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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 Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, THE MAYOR OF SAN FRANCISCO, AND THE CHIEF OF THE SAN FRANCISCO POLICE DEPARTMENT, in their official capacities, and DOES 1-10, Defendants.	**CASE NO. CV-09-2143-RS** **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** Fed. R. Civ. P. 65(a) Date: October 4, 2012 Time: 1:30 p.m. Place: Courtroom 3 - 17th Floor 450 Golden Gate Ave. San Francisco, CA 94102

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I. INTRODUCTION

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

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

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Second Amendment Standard of Review

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

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

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

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

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

United States v. Rene E., 583 F.3d 8 (1st Cir. 2009), provides an interesting case in point. There, a federal juvenile-in-possession law was upheld solely by resort to history and tradition even though the challenged law was only passed in 1994. Evaluating a long history of state laws regulating juvenile access to handguns and "evidence that the founding generation would have regarded such laws as consistent with the right," the court determined that the regulation, "with its narrow scope and its exceptions," was constitutional regardless of its recent vintage. *Id.* at 14-16.[1]

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

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

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

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

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

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

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

> the guarantee against double jeopardy, the right to counsel, *or the right to keep and bear arms*.

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

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

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

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

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

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

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

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

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

B. The City's Locked Storage Law Is Unconstitutional Under Any Analysis

1. The Locked-Storage Law Burdens Protected Conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The Ammunition Ban Restricts Protected Conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Ammunition Ban Cannot Survive Any Heightened Scrutiny

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

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

D. The City's Ban on the Sale of Ammunition that "Serves No Sporting Purpose" Violates the Second Amendment

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

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

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

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

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

III. PLAINTIFFS SUFFER REAL AND IRREPARABLE HARM

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

Date: September 20, 2012

MICHEL & ASSOCIATES, PC

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

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, Plaintiffs vs. CITY AND COUNTY OF SAN FRANCISCO, THE MAYOR OF SAN FRANCISCO, AND THE CHIEF OF THE SAN FRANCISCO POLICE DEPARTMENT, in their official capacities, and DOES 1-10, Defendants.	**CASE NO.: CV-09-2143-RS** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

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

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

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

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

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

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

/s/ C.D. Michel
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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, Plaintiffs vs. CITY AND COUNTY OF SAN FRANCISCO, THE MAYOR OF SAN FRANCISCO, AND THE CHIEF OF THE SAN FRANCISCO POLICE DEPARTMENT, in their official capacities, and DOES 1-10, Defendants.	CASE NO. C09-2143 RS **DECLARATION OF MASSAD AYOOB IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

DECLARATION OF MASSAD AYOOB

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

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

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

4. My career in law enforcement included the following:

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

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

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

5. My personal training includes the following:

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

Weapon Retention instructor course; and advanced revolver shooting course.

B) **Glock Firearms:** Glock Instructor Course; and Glock Armorer Course.

C) **Firearms Instructor Courses:** National Rifle Association.

D) **Ordnance Expo:** Firearms and Ballistic Evidence; Officer Involved Shooting Investigation; Advanced Officer Involved Shooting Investigation; Officer Survival; and Management of Barricaded Suspects.

E) **International Police Academy:** Defensive Tactics (Unarmed Combat and Restraint) Instructor Course, rated Master Instructor by sensei James Morell.

F) **NYPD:** "Hostage Negotiation for Supervisors", "Post Shooting Tactics", "House Clearing Techniques", "Off Duty Confrontation Tactics", "Summary of Violent Encounter Patterns", and "Police Shotgun Program."

G) Advanced Homicide Investigator school, by Vern Geberth, NYPD Ret., author of "Practical Homicide Investigation."

H) International Homicide Investigators' Seminar (2 occasions).

I) **PPCT:** Pressure Point Control Tactics, taught by Bruce Siddle.

J) **Federal Law Enforcement Training Center:** BOSS program including officer survival, intelligence briefings on outlaw bike gangs, booby traps, counter-ambush tactics, arrest techniques.

K) **Knife/Counter-Knife courses:** Master Paul Vunak, Hank Renhardt, Sensei Jim Maloney, Michael de Bethencourt.

L) Studying personally with world handgun champions Ray Chapman, Rob Leatham, Jerry Miculek, and Frank Garcia in advanced shooting programs.

6. I have studied special units and their training on site as follows:

A) NYPD Firarms & Tactics Unit, Emergency Services Unit, Armed Robbery Stakeout Unit.

B) LAPD SWAT, Firearms Training Unit.

C) FBI Firearms Training Unit.

D) Metro-Dade Police Firearms/SWAT Training Unit

E) Illinois State Police Ordnance Section.

F) NH State Police SWAT, EVOC, Firearms Training.

G) Kentucky State Police, Firearms Training and SRT Training.

H) Arizona Highway Patrol Firearms Training.

I) London, England Metropolitan Police firearms training and special services unit (D.11, PT-17, SO-19).

J) I have reviewed or audited numerous other law enforcement firearms training programs.

7. My instruction/teaching experience includes the following:

A) Director, Massad Ayoob Group, 2009-present.

B) Director, Lethal Force Institute, 1981-2009.

C) Chair of firearms committee, American Society of Law Enforcement Trainers (ASLET), 1987-2007. Also served on Ethics Committee, and led an annual Panel of Experts on firearms/deadly force issues at ASLET's international seminars.

D) Special Instructor, Chapman Academy, 1981-88.

E) International Instructor, PR-24 baton; has lectured several times at annual international seminar. Trains other instructors and trainers of instructors.

F) Advisory Board member, International Law Enforcement Educators' and Trainers' Association, has lectured there on investigation and management of police use of force cases since the organization's inception.

G) National Instructor, Weapon Retention & Disarming, National Law Enforcement Training Center. Trains other instructors and trainers of instructors. 1990-2009.

H) Assistant professor teaching weapons and chemical agents, Advanced Police Training Program of New Hampshire, 1974-77.

I) Co-instructor (with former world pistol champion Ray Chapman) of Advanced Officer Survival Seminars through Police Marksman Assn., in the 1980s.

J) International Instructor, Persuader Mini-Baton, certified by Joe Truncale.

K) Instructor, Kubotan self-defense, certified by Soke Takayuki Kubota.

L) National Instructor, Telescoping baton, certified by CASCO.

M) Instructor, straight baton, certified by COPSTK.

N) I have taught relevant topics for National, International, and Regional seminars of International Association of Law Enforcement Firearms Instructors; regional seminars for CLE credit on defending deadly force cases (NACDL, MA. CDL Assn); International Homicide Investigators' Seminar (investigation of officer-involved shootings and characteristics of self-defense shootings); McGill University School of Medicine (medico-legal aspects of gunshot and knife wounds); officer survival tactics (Ordnance Expo, Los Angeles; National Tactical Invitational; New England SWAT Seminar; DEA National Academy; Metro-Dade Police Academy; DEA/Miami).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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23. Based on my training and experience, the additional time that it would take to remove a firearm from a locked box or to remove a trigger lock would effectively preclude the ability to effectively defend against a violent attacker who is at close range (21 feet or less).

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

Massad Ayoob