

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG, JUDGE

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 Espanola Jackson, *et al.*,)
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 Plaintiffs,)
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 v.) No. C 09-2143 (RS)
)
 City and County of)
 San Francisco, *et al.*,)
)
 Defendants.) San Francisco, California
) Tuesday, October 9, 2012
 -----) (20 pages)

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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1 Tuesday, October 9, 2012

2 (1:55 p.m.)

3 **(In open court)**

4 DEPUTY CLERK: Calling Case 09-2143, Jackson, et al.,
5 vs. City and County of San Francisco.

6 DEPUTY CLERK: Counsel, please state your
7 appearances.

8 MR. MICHEL: Chuck Michel appearing for plaintiffs.

9 THE COURT: Good afternoon.

10 MS. VAN AKEN: Christine Van Aken for the City and
11 County of San Francisco.

12 THE COURT: Well, we've all been together before.
13 This now is on calendar for a motion for preliminary
14 injunction. I have spent some time going through what you
15 submitted and refreshing my memory on arguments that we've
16 had in this case. Interesting case in terms of how we
17 analyze and understand the *Heller* decision and where that
18 brings us.

19 What I'm inclined to do is just let you -- I don't
20 have a tentative to give you. But rather to just look to
21 each of you if there's anything additional that you do want
22 to go over with me.

23 So, I'll start with the plaintiffs.

24 MR. MICHEL: I don't have anything to add other than
25 what's in the briefs, your Honor. I -- candidly, I don't

1 think I've ever stood in front of a court and said this
2 before, but I sort of expect to lose, based on the Court's
3 ruling in our motion for judgment on the pleadings. So this
4 case -- and I'm sure you understand the context, it's always
5 been -- the first legal issue we were trying to resolve is
6 incorporation back in 2009 and the standard of review. We
7 got tied up behind the *Nordyke* case. There was a
8 three-judge panel ruling in the *Nordyke* case. Then it went
9 en banc, and it didn't give us what we had hoped it would
10 give us.

11 THE COURT: It got sent off for mediation, didn't it?
12 Isn't that what happened in the case? Is that ever -- well,
13 never mind.

14 MR. MICHEL: Just for academic interest, they didn't
15 settle, but then the Court said, Well, there's the judicial
16 admission that you could have gun shows under certain
17 conditions, so the case is moot, essentially.

18 THE COURT: I see. I see.

19 MR. MICHEL: So we never got the standard of review
20 ruling, which obviously is kind of critical to going forward
21 on any of these things. So my suggestion, and our approach
22 now basically is to try and get something that's an
23 appealable order.

24 THE COURT: Yeah. No, I recognize the procedural
25 conundrum you've been addressing. And when I saw your

1 motion, just as I made a comment on what you expect to
2 happen, I wasn't surprised to see your motion.

3 So, we have gone down this path and talked about
4 these very interesting issues. And they are really
5 interesting. So I don't take any umbrage from your
6 prediction, but I'm also not ruling today. So -- I do know,
7 though, that the parties -- I think both parties want to
8 move this along. And I recognize certainly from the
9 plaintiff's perspective you want to do that. And I have --
10 I share the notion that some clarity from courts above would
11 be useful, and so I hear your request.

12 In terms of the substance of the argument, of the two
13 ordinances we have -- and as I say, you have fully briefed
14 it, but I just wanted to make sure to give you an
15 opportunity, if there's anything further that you want to
16 say.

17 MR. MICHEL: No, not really, your Honor. I think
18 really -- this case is on for case management conference as
19 well.

20 THE COURT: Yes, I was going to talk about that in a
21 minute.

22 MR. MICHEL: I have a lot of thoughts on how we might
23 approach that.

24 THE COURT: Let's talk about the preliminary
25 injunction motion first.

1 MS. VAN AKEN: Thank you, your Honor.

2 THE COURT: Miss Van Aken?

3 MS. VAN AKEN: Thank you. The only thing I would add
4 to the papers, and I won't repeat anything that's in there,
5 is that even under plaintiff's view of the second amendment,
6 that it is a categorical approach that we take, that we look
7 only to history, text and tradition, I think the City
8 prevails in this case. So I, too, expect plaintiffs to lose
9 this motion after the Court has had the opportunity to
10 review it thoroughly and consider its ruling.

11 And this is because -- the Second Amendment objection
12 is not an unlimited right. And we know that not only are
13 there -- is there a history of different kinds of gun
14 regulations, but there's also a history of disarming entire
15 classes of people based on some sort of notion of bad
16 conduct: Domestic violence, narcotics use, juveniles -- not
17 because of bad conduct, but because we think they're not
18 responsible. So there's a notion of virtuous possessors of
19 guns that I think is embodied in the Second Amendment, and
20 that history tests and tradition recognizes.

21 THE COURT: We have the not unusual scenario of a
22 Supreme Court opinion of which both sides can take sentences
23 and present use. You highlight, as I would in your shoes,
24 this comment in *Heller* that it's not an unlimited right.
25 And you're pointing to limits. The plaintiffs point to

1 language in *Heller* that says there's nothing more core to
2 the second amendment right than protecting your residence.
3 And so -- and they make -- and *Heller* has some very strong
4 statements in that regard. So I wish, and I -- I wish that
5 one could read the *Heller* decision and it would tell us what
6 we need to know. And I think perhaps both of you think it
7 does tell us what we need to know, and it's -- your
8 respective sides should win. I think you read the *Heller*
9 decision and there are some unanswered questions.

10 So -- and we go from there.

11 MS. VAN AKEN: I agree, there's many unanswered
12 questions in *Heller*, and the Supreme Court acknowledges
13 that, that it's just beginning. But I would submit that the
14 history of the Second Amendment is not only that the
15 possessors of guns -- that there's a requirement of virtuous
16 possessors, but there's also a requirement of virtuous
17 possession. That people must be responsible. It is a
18 well-regulated militia that is protected by the Second
19 Amendment, not merely a free-for-all, and the historic
20 scholarship --

21 THE COURT: Well, I think one thing *Heller* said was
22 it's an individual right, it's not -- that battle has been
23 fought.

24 MS. VAN AKEN: I believe that it's an individual
25 right, but the Supreme Court points out that the framers'

1 understanding of the militia was that it was every
2 able-bodied person who could contribute to the state's
3 defense. In other words, everyone is a part of this right;
4 everyone participates in this right. But at the same time,
5 the framers didn't hesitate and states haven't hesitated to
6 disarm entire classes of people where they are not
7 responsible members of that militia.

8 I would submit that storage regulations -- not only
9 are they acknowledged in *Heller* as not disturbed by *Heller's*
10 ruling, but also that they are of a piece with virtuous
11 possession. And the fact that Boston prohibited any
12 gunpowder at all in any dwelling, that New York required any
13 gunpowder to be stored in these containers that they
14 specified the size of, indicates that the manner of
15 possession has long been regulated. And so the framers may
16 not have contemplated the Barska storage safe that you can
17 open merely by pressing your thumb print -- I don't know if
18 the YouTube video that we cited in our briefs was of any
19 use, but, having never seen one of these operated, it was
20 certainly instructive to me that the manner of storing
21 firearms may change as technology changes --

22 THE COURT: Do you think there's any significance
23 that this ordinance arises in a fashion that someone -- that
24 it impacts their home? Is that of consequence at all, do
25 you think?

1 MS. VAN AKEN: I do think it's of consequence in that
2 *Heller* -- it's not even clear that the Second Amendment
3 applies outside the home. And that *Heller* does indicate
4 that the right to self-defense, the need for self-defense is
5 most acute in the home. I don't disregard that. I think
6 that's important. But I think, as the Court points out,
7 what Dick Heller sued for was the right to render his
8 firearms operative.

9 THE COURT: To do what the city ordinance allows you
10 to do.

11 MS. VAN AKEN: Precisely. And the court in *Heller*
12 went out of its way to decide that the D.C. ordinance had no
13 exception for self-defense situations.

14 Now, if it were the case that the Second Amendment
15 prohibited Dick Heller from -- or prohibited D.C. from
16 saying, Okay, you can store your firearms, but you can put
17 them together in case of an emergency, there would have been
18 no reason at all for the Court to decide that there was no
19 self-defense exception in that ordinance. In other words,
20 if D.C. couldn't say, Okay, store it broken down, but you
21 can put it together if you need to in a self-defense
22 emergency, there would be no reason why the *Heller* court had
23 to reach the question of whether there was a self-defense
24 exception in the D.C. ordinance.

25 THE COURT: Let me ask you both, and then we'll talk

1 about the case management issues: Just so I'm clear on your
2 respective arguments, as we've discussed, in *Nordyke*, we
3 were teased by the notion we would get some guidance on what
4 level of scrutiny we were to apply, and then it was pulled
5 away.

6 But from the plaintiff's perspective on -- I almost
7 hear -- or I do hear the argument that that's really the
8 wrong construct? That the identifying level of scrutiny, if
9 one must -- you would prefer strict scrutiny, but that we're
10 not even necessarily -- the Supreme Court is suggesting that
11 we shouldn't necessarily buy into the level of scrutiny
12 construct. Is that right or wrong?

13 MR. MICHEL: That's absolutely right. Let me first
14 say, I'm not going to respond to every one of those points,
15 but obviously I disagree with the vast majority of them.
16 Two important things to keep in mind: One is *Heller* and
17 *McDonald* recognized two different constitutional rights.
18 Civil rights. *McDonald* recognized the right to keep and
19 bear arms, per se, the actual instrumentality. *Heller*
20 recognized -- did not recognize the right to keep and bear
21 arms expressly. It recognized the right to self-defense.
22 So those are two different rights that have never been
23 addressed before by the courts.

24 And so the question is: Is there infringement on
25 really either one of them? And really, this case is whether

1 or not this ordinance infringes on the right to self-defense
2 and the right to keep and bear arms, because you can't have
3 a firearm readily available for self-defense in case of
4 confrontation in your own home. So a guy who has no
5 children, and has, you know, in a secure home sitting alone
6 by himself, has to either have it in a holster, including
7 when he goes to bed, if he wants to have it more readily
8 available, or put it in a locked box. That's the degree --
9 *Heller* dealt with the legally impossible. This deals with
10 practically impossible.

11 And so it's the degree of infringement that is the
12 right to self-defense infringed by this. And we think that
13 now it's the Supreme Court's inclination that you're going
14 forward with two rights which have never been recognized
15 before, really. Is to look at the tests that have been
16 applied historically in other contexts, First Amendment
17 being the most obvious, and say, Why are we going to -- look
18 at all the Rube Goldberg machinations that we had to come up
19 with as we developed this body of jurisprudence on the First
20 Amendment. Why go there? And so there's this fundamental
21 difference of opinion about what the approach should be, and
22 engrained in the Supreme Court to say, You go by the
23 intention of the founders. What was the understanding at
24 the time the law was passed, based on history and tradition?
25 And then see if there are acceptable regulations which are

1 kind of -- it's sort of a societal test, you know,
2 original-ism. And there's a few justices on the Supreme
3 Court that are pushing that -- and so that's really kind of
4 what this comes down to.

5 So, it's a great case to be involved in. It's
6 cutting edge stuff. But I certainly understand why the
7 court would -- why many courts have taken sort of a -- not
8 cautious, but a more measured approach. I think it's
9 something that needs to go up. So...

10 THE COURT: Okay. Thank you.

11 With respect to -- your position, I understand, Miss
12 Van Aken, is a classic level of scrutiny needs to be
13 identified against which the ordinance is to be assessed.
14 Is that correct?

15 MS. VAN AKEN: Yes, your Honor. Although --

16 THE COURT: And you think it should be rational
17 basis?

18 MS. VAN AKEN: Your Honor, I think that under the
19 DeCastro -- I think the DeCastro test is the one the Court
20 should adopt, which is not to say that --

21 THE COURT: And that's out of the Third Circuit.

22 MS. VAN AKEN: Second Circuit. Which says that if
23 there's a substantial -- in view of the multifaceted
24 restrictions on gun possession and ownership, that only
25 those that impose a substantial burden on the right to keep

1 and bear arms are subject to a degree of heightened
2 scrutiny. And then after that, we evaluate the extent of
3 the burden, how close --

4 THE COURT: Heightened scrutiny. What label do you
5 put on the heightened scrutiny?

6 MS. VAN AKEN: I think every court -- every court --
7 has applied something short of strict scrutiny.

8 THE COURT: Something more than rational basis.

9 MS. VAN AKEN: Something more than rational basis.
10 Intermediate scrutiny is the one most courts have adopted.
11 District of Columbia, Fourth Circuit, Third Circuit. I
12 understand plaintiffs distinguish that because they are were
13 not necessarily in the home, but that is -- the overwhelming
14 weight of authority points to intermediate scrutiny for
15 everything except something that disarms someone who is a
16 virtuous possessor.

17 THE COURT: Okay. Well, it's very interesting and
18 I'll work on it and get you an order.

19 Let's talk now about briefly about the case
20 management issues with respect to this matter. We are --
21 the reality here, that when I do issue the opinion on the
22 motion for preliminary injunction, I assume there will be a
23 request for review at that point, so I hear the plaintiff
24 saying that because of that inevitability, that some further
25 management may be premature. Am I hearing that correctly?

1 MR. MICHEL: Essentially, yes. We got a little
2 wrapped up in the CMC statement about stay or don't stay.
3 Really, I think the City's suggestion that there be a motion
4 to stay filed that gets heard, you know, notice of motion, I
5 think that's a good one. And I think that both sort -- our
6 office contemplated that, but really was a little -- but as
7 I thought more about this, it occurred to me, Well, why not
8 just file a motion for stay Wednesday? And get a hearing on
9 November 16th.

10 And if something happens, which I don't expect to
11 happen, we can always withdraw that motion and I'll run over
12 and buy a bunch of lottery tickets. But in the meantime,
13 why not get that on calendar?

14 And also, we have a --

15 THE COURT: You wouldn't want to bring a motion to
16 stay an order that hasn't yet been issued.

17 MR. MICHEL: It would be to stay the case pending
18 appeal. To stay discovery as well? I mean, right now we
19 have a bunch of --

20 THE COURT: I think the more appropriate way to
21 proceed -- I'm not the lawyer here -- but when a decision is
22 rendered, if you are concerned about delay or whatever, you
23 bring a motion to have something heard on shortened time,
24 and then you hear it. But to anticipate -- it just -- I
25 think that would be a procedurally difficult motion to

1 consider before a decision has been rendered, whatever that
2 decision may be.

3 But the concept of not setting a lot of dates that
4 otherwise are going to fall by the wayside because another
5 court is going to be spending time on this is something to
6 discuss.

7 Now, as I hear the City argue, they're saying, if I
8 understand it correctly, even if the decision is subject to
9 review by the appellate court, that that shouldn't mean --
10 because then there's a question of how much of the
11 jurisdiction in this court is being divested vested by
12 virtue of the review of the appeal, and I hear the City
13 saying you shouldn't assume you can't continue to work on
14 the case even if there's appellate review on a preliminary
15 injunction determination.

16 MS. VAN AKEN: That's correct, your Honor. I think
17 what I suggest is that -- the discovery in this case is not
18 extensive. But that's what we're ready for. That's the
19 next stage in this case. I think that the parties should
20 proceed with that and get it done. And then, in the event
21 that this court is now looking at scheduling summary
22 judgment and one of us has taken an appeal to the Ninth
23 Circuit and it hasn't yet been decided, it might be
24 appropriate at that point for the Court to avoid considering
25 summary judgment, and to stay summary judgment.

1 But what does not make sense to me is to stay this
2 step of discovery that we will need to take in all
3 likelihood, no matter what -- should not happen. The
4 only -- I mean, if the Ninth Circuit says categorically
5 plaintiffs are correct and there is no set of circumstances
6 under which.... then possibly. But then -- it's not as if
7 the discovery is so extensive that we would have been put to
8 much burden from proceeding with that anyway.

9 And in the meantime, your Honor, this is a cloud in
10 the legitimacy of the City's ordinance. We want to get it
11 resolved. This case has been going on a long time. I
12 understand that sometimes appellate courts, you know, don't
13 decide things as quickly or in the order that the parties
14 would like. But I think the case just needs to proceed.

15 MR. MICHEL: One of the reasons to have a formal
16 motion to stay heard is to kind of lay out where we think
17 the discovery would have to go under a noncategorical test.
18 I mean, I've been giving some thought to that. But it's
19 certainly -- and I think it's a gross mischaracterization to
20 say that there's not much to it. The City just wants to
21 explore standing. And if there are -- if we do some kind of
22 burden analysis, what kind of experts are there that I have
23 to depose? What kind of subpoenas do I have to issue? What
24 credit does the City's findings get? How deferential are we
25 to them? How much can I attack them? How would I attack

1 them? Am I going to issue subpoenas to each of the authors?
2 Am I going to try to get the raw data?

3 The burden, so to speak, of the actual labor of
4 discovery, if the standard of review, depending on what it
5 is, is going to be tremendous. And I expect there'll be
6 lots of fights about it.

7 THE COURT: Well, and the other thing is that just as
8 you say, the discovery wouldn't be all that extensive, that
9 cuts both ways, maybe, because if and when there's review
10 and the case comes back, you're not starting on a very
11 extended development of the case. It could be then done
12 rather quickly.

13 The question is, you know: Will there be guidance in
14 some form if we -- that may effectively streamline this case
15 when it gets done. And I'm also cognizant of the fact,
16 although not entirely up to speed on it -- are you counsel
17 in Judge Wilken's case?

18 MS. VAN AKEN: I am.

19 THE COURT: So I know that that's going along. And I
20 don't know if that weighs into this at all either, but
21 you're talking about a cloud on the City's ordinances.
22 Well, it's an issue in her case, and I don't -- you know.

23 MS. VAN AKEN: I could advise the Court.

24 THE COURT: Well, I'm curious, yeah.

25 MS. VAN AKEN: Summary judgment has been heard, and

1 that was about a month ago. We're still waiting on the
2 order. Obviously it will be up to Judge Wilken. She was
3 very interested in standing at the hearing, so it is quite
4 possible that we will not get a merits ruling at all in that
5 case.

6 MR. MICHEL: I would also point out that whole
7 cloud -- there were times where the City wanted to stay it
8 for the McDonald hearing, for the Nordyke hearing. The City
9 hasn't been in a hurry until now when the burden of proof is
10 poised to be very burdensome on us.

11 THE COURT: I tell you what, what I'm going to do.
12 It's not so much an issue about specific dates here, it's
13 whether or not dates should be set. I've heard you. What I
14 think I will do is focus first on the preliminary injunction
15 issue, and then I will give you further guidance when I
16 issue that decision on how we may proceed. And it could be
17 that I contemplate some sort of accelerated motion to stay,
18 or something along those lines. I don't think filing a
19 motion to stay prior to my preliminary injunction order is a
20 good idea.

21 MR. MICHEL: Your Honor, can I suggest -- we have a
22 hearing right now on November 8th in this court.

23 THE COURT: Remind me what that's about.

24 MR. MICHEL: It's about dismissing a plaintiff.

25 THE COURT: I thought that was unopposed.

1 MR. MICHEL: There's two.

2 THE COURT: And you oppose one of them?

3 MS. VAN AKEN: Yes, your Honor.

4 THE COURT: All right.

5 MR. MICHEL: So the one concern I have is, we do have
6 dates that are actually going by, and it makes lawyers
7 nervous when there are dates that a judge has said that
8 they're not adhering to. So I hope we can vacate those
9 dates, and perhaps we could continue the CMC to the 8th, at
10 which point maybe there will be some more information that
11 we can use to --

12 THE COURT: Maybe.

13 MS. VAN AKEN: I think what I would suggest as an
14 alternative, your Honor, would be: The City's happy to
15 forgo taking discovery now while the Court is considering
16 the preliminary injunction motion. The Court has indicated
17 that it would, you know, provide some guidance about case
18 management in that order or set something shortly
19 thereafter, so perhaps we should set "pause" on everything,
20 including dismissal of the plaintiffs. If we're not to do
21 any discovery, whether they're in the case or not really
22 doesn't have much material impact.

23 That would be my suggestion. And then we can revisit
24 this in light of the preliminary injunction.

25 THE COURT: That's fine. Therefore, if the City's

1 taking a position that the, if you will, "pause" is
2 appropriate, do I need to hear this November 8th motion with
3 respect to the plaintiffs?

4 MR. MICHEL: Not if we're stopping anything. We just
5 want to keep it on calendar so we have something on
6 calendar. Or otherwise we're going to --

7 THE COURT: I'm paying attention to this case. This
8 won't -- you don't have to worry that it will somehow --

9 MR. MICHEL: The Court will bring us back? That's
10 fine.

11 THE COURT: I will give the order. I'll give you
12 also clearer guidance on the question on the 8th. I'll go
13 back, take a look, and I may either do that on the papers --
14 I'll give you further guidance on it, but I don't think I'm
15 going to set any dates today.

16 MR. MICHEL: But your Honor, doesn't the Court need
17 to vacate -- we have a pretrial motion cutoff coming up for
18 November 11th.

19 THE COURT: All right. I will go ahead and -- were
20 these dates set by me or by whoever had this before me? It
21 initially was Judge Hamilton's case. Did she set these
22 dates?

23 MS. VAN AKEN: I think they were your dates, your
24 Honor. This was before I had the case. It was Docket
25 Number 101, if I remember correctly.

1 THE COURT: Okay.

2 MS. VAN AKEN: But I'm not sure.

3 THE COURT: Well. So the particular dates that are
4 looming that you want vacated are -- run them by me again.

5 MR. MICHEL: Well, a pretrial motion deadline of
6 November 8th; a pretrial statement due January 31st;
7 pretrial conference, February 14th; and trial,
8 February 25th.

9 THE COURT: Okay. I'm going to vacate all those
10 dates.

11 MR. MICHEL: That would be my suggestion.

12 THE COURT: And then we will see where we are. Okay.

13 MS. VAN AKEN: Okay.

14 MR. MICHEL: Thank you, your Honor.

15 MS. VAN AKEN: Thank you, your Honor.

16 (Adjourned)

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19 CERTIFICATE OF REPORTER

20

21 I, Connie Kuhl, Official Reporter for the United
22 States Court, Northern District of California, hereby certify
23 that the foregoing proceedings were reported by me, a
24 certified shorthand reporter, and were thereafter transcribed
25 under my direction into written form.



Connie Kuhl, RMR, CRR
Tuesday, October 23, 2012