordingly, the Court should reverse the ruling of the district court.

Date: February 14, 1013

Respectfully Submitted,

/s Don B. Kates

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and Gun Owners of California*

### **CERTIFICATE OF COMPLIANCE**

I certify pursuant to the Federal Rules of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Word Perfect), the word count of the brief is exactly 3135 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

Date: February 14, 2013

Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on February 14, 2013, an electronic PDF of Brief on Behalf of FFLGuard and Gun Owners of California, Inc. in Support of Appellants was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: February 14, 2013

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