

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

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

11 ESPANOLA JACKSON, PAUL COLVIN,) **CASE NO.: CV-09-2143-RS**
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **JOINT CASE MANAGEMENT**
ROBINSON, NATIONAL RIFLE) **CONFERENCE STATEMENT AND**
13 ASSOCIATION OF AMERICA, INC.,) **[PROPOSED] ORDER**
SAN FRANCISCO VETERAN POLICE)
14 OFFICERS ASSOCIATION,)

15 Plaintiffs)

16 vs.)

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

20 Defendants.)
21)
22)
23)
24)
25)
26)
27)
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) Hearing: October 4, 2012
) Time: 10:00 a.m.
) Place: Courtroom 3 - 17th Floor
) Judge: Honorable Richard Seeborg

1 The parties hereby submit this Joint Case Management Conference Statement.

2 **1. Jurisdiction and Service**

3 The Court has federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331
4 because plaintiffs contend that San Francisco Police Code section 4512 violates their Second
5 Amendment rights and that San Francisco Police Code section 613.10(g) violates their rights
6 under the Second Amendment and the Due Process Clause of the Fifth and Fourteenth
7 Amendments. All parties have been served and have appeared.

8 **2. Facts**

9 The individual plaintiffs wish to store handguns in their homes unlocked for lawful self-
10 defense purposes and to purchase ammunition prohibited by San Francisco Police Code section
11 613.10(g) within the City and County of San Francisco for lawful self-defense purposes in their
12 homes. The entity plaintiffs contend that their members' rights are violated by the challenged
13 ordinances. Plaintiffs assert that factual information concerning plaintiffs' individual
14 circumstances should not inform a determination of the applicable standard of review for Second
15 Amendment challenges and that discovery into standing issues beyond the minor issues identified
16 by the Court in its denial of the City's Second Motion to Dismiss are irrelevant. Plaintiffs further
17 contend that regardless of whether a lockbox might enable a plaintiff to access a locked firearm in
18 a self-defense emergency in time to save his or her life, the government may not require a law-
19 abiding adult to store his or her firearms locked up at all times when not being carried, regardless
20 of the circumstances. Plaintiffs further contend that the availability of ammunition whose sale is
21 not prohibited by the City's ammunition ordinance that might be sufficient for self-defense
22 purposes does not justify a government ban on the sale of arms, including ammunition, that are in
23 common use and thus protected by the Second Amendment. In light of the Court's Order denying
24 Plaintiffs' Motion for Judgment on the Pleadings, Plaintiffs anticipate a denial of their pending
25 motion for preliminary injunction and intend to promptly file an appeal of that decision with the
26 Ninth Circuit Court of Appeals.

27 The City and County of San Francisco ("the City") asserts that it has no knowledge of the
28 individual plaintiffs' practices or wishes but wants to conduct discovery to determine whether the

1 ordinances at issue can lawfully be applied to the individual plaintiffs and whether the individual
2 plaintiffs in fact have standing to bring their claims. The City also contends that modern
3 lockboxes provide easy access to stored firearms, rendering them useable in the event of a self-
4 defense emergency, and that conventional ammunition whose sale is not prohibited by the City's
5 ammunition ordinance is sufficient for self-defense purposes. The City contends that its factual
6 findings in support of its ammunition and storage ordinances, set forth in San Francisco Police
7 Code sections 613.9.5 and 4512, are true.

8 Further information about the parties' factual contentions and relevance thereof is available
9 in Plaintiffs' motion for preliminary injunction and the City's opposition to that motion.

10 **3. Legal Issues**

11 San Francisco Police Code section 4512 requires that guns stored in the home either be
12 carried on the person of an adult, under the control of a peace officer, or locked in a storage box
13 or disabled with a trigger lock. Plaintiffs contend, and the City disputes, that this ordinance
14 violates Plaintiffs' Second Amendment rights to keep and bear arms for the core lawful purpose
15 of self-defense in the home. San Francisco Police Code section 613.10(g) prohibits licensed
16 ammunition dealers from selling what the City deems "enhanced lethality ammunition," including
17 all hollow point ammunition and ammunition that serves no sporting purpose. Plaintiffs contend,
18 and the City dispute disputes, that this ordinance violates their Second Amendment rights because
19 it bans the sale of ammunition in common use for lawful self-defense purposes, and because the
20 City's sporting purposes ban directly conflicts with the right to keep and bear arms for the core
21 purpose of self-defense.

22 Plaintiffs contend that *Heller* advances a historical, scope-based approach for reviewing the
23 constitutionality of firearms restrictions. Further, because the ordinances in question restrict the
24 rights of law-abiding individuals for self-defense within the home, i.e. the core of the core of the
25 right, the challenged ordinances require the most exacting standards of review, in other words, if
26 the Court chooses to adopt a means-end test, strict scrutiny must apply. Plaintiffs also contend
27 that the government cannot require residents to store or keep (as opposed to carry or bear) their
28 firearms locked up at all times when not being carried, including when Plaintiffs are most

1 vulnerable to a criminal attack, and that such restrictions are invalid under any level of heightened
2 scrutiny consistent with *Heller*.

3 Plaintiffs' further contend that section 613.10(g) is unconstitutional under even intermediate
4 scrutiny because the government cannot ban the sale the sale of protected arms, i.e. firearms or
5 ammunition that are in "common use" as recognized by *District of Columbia v. Heller*, 554 U.S.
6 570 (2008), and subsequent cases. Plaintiffs also contend that the government cannot require
7 residents to store or keep (as opposed to carry or bear) their firearms locked up at all times when
8 not being carried, including when Plaintiffs are most vulnerable to a criminal attack, and that such
9 restrictions are invalid under any level of heightened scrutiny consistent with *Heller*.

10 The City contends that locked storage laws are outside the scope of the Second Amendment
11 right recognized by *Heller*, or alternatively that the City's storage ordinance passes intermediate
12 scrutiny because it imposes a minimal burden on Second Amendment and is readily justified by
13 the City's interest in protecting public safety.

14 The City also contends that the Second Amendment does not protect exceptionally
15 dangerous ammunition and firearms, that conventional ammunition is sufficient for self-defense
16 purposes, and that its ordinance survives intermediate scrutiny because it is reasonably tailored to
17 the City's interest in minimizing firearms injuries and fatalities.

18 Plaintiffs also contend that Police Code section 613.10(g) violates the due process clause
19 because its definition "serves no sporting purpose" is vague and overbroad. The City contends
20 that this is a common and readily understood term of art in gun control legislation. The City
21 contends that Plaintiffs lack standing to challenge the ordinances because they have not shown
22 that the ordinances are reasonably likely to be applied to them or that they have violated the
23 ordinances and received individualized threats of enforcement. The Court has denied the City's
24 motion to dismiss the case on this basis. Dkt. 89.¹

25
26
27 ¹ Plaintiffs also challenged Police Code section 1290, which prohibits the discharge of
28 firearms within city limits. Since this lawsuit was filed, the City has amended the discharge ban
to provide an exception for discharge during a self-defense emergency in the home. Plaintiffs are
no longer proceeding with this claim.

1 Further information about the parties' legal contentions is available in Plaintiffs' motion for
2 preliminary injunction and the City's opposition to that motion.

3 **4. Motions**

4 Plaintiffs' Position

5 Plaintiffs have filed a motion for preliminary injunction. This motion is fully briefed and set
6 to be heard on October 4, 2012, the same date that the Court has scheduled a Further Case
7 Management conference to address the setting of appropriate discovery and trial deadlines.

8 Plaintiffs intend to file a Request for Dismissal of Plaintiffs Paul Colvin and Thomas Boyer.
9 Plaintiffs' counsel informed the City of these Plaintiffs' request to be dismissed from the suit due
10 to medical issues and fear of continued retaliation and harassment by the City and/or its agents for
11 participating in a lawsuit against the City. Plaintiff Colvin is elderly, suffers from late stage
12 cancer, and has severe memory troubles. He thus instructed Plaintiffs' counsel that he is
13 physically and mentally incapable of undergoing deposition or continuing to participate in this
14 case as a Plaintiff, and he fears retaliation from the City should he participate in a deposition and
15 reveal further information about himself to the City. Plaintiff Boyer has expressed concerns on
16 multiple occasions throughout the course of this lawsuit regarding his continued participation in
17 this lawsuit due to retaliation and harassment he previously faced from the City. Mr. Boyer
18 informed Plaintiffs' counsel that he fears further retaliation should he continue in the lawsuit and
19 particularly if he takes an active role in the litigation, including but not limited to participation as
20 a party deponent. Plaintiffs' counsel informed the City's counsel that Plaintiffs Boyer and Colvin
21 wished to be dismissed from the suit, noting that these plaintiffs feared retaliation and harassment
22 as a result of their participation in a deposition. The City's counsel then asserted that Plaintiffs
23 should not be permitted to be dismissed from the case for the purpose of avoiding discovery
24 obligations. Although these Plaintiffs wish to be dismissed from the case and do not wish to
25 participate further in the lawsuit, whether in a deposition or in any other manner, Plaintiffs'
26 counsel clarified to the City's counsel that the purpose of the dismissals is not to avoid discovery
27 obligations. Plaintiffs' counsel further clarified that the remaining Plaintiffs in this case remain
28

1 available for deposition and active participation in this case, and that Plaintiffs' counsel has no
2 intention of dismissing the action or any Plaintiff to avoid discovery obligations.

3 Plaintiffs do not anticipate filing any further motions prior to resolution of the expected
4 denial of the pending motion for preliminary injunction on appeal to the Ninth Circuit, but expect
5 to file a motion for summary judgment to resolve this case on the merits at the appropriate time.

6 The City's Position

7 Concerning Plaintiffs' anticipated request to dismiss Paul Colvin and Thomas Boyer, the
8 City expects to oppose the dismissal of Mr. Boyer because Plaintiffs have represented that he
9 seeks dismissal to avoid his deposition. Plaintiffs also represent that Mr. Boyer fears
10 "harassment" by the City, but have made only a conclusory statement to the City about alleged
11 harassment, and this for the first time two days before his deposition was scheduled to occur.

12 Plaintiffs initially represented that Paul Colvin also wished to be dismissed to avoid being
13 deposed, but later asserted that Mr. Colvin suffers severe medical issues. In light of this
14 representation, the City does not oppose the dismissal of Mr. Colvin.

15 The City anticipates filing a motion for summary judgment.

16 **5. Amendment of Pleadings**

17 Plaintiffs have filed a First Amended Complaint. The parties do not anticipate any further
18 amendments to the pleadings.

19 **6. Evidence Preservation**

20 Plaintiffs believe that all evidence that might be relevant to this dispute is in the Plaintiffs'
21 possession or in the possession of Plaintiffs' counsel in Long Beach, California, and has been
22 preserved as a matter of course. The City believes that all evidence relevant to this dispute in the
23 City's possession is the legislative file of the San Francisco Board of Supervisors for the relevant
24 enactments and is preserved as a matter of course.

25 **7. Disclosures**

26 The parties believe they have made full and timely initial disclosures.

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28 ///

1 **8. Discovery**

2 In its Case Management Order of November 18, 2011 (Dkt.101), the Court limited fact
3 discovery as follows: (a) ten (10) non-expert depositions per party; (b) twenty-five (25)
4 interrogatories per party, including all discrete subparts; (c) a reasonable number of requests for
5 production of documents or for inspection per party; and (d) a reasonable number of requests for
6 admission per party.

7 During the case management conference held immediately following hearing on Plaintiffs'
8 Motion for Judgment on the Pleadings, the Court and the parties agreed to set a further case
9 management conference to address appropriate trial deadlines and discovery cutoffs following the
10 Court's ruling on Plaintiffs' Motion for Judgment on the Pleadings.

11 In mid-August, the Court issued an order denying Plaintiffs' Motion for Judgment on the
12 Pleadings, but did not set a further case management conference. The parties subsequently agreed
13 to request the Court set a further case management conference to address appropriate deadlines
14 and cutoffs dates. The Court ordered that the further case management conference be held on
15 October 4, 2012, and consolidated the hearing with Plaintiffs' Motion for Preliminary Injunction.
16 In the interim, the parties have agreed to extend discovery deadlines pending the coming further
17 case management conference.

18 Plaintiffs' Position

19 It is Plaintiffs' position that district court proceedings should be stayed pending final
20 resolution of Plaintiffs' Motion for Preliminary Injunction which is fully briefed and will likely be
21 appealed immediately to the Ninth Circuit. The standard of review should not be determined
22 according to the circumstances of the individual plaintiffs, and *Heller* advances a historical,
23 scope-based approach to Second Amendment challenges. Resolution of Plaintiffs' Motion for
24 Preliminary Injunction at the Ninth Circuit will provide guidance to the parties and the Court as to
25 the appropriate standard of review, and to what extent, if any, factual development and/or expert
26 testimony should inform an analysis of this case. Engaging in further discovery and anticipated
27 motion practice prior to a determination of whether such factual development is necessary are not
28 in the interests of efficiency or judicial economy. The City has also asserted an intention on

1 multiple occasions to engage in discovery into standing matters expressly deemed irrelevant by
 2 this Court, in the hopes that the Court’s standing analysis will be overturned on appeal. Discovery
 3 and motion practice on these issues should be stayed. Contrary to the City’s assertion, Plaintiffs
 4 do not wish stay the case to avoid inconvenience of discovery and related costs. Although the City
 5 argues that a motion to dismiss does not always warrant a stay of discovery, the City itself agreed
 6 to stay discovery pending resolution of its own motion to dismiss. Although the City expresses
 7 concerns over the time frame of this litigation, the City opposed Plaintiffs’ motion to lift a stay
 8 that was previously in place in this case.

9 The district court maintains broad discretion to stay proceedings pending interlocutory
 10 appeal of an order denying preliminary injunction. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 706
 11 (1997) (district court “has broad discretion to stay proceedings as an incident to its power to
 12 control its own docket”). A stay of proceedings is justified when “serious legal questions are
 13 raised,” especially in an area where the law is unclear. *Leiva–Perez v. Holder*, 640 F.3d 962, 967-
 14 68 (9th Cir. 2011). Indeed, district courts hearing cases involving important and unresolved legal
 15 questions related to the Second Amendment have, as a matter of course, stayed further
 16 proceedings pending appeal of orders denying preliminary injunction. *See, e.g., Order Granting*
 17 *Plaintiff’s Motion to Stay Proceedings 5-6, Baker v. Kealoha*, No. 11-00528 (D. Haw. June 19,
 18 2012); *Order Granting City’s Motion to Stay, Ezell v. City of Chicago*, No. 10-5135 (N.D. Ill.
 19 April 8, 2011).

20 The City’s Position

21 The City requests that the Court enter an order setting discovery deadlines and trial
 22 deadlines as follows:

23 Fact discovery closes	December 3, 2012
24 Plaintiffs’ expert reports	January 2, 2013
25 City’s expert reports	January 16, 2013
26 Expert discovery closes	January 30, 2013
27 Last day to file dispositive motions	February 21, 2013
28 Dispositive motions hearing	March 28, 2013

1 Pretrial conference April 25, 2013

2 Trial May 6, 2013

3 The City opposes any stay pending this Court's or the Ninth Circuit's consideration of
4 Plaintiffs' entitlement to a preliminary injunction. This case has been pending for more than three
5 years, and so long as it is unresolved it clouds the legitimacy of the City's duly enacted ordinances
6 and harms the public interest.

7 Nor does a stay serve *judicial* economy. If the case goes forward while this Court and
8 possibly the Ninth Circuit consider the preliminary injunction, the parties will engage in discovery
9 and, depending on the timing of any Ninth Circuit decision, will move for summary judgment.
10 Only if the Ninth Circuit is unable to resolve the appeal that Plaintiffs anticipate taking before
11 summary judgment motions are heard (in March 2013, according to the City's proposed schedule)
12 will *the Court* be put to any effort if the case proceeds. What Plaintiffs really seek is to avoid the
13 inconvenience and attorneys' fees of discovery—in an action they elected to bring in the first
14 place, and where this Court has already determined that the case cannot be resolved on the
15 pleadings alone. In analogous cases where defendants seek a stay of discovery pending motions
16 to dismiss, courts deny stays unless it is clear that the case presents no factual issues and the
17 defendants are likely to succeed in obtaining dismissal. *See, e.g., F.T.C. v. AMG Services, Inc.*,
18 2:12-CV-00536-GMN, 2012 WL 3730561 (D. Nev., Aug. 28, 2012); *Baker v. Arkansas Blue*
19 *Cross*, C-08-03974SBAEDL, 2009 WL 904150 (N.D. Cal. Mar. 31, 2009). Applying those
20 criteria here, a stay should be denied because this case cannot be finally resolved on the merits
21 until the facts are further developed. Delaying discovery only delays the ultimate resolution of the
22 case, however this Court (and possibly the Ninth Circuit) resolves Plaintiffs' preliminary
23 injunction motion.

24 The cases that Plaintiffs cite do not indicate any different result. *Clinton v. Jones*, 520 U.S.
25 681 (1997), held that a district court abused its discretion when it stayed a civil case against a
26 sitting president during the term of his presidency, in part because “a lengthy and categorical stay
27 takes no account whatever of the respondent's interest in bringing the case to trial.” *Id.* at 707.
28 Here, a lengthy and categorical stay while Plaintiffs shop for a different decision maker

1 concerning the Second Amendment standard of review takes no account of the City's interest in
 2 finally resolving the case against its ordinances. *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir.
 3 2011), is simply not relevant to this case, since it concerns immigration stays of removal after
 4 final BIA decisions, not interlocutory stays of district court proceedings. Plaintiffs do not argue,
 5 because they cannot, that forcing them to litigate this case will work any hardship on them
 6 comparable to deporting an asylum-seeker while his appeal is pending.²

7 The City therefore requests that the Court not enter a stay order, or alternatively that it
 8 require Plaintiffs to file a motion requesting a protective order or stay, so that the City has the
 9 opportunity to fully brief the issue.

10 The City has already sought written discovery from the individual Plaintiffs. The City
 11 anticipates deposing the individual and organizational plaintiffs and seeking limited additional
 12 written discovery from the organizational plaintiffs. Plaintiffs have conducted no discovery to
 13 date.

14 **9. Class Actions**

15 Not applicable.

16 **10. Related Cases**

17 The Ninth Circuit has not yet determined what standard of review applies to Second
 18 Amendment claims. *See Nordyke v. King*, No. 07-15763, 2012 WL 1959239 (9th Cir. June 1,
 19 2012) (*en banc*). There are cases pending before the Ninth Circuit that may address this issue,
 20 including *Peruta v. San Diego*, Ninth Circuit Case No. 10-56971, *Richards v. Prieto*, Ninth
 21 Circuit Case No. 11-16255, and *Mehl v. Blanas*, Ninth Circuit Case No. 08-15773, which are fully
 22 briefed. (These cases were stayed pending *Nordyke*. The stays in *Peruta* and *Richards* were
 23 recently lifted.) *Peruta* and *Mehl* involves challenges to San Diego's and Sacramento's
 24 administration of concealed weapons licenses, respectively, and *Prieto* involves a challenged to
 25

26 ² Plaintiffs also cite to two district court orders in Second Amendment cases staying
 27 proceedings. In *Baker v. Kealoha*, No. 11-00528 (D. Haw.), the plaintiff made a formal motion for
 28 a stay, Dkt. 52, and the City and County of Honolulu did not oppose Plaintiff's motion, Dkt. 61.
 In *Ezell v. City of Chicago*, No. 10-cv-05135 (N.D. Ill.), it was the city, not the plaintiffs, that
 sought a stay in the district court after that court denied plaintiffs' preliminary injunction motion.
 Here, the City wishes to have this three-and-a-half-year-old case resolved.

1 California statutes regulating licenses to carry firearms. These cases will not directly control the
2 issues in this case. The City notes that these cases may provide a standard of review for Second
3 Amendment claims that will be applicable here. Plaintiffs note that these cases may not address
4 the standard of review applicable to restrictions on the core right to keep and bear arms in the
5 home for self-defense because those cases involve the right to carry firearms in public.

6 **11. Relief**

7 Plaintiffs seek a declaration that the challenged statutes are unconstitutional and an
8 injunction prohibiting the City from implementing them. Plaintiffs also seek attorneys' fees
9 pursuant to 42 U.S.C. § 1988. Plaintiffs do not seek damages.

10 **12. Settlement and ADR**

11 Because this case presents questions of law and facial challenges to legislative enactments,
12 the parties do not believe that settlement is possible.

13 **13. Consent to Magistrate Judge**

14 The parties do not consent to a magistrate judge for all purposes.

15 **14. Other References**

16 This case is not suitable for reference to binding arbitration, a special master, or the Judicial
17 Panel on Multidistrict Litigation.

18 **15. Narrowing of Issues**

19 Plaintiffs believe that the issues in this case may be narrowed upon resolution of the
20 anticipated appeal by either party of Plaintiffs' pending Motion for Preliminary Injunction. The
21 parties do not otherwise believe the case can be narrowed by motion or stipulation.

22 **16. Expedited Trial Procedure**

23 The parties do not believe this case can be handled under the Expedited Trial Procedure of
24 General Order No. 64 Attachment A.

25 **17. Scheduling**

26 As set forth above, the parties agreed to stay any discovery deadlines pending a Further
27 Case Management Conference to prevent the parties from missing a deadline that was previously
28 put in place by the Court, but which have not yet been addressed pursuant to agreement of the

1 Court and the parties to revisit these issues during a further case management conference
2 following the Court's issuance of the Court's Order on Plaintiffs' Motion for Judgment on the
3 Pleadings.

4 The remaining trial deadlines previously set by the Court were as follows:

5 Dispositive motions - December 13, 2012.

6 Pretrial conference - February 14, 2013, at 10:00 a.m.

7 Trial - February 25, 2013, at 9:00 a.m. *See* Dkt. 101.

8 **18. Trial**

9 The parties expect that this case can be resolved by summary judgment. If trial is necessary,
10 the case will be tried to the Court. The parties anticipate no more than 2 days for trial.

11 **19. Disclosure of Non-party Interested Entities or Persons**

12 Neither Plaintiffs nor the City have any interested entities or persons to disclose.

13 Date: September 27, 2012

MICHEL & ASSOCIATES, P.C.

14
15 s/ C. D. Michel

16
17 C. D. MICHEL
Attorney for Plaintiffs

18 Date: September 27, 2012

San Francisco City Attorneys Office

19
20 s/Christine Van Aken
CHRISTINE VAN AKEN *

21 Attorney for Defendants

22 * The filer of this document attests that concurrence in the filing of this document has been
23 obtained from this signatory.
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