No. 14-15408 [DC# CV 13-05807-RMW]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD FYOCK, *et al.*,

*Plaintiffs-Appellant*s,

v.

CITY OF SUNNYVALE, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLEES' ANSWERING BRIEF

Roderick M. Thompson (State Bar No. 96192)
Anthony P. Schoenberg (State Bar No. 203714)
Rochelle L. Woods (State Bar No. 282415)
Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480
E-mail: rthompson@fbm.com

Counsel for Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL COURT CASES

FEDERAL STATUTORY AUTHORITIES

STATE STATUTORY AUTHORITIES

LOCAL STATUTORY AUTHORITIES

INTRODUCTION

California state law has prohibited the manufacture and sale of detachable ammunition magazines capable of holding more than ten rounds for nearly fifteen years. Last year, in the wake of the horrific mass shootings in Newtown and other American cities and towns, where the shooters used these large-capacity magazines to achieve their unspeakable carnage, the city of Sunnyvale passed an ordinance to close a loophole in the state law by prohibiting the possession of such magazines.

The plaintiffs in this case sought to preliminarily enjoin enforcement of Sunnyvale's ordinance, asserting that it violates their Second Amendment right to bear arms.[1] After considering the briefing and evidence presented by the parties, the district court properly denied the plaintiffs' motion. This appeal rapidly followed.

STATEMENT OF THE ISSUE

The issue presented is whether the district court abused its discretion in denying plaintiffs' motion for preliminary injunction where plaintiffs failed to establish that: (1) they were likely to succeed on the merits of their Second Amendment challenge to Sunnyvale's ordinance restricting the possession of

[1] The National Rifle Association ("NRA") recruited these plaintiffs and is directing this litigation. "Even before the measure was passed, the NRA said it was seeking Sunnyvale residents to represent in challenging it." (http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/07/why-sunnyvale-calif-could-be-the-next-front-in-the-national-gun-control-fight/)

ammunition magazines to those with a capacity to hold ten or fewer rounds; (2) they were likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction would be in the public interest.

All applicable constitutional provisions, ordinances, and statutes are contained in the addendum to the Plaintiffs' opening brief (prefix "Addend") or in the addendum to this brief (prefix "ADD").

STATEMENT OF THE CASE

I. LARGE-CAPACITY MAGAZINES ARE FREQUENTLY USED IN MASS SHOOTINGS AND THE MURDERS OF LAW ENFORCEMENT OFFICERS NATIONWIDE.

Large-capacity magazines ("LCMs") are detachable ammunition feeding devices that hold more than ten rounds of ammunition—in fact, some can hold up to 100 rounds of ammunition—and can be used with semiautomatic weapons. (Koper Decl., ER225 at ¶ 5.) A semiautomatic weapon fires one bullet for each pull of the trigger and, after each round of ammunition is fired, automatically loads the next round and cocks itself for the next shot, thereby permitting a faster rate of fire. (ER225 at ¶ 5 n. 5.) LCMs allow semiautomatic weapons to fire many rounds without the need for the shooter to reload the weapon. (*Id*. at ¶ 5; *see also* Appellant's Opening Brief ("App. Br.") at 46 ("Admittedly, magazines with greater capacities can facilitate the firing of a higher number of rounds.")

Because LCMs enable the shooter to fire repeatedly without needing to reload, they significantly increase the shooter's ability to injure and kill large numbers of people quickly. (ER225 at ¶ 7; *see also* Ayoob Decl., ER638, at ¶ 28 ("[S]imply pulling the trigger again on a pistol that still has more ammunition in it can be accomplished in a fraction of a second.")))

Semiautomatic firearms equipped with LCMs have frequently been employed in mass shootings over the past three decades. (Koper Decl., ER226-27, at ¶¶ 9-10; *see also* Thompson Decl., SER7-11.) In instances of mass shootings where the magazine capacity used by a killer could be determined, researchers found that 86% of these shootings involved an LCM. (Koper Decl., ER228, ¶ 14; *see also* Allen Decl., ER416, at ¶ 17 (85% correlation).)

Mass shootings involving LCMs injure and kill more people than mass shootings without LCMs. A recent study found that use of LCMs and assault weapons in recent mass shootings was associated with a 151% increase in number of people shot and a 63% increase in deaths. (Thompson Decl. at SER15; *see also* Koper Decl., ER229, ¶ 19 (where an LCM was used, an average of about four more people were killed in each shooting and an average of about nine more people were wounded, compared to shootings using standard-capacity magazines).) Another recent study found an average of 22 fatalities or injuries per

mass shooting with an LCM compared to only nine without. (Allen Decl., ER415, at ¶ 14.)

Across all kinds of gun attacks, those committed with semiautomatic weapons, including LCMs, tend to result in more shots fired, more people wounded, and more wounds per victim than attacks with other weapons. (Koper Decl., ER229-31, at ¶¶ 20-25.) These results have been confirmed in multiple studies. (*Id*.)

LCMs are also frequently used in the murders of law enforcement officers. Prior to the federal ban in 2004, LCMs were used in somewhere between 31% to 41% of gun murders of police. (Koper Decl., ER229, at ¶ 18 & ER365.)[2] Facing an offender equipped with an LCM is a particularly dangerous event for a police officer. When a shooter pauses, even briefly, to reload a weapon, police officers or bystanders have the chance to take tactical action, such as by advancing or taking cover. A shooter who does not have to reload does not give police that opportunity. (Thompson Decl. at SER17-33 (media accounts where shooters were subdued by police or bystanders during reloading).)

[2] Plaintiffs assert in several places that Sunnyvale's police officers "prefer" LCMs for personal defense, but do not identify any evidence for this unsupported claim (*See, e.g.*, App. Br. at 8 n. 7 & 13.) In any case, under the Ordinance, active-duty police officers need not discontinue possession of their non-duty magazines capable of holding more than ten rounds. (Grgurina Decl., ER384-8, at ¶ 6 & Ex. A.)

II. LCMS ARE RARELY USEFUL FOR SELF-DEFENSE.

Substantial empirical evidence shows that LCMs are neither necessary nor even useful for self-defense because defenders seldom fire more than two shots. For example, an analysis of the NRA's reports "over a five-year period" of firearm use in self-defense, both within the home and elsewhere, "demonstrated that in 50% of all cases, two or fewer shots were fired, and the average number of shots fired across the entire data sample was also about two." (Thompson Decl. at SER103-4, 111-4.) Similarly, a recent study over the last three years (2011-2013) showed an average of 2.1 bullets fired by defenders, and there were no incidents where the defender reported firing more than 10 bullets. (Allen Decl., SER169, at ¶ 9.) Indeed, "[r]eloading was required in only 3 incidents," one of which involved an escaped lion. (Thompson Decl. at SER113.) Even Plaintiffs admit that a restriction on LCM possession "may not often impact the ability of law-abiding citizens to defend themselves." (App. Br. at 13.)

III. CALIFORNIA HAS PROHIBITED THE MANUFACTURE AND SALE OF LCMS SINCE 2000.

Because of the devastating role that LCMs have repeatedly played in mass shootings and the shootings of law enforcement personnel, LCMs have been extensively regulated in the United States for decades. In 1989, the U.S. Department of Treasury, charged with developing guidelines for importing firearms into the United States, determined that the ability to accept an LCM was a

signature characteristic of military firearms, and that detachable LCMs did not serve any sporting purpose. (Thompson Decl. at SER40, 81.)

In 1994, in the wake of the 101 California Street massacre at the law firm of Petit & Martin in San Francisco and numerous other mass shootings during the 1980s and early 1990s, Congress passed the Violent Crime Control and Law Enforcement Act (the federal assault weapons ban). (ER174-81.) The Act prohibited the possession or transfer of all "large-capacity ammunition feeding devices," defined as those with the capacity to accept more than ten rounds, except those lawfully possessed at the time of the bill's enactment. *See* Pub. L. 103-322, Sept. 13, 1994, 108 Stat. 1796, 1998-2000 (formerly codified at 18 U.S.C. § 922(w)). The law, which also prohibited the possession or transfer of assault weapons (except those manufactured before 1994), expired in 2004. *Id*., 108 Stat. at 2000.

But in 2000, before the federal ban expired, California adopted its own legislation at the state level prohibiting the manufacture, import, keeping or offering for sale, giving, or lending of LCMs. (Cal. Stats. 1999, ch. 129, §§ 3, 3.5, presently codified at Cal. Penal Code § 32310 (Addend2); Cal. Penal Code § 16740 (ADD1).) More recently, California also enacted a ban on the purchase and receipt of LCMs. (*Id.*) California has declared LCMs to be a "nuisance." (Cal. Penal Code § 32390 (ADD34-5.)) Thus, though the federal assault weapons ban

expired in 2004, LCMs have remained illegal to buy, sell, or import in California. Taken together, LCMs have been unavailable to the vast majority of Californians for the past twenty years.

IV. THE VOTER-APPROVED ORDINANCE.

In early 2013, in the wake of another series of mass shootings and violence caused by persons armed with LCMs—including the horrific shooting deaths of twenty young school children and six adults in Newtown and a shooting rampage using firearms equipped with LCMs that ended in Sunnyvale[3]—defendant Mayor Spitaleri (now the former mayor) and the other members of Sunnyvale's City Council proposed a ballot initiative, Measure C, in an effort to establish safety regulations related to guns and ammunition that would help stop preventable deaths caused by gun violence. (Addend104-7.) The citizens of Sunnyvale recognized that the "violence and harm caused by and resulting from both the intentional and accidental misuse of guns constitutes a clear and present danger to the populace," and found that "sensible gun safety measures" would "provide some relief from that danger and are of benefit to the entire community." (*Id.*)

To meet those goals, the Ordinance provided the following:

[3] In 2011, Shareef Allman killed three co-workers and seriously injured several others in a shooting rampage that began in Cupertino and ended in Sunnyvale, where Allman was confronted by police, in an incident that resulted in an exchange of gunfire. (Grgurina Decl., ER385, at ¶ 4.) Allman had several weapons that included LCMs. (*Id.*)

> No person may possess a large-capacity magazine in the city of Sunnyvale whether assembled or disassembled. For purposes of this section, "large-capacity magazine" means any detachable ammunition feeding device with the capacity to accept more than ten (10) rounds, but shall not be construed to include any of the following:
>
> (1) A feeding device that has been permanently altered so that it cannot accommodate more than ten (10) rounds; or
>
> (2) A .22 caliber tubular ammunition feeding device; or
>
> (3) A tubular magazine that is contained in a lever-action firearm.

(Addend102 at §9.44.050(a).)

The Ordinance carves out several categories of exceptions, including:

- Any federal, state, county, or city agency that is charged with the enforcement of any law, for use by agency employees in the discharge of their official duties;
- Any government officer, agent, or employee, member of the armed forces of the United States, or peace officer, to the extent that such person is otherwise authorized to possess a large-capacity magazine and does so while acting within the course and scope of his or her duties;
- Any person lawfully in possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that holds fewer than 10 rounds of ammunition is compatible with the firearm and the person possesses the large-capacity magazine solely for use with that firearm.
- Any retired peace officer holding a valid, current Carry Concealed Weapons (CCW) permit issued pursuant to California Penal Code. (Ord. 3027-13 § 1).

(*Id*. at §9.44.050(c)).)

On November 5, 2013, the citizens of Sunnyvale passed Measure C by an overwhelming majority.[4] Measure C was subsequently codified as Sunnyvale Municipal Code § 9.44.050.

V. RELEVANT PROCEDURAL HISTORY AND THE DISTRICT COURT'S RULING.

On December 16, 2013, Plaintiffs-Appellants ("Plaintiffs") filed this action against the City of Sunnyvale, the now former Mayor of Sunnyvale, Anthony Spitaleri, and Chief of the Sunnyvale Department of Public Safety Frank Grgurina (collectively, "Sunnyvale"), alleging that Sunnyvale Municipal Code § 9.44.050 (the "Ordinance") violates Plaintiffs' Second Amendment right to keep and bear arms. (ER663-669.)

On December 23, 2013, Plaintiffs filed a motion for preliminary injunction. (ER684, Dkt. 10.) The district court heard oral arguments on February 21, 2014 (ER689, Dkt. 53).

The district court denied Plaintiffs' motion for preliminary injunction on March 5, 2014. (ER689, Dkt. 56.) In so ruling, the court determined, after considering the arguments and evidence presented by the parties, that Plaintiffs were unlikely to succeed on the merits. (ER5-15.) The district court first found that Sunnyvale's "ban on possession of magazines having a capacity to accept more than ten rounds implicates the Second Amendment's protections,"

[4] 66.55% of voters supported Measure C. (Thompson Decl. at SER85.)

necessitating the application of means-end scrutiny. (ER9.) The court then selected intermediate scrutiny as the appropriate level of review, reasoning that, although the Ordinance "approach[ed]" the core of the Second Amendment's protections, its burden on the Second Amendment is "light" because, *inter alia*, it "only bans a less-preferred subset of magazines that cannot have been legally sold in California for twenty years." (ER12.) The court noted that the application of intermediate scrutiny to the Ordinance "is in accord with every other court that has considered a similar ban on magazines having a capacity to accept more than ten rounds" and that "in most Second Amendment cases, courts tend to reject strict scrutiny and apply intermediate scrutiny." *Id*.

Applying intermediate scrutiny, the district court found that "[p]ublic safety and crime prevention are compelling government interests." (ER13.) The court recognized that "prevention of gun violence" lies at the "heart" of the Ordinance. (ER13-14.) The court credited Sunnyvale's substantial evidence showing that a ban on the possession of magazines having a capacity to accept more than ten rounds may reduce the threat of gun violence. (ER14.) The court also specifically considered and rejected Plaintiffs' arguments and purported evidence to the contrary. (*Id*. at 14-15.) After weighing the evidence presented by both parties, the court concluded:

> The court is persuaded that Sunnyvale residents enacted Measure C out of a genuine concern for public safety, and that the law, with its

> many exceptions and narrow focus on just those magazines having a capacity to accept more than ten rounds, is reasonably tailored to the asserted objective of protecting the public from gun violence.

(ER15.)

The district court made fact findings that Plaintiffs failed to establish that they would suffer irreparable harm absent an injunction, that the balance of hardships is neutral, and that the public interest favors Sunnyvale. (ER16-19.)

On March 5, 2014, Plaintiffs filed in the district court a notice of appeal to the Ninth Circuit Court of Appeals (ER689, Dkt. 57), as well as an emergency motion filed with this Court for an injunction pending appeal (Dkt. 3). The Court denied Plaintiffs' motion. (Dkt. 8.) On March 10, 2014, Plaintiffs filed an emergency application for injunction pending appeal to Justice Kennedy. Justice Kennedy denied Plaintiffs' motion.[5]

Plaintiffs have since changed course and filed with this Court several motions requesting extensions of time to file their briefs (Dkts. 11 (unopposed and granted, Dkt. 12), 14 (unopposed and denied, Dkt. 18)), as well as an opposed motion to stay all appellate proceedings pending the resolution of several other Second Amendment cases (Dkt. 13), which was denied (Dkt. 18).

[5] Plaintiffs proposed, and Sunnyvale agreed, to a stipulated stay of proceedings in the district court pending the appeal. (ER690, Dkt. 63.) The district court stayed the case on March 27, 2014. (*Id*. at Dkt. 64.)

SUMMARY OF THE ARGUMENT

The Supreme Court in *District of Columbia v. Heller* held that the Second Amendment guarantees an individual right to keep and bear arms for purposes of self-defense. 554 U.S. 570 (2008). But the Court took care to make clear that the District of Columbia's total ban on handguns was an outlier, and emphasized that the right secured by the Second Amendment is not unlimited. Courts assessing Second Amendment cases under *Heller* have allowed reasonable government regulation of guns to continue by adopting flexible tests that take into account the degree of burden the government has placed on the right to bear arms in choosing a standard of scrutiny.

In denying Plaintiffs' motion for preliminary injunction, the district court—consistent with every other court that has addressed the constitutionality of a law restricting the possession of LCMs—first determined that intermediate scrutiny was appropriate because, unlike the laws at issue in *Heller* and *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), the Ordinance does not "destroy" any Second Amendment right. The Ordinance does not ban any firearm at all. And it applies only to a subset of detachable ammunition magazines with characteristics that Sunnyvale and its citizens have determined to be particularly dangerous and unnecessary for self-defense. Gun owners have numerous other handgun and

magazine options to exercise their Second Amendment rights. As such, the Ordinance places (at most) only a minimal burden on gun owners' rights.

Applying intermediate scrutiny, the district court then correctly determined that the Ordinance bears a substantial relationship to Sunnyvale's compelling interest in public safety by helping to prevent gun violence, including mass shootings and the shootings of law enforcement personnel. This determination, too, is consistent with every other court's decision addressing a restriction on LCM possession: every court has determined that such restrictions pass intermediate scrutiny. The fact that the Ordinance merely closes the last loophole in California state law—which has long banned the manufacture, sale, purchase and transfer of LCMs—further demonstrates that it is narrowly tailored. As the Ordinance is a sufficiently narrowly tailored means of serving vital government interests that is neither overly broad nor arbitrary, it should be upheld as constitutional. Accordingly, the district court did not abuse its discretion in finding that Plaintiffs failed to establish that they were likely to succeed on the merits of their Second Amendment claim.

The district court also correctly held that Plaintiffs failed to show that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in plaintiff's favor, and that an injunction is in the public

interest. This Court should affirm the district court's order denying the Plaintiffs' motion for a preliminary injunction.

ARGUMENT

VI. STANDARD OF REVIEW OF PRELIMINARY INJUNCTION DENIALS.

"The grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged in except in a case clearly warranting it." *Dymo Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964) (citation omitted); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (noting that a preliminary injunction is an "extraordinary and drastic remedy," requiring the movant to clearly carry the burden of persuasion) (citation omitted). A plaintiff seeking a preliminary injunction must establish that: (1) plaintiff is likely to succeed on the merits; (2) plaintiff is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in plaintiff's favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A plaintiff who has proved likely irreparable harm, has proved that an injunction is in the public interest *and* has raised serious questions going to the merits may obtain an injunction *only* if the balance of hardships tips *sharply* in his favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

A denial of a preliminary injunction motion is reviewed for abuse of discretion. *See Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012), *citing Alliance for the Wild Rockies*, 632 F.3d at 1131. A district court abuses its discretion only if it uses an erroneous legal standard or has made "clearly erroneous findings of fact," *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010) (citation omitted), *i.e.*, if its application of the legal standard was "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *U.S. v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (*en banc*) (citation, footnote reference and internal quotation marks omitted). This Court's review is "limited and deferential." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (internal citations omitted).

The district court's interpretation of the underlying legal principles is subject to *de novo* review. "However, unless the district court's decision relies on erroneous legal premises, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). "The (reviewing) court is not empowered to substitute its judgment for that of the (district court)." *Id.*, *quoting Citizens to Preserve Overton Park, Inc. v.*

Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971) (citations omitted).

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

For the reasons set forth below, the district court correctly concluded that Plaintiffs failed to carry their burden of showing a likelihood of success on the merits of their challenge to the Ordinance. (Order at ER15.)

A. The Constitutionality Of Firearm Restrictions Are Assessed In Accordance With The Burden They Impose on Second Amendment Protected Conduct

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. The Court held that the District's total ban on handgun possession in the home violated the Second Amendment. *Id.* at 635. In doing so, however, the Court noted that this total ban was an outlier: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id*. at 629. *Heller* also affirmed that "the right secured by the Second Amendment is not unlimited," and declined to prescribe a level of scrutiny or method for analyzing gun control laws. *Id*. at 626, 634.

In *McDonald v. City of Chicago*, the Supreme Court reaffirmed that the Second Amendment right is subject to reasonable state and local regulations. 130

S. Ct. 3020, 3047 (2010) (plurality) ("It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' . . . We repeat those assurances here."). The Court further provided assurance that "state and local experimentation with reasonable firearms regulation will continue under the Second Amendment." *Id*. at 3046.

This Court has adopted a two-step inquiry previously outlined by other circuit courts, including the Third and Fourth Circuits, to determine whether a statute is constitutional under the Second Amendment post-*Heller*. *U.S. v. Chovan*, 735 F.3d 1127, 1136-7 (9th Cir. 2013). The inquiry first asks whether the challenged law is protected at all—*i.e*., whether the law burdens conduct protected by the Second Amendment. *Id., citing U.S. v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *U.S. v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir. 2010).

If the law in fact burdens Second Amendment rights, the Court next employs a sliding-scale approach to consider what level of scrutiny is appropriate based on the severity of the burden imposed by the law and how close the regulated conduct is to the core of the Second Amendment right. *Chovan*, 735 F.3d at 1138.

Employing this same basic approach, every Court of Appeals that has considered a gun restriction falling short of a prohibition on armed self-defense has

applied something less than strict scrutiny. *See, e.g., U.S. v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (applying intermediate scrutiny to prohibition on gun ownership by domestic violence misdemeanants, 18 U.S.C. § 922(g)(9)); *U.S. v. Marzzarella*, 614 F.3d 85, 97 (3rd Cir. 2010) (applying intermediate scrutiny to statute prohibiting possession of handgun with obliterated serial number); *U.S. v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011) (applying intermediate scrutiny to prohibition on loaded firearms in cars in national parks); *NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 205-07 (5th Cir. 2012) (applying intermediate scrutiny to prohibition on commercial handgun sales to people under 21); *U.S. v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (*en banc*) (finding a "substantial relation" between the important government objective of "preventing armed mayhem" and 18 U.S.C. § 922(g)(9)); *U.S. v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to prohibition on possession by persons subject to domestic violence protection order).

B. Intermediate Scrutiny Is The Highest Level of Review That Could Be Applied

As an initial matter, Sunnyvale maintains—for the reasons set forth in its briefing before the district court—that the Ordinance is far outside the core of the Second Amendment right and imposes no burden on Plaintiffs' ability to defend themselves in the home with firearms because LCMs are not "arms," they are not

in common use for self-defense, and they are in fact dangerous and unsuitable for responsible self-defense in the home. (*See* SER188-98.)

But to the extent that the Ordinance burdens the Second Amendment at all, the district court correctly recognized that the degree of burden is so modest that at most intermediate scrutiny must apply. In so finding, the district court reasoned that:

> [T]he Sunnyvale law's burden on the Second Amendment right is light. Magazines having a capacity to accept more than ten rounds are hardly crucial for citizens to exercise their right to bear arms. The Sunnyvale ordinance does not place any restrictions on smaller magazines, which are the most popular magazines for self-defense. Individuals have countless other handgun and magazine options to exercise their Second Amendment rights. The evidence thus establishes that the banned magazines make up just one subset of magazines, which interoperate only with a subset of all firearms. Accordingly, a prohibition on possession of magazines having a capacity to accept more than ten rounds applies only the most minor burden on the Second Amendment.

(Order at ER11-12) (citations omitted.)

The district court's determination that intermediate scrutiny is appropriate comports with every other decision of a court addressing the constitutionality of an LCM restriction. *See Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1261-2 (D.C. Cir. 2011) (applying intermediate scrutiny); *San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, No. C-13-05351 WHA, 2014 WL 644395, at *5 (N.D. Cal. Feb. 19, 2014) (same); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, No. C-13-291S, 2013 WL 6909955, at *12-13

(W.D.N.Y. Dec. 31, 2013) (same); *Shew v. Malloy*, No. C-13-739 AVC, 2014 WL 346859, at **6-7 (D. Conn. Jan. 30, 2014) (same). And with good reason. Protecting public safety is the bedrock function of government, and guns have an obvious and "unique potential to facilitate death and destruction and thereby to destabilize ordered liberty." *McDonald*, 130 S. Ct. at 3108 (Stevens, J., dissenting). Accordingly, state and local governments have a profound interest in safeguarding the public and law enforcement personnel from gun violence. *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("promotion of safety of persons and property is unquestionably at the core of the State's police power"); *Osterweil v. Bartlett*, 706 F.3d 139, 143 (2d Cir. 2013), certified question accepted, 20 N.Y.3d 1058 (2013) (O'Connor, Sup. Ct. Justice (Ret.) sitting by designation) ("[t]he regulation of firearms is a paramount issue of public safety, and recent events in this circuit are a sad reminder that firearms are dangerous in the wrong hands"). The level of scrutiny applied to firearms regulations must not deprive legislatures of the flexibility to safeguard the populace. *See Heller*, 554 U.S. at 636 (Constitution permits legislatures "a variety of tools for combating that problem").

For example, the D.C. Circuit applied intermediate scrutiny to uphold the constitutionality of the District of Columbia's restriction on assault weapons and LCMs substantially similar to the Ordinance. *Heller II*, 670 F.3d at 1261-2. "[R]estrictions that impose severe burdens (because they don't leave open ample

alternative channels) must be judged under strict scrutiny, but restrictions that impose only modest burdens (because they do leave open ample alternative channels) are judged under a mild form of intermediate scrutiny." *Id*. at 1262, *quoting Eugene Volokh*, "Implementing the Right to Keep and Bear Arms for Self–Defense: An Analytical Framework and a Research Agenda," 56 UCLA L. Rev. 1443, 1471 (2009). The circuit court stated that the prohibition of assault weapons and LCMs was "more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights," since the prohibition did not "prevent a person from keeping a suitable and commonly used weapon for protection in the home." *Id*. at 1262, *quoting Marzzarella*, 614 F.3d at 97 (emphasis added). The Court also highlighted a fundamental distinction between the absolute handgun ban in *Heller* and restrictions on assault weapons and LCMs: "Unlike the law held unconstitutional in *Heller*, [restrictions on assault weapons and LCMs] do not prohibit the possession of 'the quintessential self-defense weapon,' to wit, the handgun." *Id*. at 1261-62, *quoting Heller*, 554 U.S. at 629.

Similarly, in *Cuomo*, the Western District of New York granted summary judgment in favor of the state on its LCM and assault weapons restriction. 2013 WL 6909955, at *17-18. It held that intermediate scrutiny should apply to the restriction because prohibiting assault weapons and LCMs was akin to a time,

place and manner restriction on the use of firearms, leaving open ample alternative channels for self defense. *Id*. at *13. And it concluded that the assault weapon and LCM restriction was ultimately constitutional under intermediate scrutiny. *Id*. at **14-19. And in *Shew*, the District of Connecticut also held that intermediate scrutiny should apply because the LCM restriction "does not effectively disarm individuals or substantially affect their ability to defend themselves." 2014 WL346859 at *7, *quoting Heller II*, 670 F.3d at 1262. Rather, "[t]he challenged legislation provides alternate access to similar firearms and does not categorically ban a universally recognized class of firearms." *Id.*

C. The Court Should Not Apply Categorical Invalidation Or Strict Scrutiny Here

1. *Heller*-Style Categorical Invalidation Is Not Appropriate

Plaintiffs' argument that the Ordinance is *per se* invalid without applying any level of scrutiny, pursuant to *Heller*, is meritless.

First, Plaintiffs repeatedly insist that the Ordinance is categorically invalid because the LCMs themselves are allegedly "protected by the Second Amendment." (App. Br. at 20; *id*. ([t]he City's ordinance is thus irreconcilable with the Second Amendment's protections for these magazines"); *id*. (characterizing the ban at issue in *Heller* as "a ban on a protected class of firearms"); *id*. at 15 ("Arms are either protected, or they are not").) Plaintiffs misapprehend the protections afforded by the Second Amendment. The Second

Amendment inquiry addresses whether certain *conduct* is protected, not whether the firearms themselves are. *Chovan*, 735 F.3d at 1136 (the "Second Amendment inquiry we adopt [] asks whether the challenged law burdens ***conduct*** protected by the Second Amendment") (emphasis added); *Peruta*, 742 F.3d at 1150 (noting that *Heller* addressed whether the challenged laws "burden[ed] constitutionally protected ***conduct***") (emphasis added). No firearm or magazine, separate from an individual's right to use it, is protected by the Second Amendment.[6]

Second, Plaintiffs' attempt to analogize this case to *Peruta* and *Heller* must fail. As the district court and the Ninth Circuit have recognized, "[i]t is the rare law that 'destroys' the right [to keep and bear arms], requiring *Heller*-style per se invalidation." (Order at ER10; *citing Peruta*, 742 F.3d at 1170). In *Heller*, the Court held that the District's total ban on handgun possession in the home violated the Second Amendment. *Heller*, 554 U.S. at 635. In doing so, the Court noted that this total ban was an outlier: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id*. at 629. Similarly,

[6] Under Plaintiffs' proposed interpretation of the Second Amendment, once an arm has been classified as "protected" (*e.g.*, like the handgun in *Heller*), no regulation of that arm would pass constitutional scrutiny. But *Heller* specifically noted that many regulations of firearms, including handguns, are in fact "presumptively lawful." 554 U.S. at 626-7 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

in *Peruta*, it was only because San Diego's policy was a "complete carry prohibition" on any gun, whether loaded or not, and whether open or concealed, did the Ninth Circuit invalidate that policy without considering San Diego's justification for its policy. 742 F.3d at 1170. "A law effecting a '*destruction* of the right' rather than merely *burdening* it is, after all, an infringement under any light." *Id*. at 1168, *quoting Heller*, 554 U.S. at 629 (emphasis in original).

Peruta and *Heller* thus contrast laws that "destroy" a Second Amendment right with laws that merely "burden" a Second Amendment right. "[A] law that destroys (rather than merely burdens) a right central to the Second Amendment must be struck down" under a *Heller*-style categorical approach. *Peruta*, 742 F.3d at 1167, *citing Heller*, 554 U.S. at 628-29. But this approach is reserved only for "the most severe cases." *Id*. at 1168. A law that merely burdens a Second Amendment right, and does not destroy it, is analyzed under the *Chovan* two-step approach.

Unlike *Heller* and *Peruta*, Sunnyvale's Ordinance does not "destroy" any Second Amendment right. The Ordinance is not a total ban on self-defense at home or in public. *See, e.g., San Francisco Veteran Police Officers Ass'n*, 2014 WL 644395, at *4 ("Given that the San Francisco rule is not a total ban on self-defense at home or in public, there is no occasion whatsoever to apply the 'categorical' prohibition advanced by plaintiffs"). Plaintiffs themselves have

admitted as much. (App. Br. at 13 (the Ordinance "may not often impact the ability of law-abiding citizens to defend themselves."); *id*. at 22 (acknowledging that the Ordinance does not "destroy[] his right to use a firearm for self-defense.")).

The Ordinance does not ban any firearm.[7] It does not, as the district court recognized, ban "all, or even most, magazines." (Order at ER10; *see also* App Br. at 5 (admitting that LCMs account for only about 47% of the magazines in circulation).) The Ordinance instead applies only to a subset of magazines with characteristics that Sunnyvale and its citizens have determined to be particularly dangerous and unnecessary for self-defense. Indeed, Plaintiffs do not (and cannot) dispute the district court's findings that: (1) smaller, non-LCM magazines are the *most* popular magazines for self-defense (and are more popular than LCM magazines) (Order at ER11 ("The Sunnyvale ordinance does not place any restrictions on smaller magazines, which are the most popular for self-defense."), *citing* Curcuruto Decl., ER617, at ¶ 8); and (2) individuals have numerous other handgun and magazine options to exercise their Second Amendment rights (*id.*).

[7] Nearly all firearms capable of accepting detachable LCMs will also accept a magazine with a maximum capacity of ten rounds. (Yurgealitis Decl., at SER179, ¶ 5.) In addition, the Ordinance provides a specific exception permitting the lawful possession of magazines holding more than ten rounds if "no magazine that holds fewer than 10 rounds of ammunition is compatible with the firearm and the person possesses the large-capacity magazine solely for use with that firearm." Sunnyvale Mun. Code § 9.44.050(c)(8) (Addend102.)

In sum, depriving Plaintiffs of LCMs does not impair their ability to use any firearm in self-defense, whether in the home or elsewhere. It does not totally disarm Sunnyvale's citizens. And it does not meaningfully jeopardize their right to self-defense. Such a regulation is nothing like the complete prohibitions on operable guns at issue in *Heller* and *Peruta*.

2. Strict Scrutiny Should Not Apply

Plaintiffs' alternative argument that strict scrutiny should apply is also meritless. Plaintiffs first claim that strict scrutiny is the "default" standard for reviewing laws that impact the Second Amendment right to bear arms. (App. Br. at 25-26).[8] But the Ninth Circuit has specifically stated to the contrary that "*Heller* did not establish that Second Amendment restrictions must be reviewed under strict scrutiny." *U.S. v. Vongxay*, 594 F.3d 1111, 1118 n.5 (9th Cir. 2010). Indeed, Plaintiffs themselves have acknowledged that no court has applied any standard stricter than intermediate scrutiny to an LCM possession restriction. (Hearing Tr.

[8] To support their argument that strict scrutiny should apply here (App. Br. at 25), Plaintiffs cite to *Tucson Woman's Clinic v. Eden*, a case addressing the constitutionality of a statutory and regulatory scheme covering abortion clinics. 379 F.3d 531 (9th Cir. 2004). But they quote an *argument* from the plaintiff rather than a holding by the Court. *Id*. at 544 (noting that plaintiffs "argue that this claim is not the same as a claim that the scheme unconstitutionally infringes the abortion liberty interest, because the test for when a law is subject to strict scrutiny is when that law impacts a fundamental right, not when it infringes it"). In fact, after considering the plaintiffs' arguments, the *Tucson* Court determined that strict scrutiny was *not* the appropriate standard to apply. *Id*. at 544-547. *See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) (applying rational basis review).

at ER53 (admitting that "there hasn't been a [strict] scrutiny standard applied in a case like this yet.")) As the Fifth Circuit has recognized, "even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to the severity of the challenged regulation." *NRA, Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco & Firearms*, 700 F.3d 185, 198 (5th Cir. 2012).[9]

Plaintiffs next claim that, under Ninth Circuit law, where a law burdens "core Second Amendment conduct," strict scrutiny applies "no matter how severe the burden." (App. Br. at 26-27.) This is incorrect. The Ninth Circuit specifically addressed this issue in its recent decision *Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014). In *Jackson*, the Ninth Circuit addressed the constitutionality of an ordinance prohibiting individuals from keeping handguns in their homes unless the handguns were stored in locked containers or carried on their persons. *Id*. at 963-4. The Ninth Circuit held that the ordinance "burdens the core of the Second Amendment right." *Id*. But because the

[9] Circuits throughout the country have handily rejected Plaintiffs' argument that government restrictions on fundamental rights generally must be evaluated under strict scrutiny. *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 592 (2005) (in voting rights challenge, holding that "strict scrutiny is appropriate only if the burden is severe"); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (applying intermediate scrutiny to commercial speech prohibition); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to content neutral restrictions on speech); *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) ("reasonable regulations that do not significantly interfere with decisions" to marry are not subject to the same "rigorous scrutiny" as direct interference with marriage rights).

ordinance at issue did not "impose the sort of severe burden that requires the higher level of scrutiny," the Court concluded that the ordinance is "not a substantial burden on the Second Amendment right itself." *Id*. at 964-5.

Accordingly, "[e]ven though [the ordinance] implicates the core of the Second Amendment right, because it does not impose a substantial burden on conduct protected by the Second Amendment, we apply intermediate scrutiny." *Id*. at 965. These principles apply equally to this case, where the district court has held that the Ordinance comes "relatively near the core of the Second Amendment right" (ER10) but imposes only a "light" burden on the right (ER11). [10]

Plaintiffs further argue that "the burden imposed on core conduct in this case is particularly severe" because it bans the possession of purportedly "constitutionally protected arms." (App. Br. at 28.) But as discussed earlier, this argument relies on the flawed premise that the arms themselves are somehow

[10] Plaintiffs also argue that the Court applied intermediate scrutiny rather than strict scrutiny in *Jackson* solely because the hollow-point ammunition sales ban at issue in that case did not preclude plaintiff from keeping the ammunition in her home. (App. Br. at 30-1.) By contrast, Plaintiffs assert, because the Ordinance at issue here does not permit plaintiffs to keep LCMs in their home or in Sunnyvale, strict scrutiny must apply. (*Id*.) But the Court's decision on the level of scrutiny to apply in *Jackson* did not turn on whether the statute permitted gun owners to keep the firearm at issue in their homes or in the city. Rather, the Court reasoned that the challenged ordinance did not "place a substantial burden on the Second Amendment right" because it "does not prevent the use of handguns or other weapons in self-defense" and "leaves open alternative channels for self-defense in the home." 746 F.3d at 968. The Ordinance here similarly does not prevent the use of handguns for self-defense and leaves open numerous other channels for self-defense in the home. Accordingly, intermediate scrutiny should apply.

"constitutionally protected." (*See supra* at 22-23.) Moreover, Plaintiffs cannot plausibly claim that the burden imposed by the Ordinance is particularly "severe" when (1) the Ordinance does not ban any firearms at all; (2) a number of other jurisdictions have passed similar laws restricting LCM possession[11]—none of which have been declared unconstitutional; and (3) the vast majority of Californians have not had access to LCMs for nearly twenty years.

In addition, Plaintiffs' assertion that the Ordinance does not merely regulate the "manner in which [Plaintiffs] may exercise [their] rights" has been rejected by other courts. (App. Br. at 28.) A number of courts have specifically found that a law like the Ordinance—which permits armed self-defense in the home and merely

[11] At least ten other jurisdictions restrict the possession or sale of ammunition magazines on the basis of capacity. *See* Haw. Rev. Stat. § 134-8(c) (prohibiting possession of LCMs capable of use with pistols) (App. Br., Addend11); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131M (enacted as 1998 Mass. Stats. ch. 180, § 8) (prohibiting sale or possession of LCMs) (*Id*. at Addend12-16); 2013 Md. Sess. Laws ch. 427, § 1 (prohibiting sale of magazines with capacity of more than 10 rounds) (*Id*. at Addend17-78); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j) (prohibiting possession of magazines with capacity of more than 15 rounds except magazines grandfathered under 1990 law) (*Id*. at Addend79-82); 2013 N.Y. Sess. Laws ch. 1, §§ 38, 41-b (prohibiting LCM possession) (*Id*. at Addend83-87); City of Rochester, N.Y., City Code No. 47-5 (prohibiting possession of pistol magazines containing more than 17 rounds or rifle magazines containing more than five rounds) (ADD6-11); D.C. Code § 7- 2506.01 (prohibiting possession of LCMs) (ADD22-23); Chicago, Ill. Muni. Code §§ 8-20-010, 8-20-085 (prohibiting possession of magazines with capacity greater than 15 rounds) (ADD13-21); Colo. Stats. H.B. 13-1224 (prohibits magazines with capacity to hold more than 15 rounds; grandfathers previously possessed magazines) (App. Br., Addend3-7); 2013 Conn. Acts P.A. 13-3, § 23 (Reg. Sess.) (prohibits LCM possession except those owned prior to the ban and registered with state authorities) (*id*., Addend8-10).

regulates some types of arms, leaving a person "free to possess any otherwise lawful firearm"—only operates like a "regulation of the manner" in which persons may lawfully exercise their Second Amendment rights. *Marzzarella*, 614 F.3d at 97 (*cited with approval in Chovan*, 735 F.3d at 1138); *Heller II*, 670 F.3d at 1262 (agreeing that the prohibition of assault weapons and LCMs was "more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights."), *citing Marzzarella*, 614 F.3d at 97; *Cuomo*, 2013 WL 6909955, at *13 (prohibiting assault weapons and LCMs was akin to a time, place and manner restriction on the use of firearms).

D. The District Court Did Not Abuse Its Discretion In Holding That The Ordinance Survives Intermediate Scrutiny

1. The District Court Properly Determined That The Ordinance Is A Sufficiently Narrowly-Tailored Means Of Serving The Government's Compelling Interest In Public Safety And Crime Prevention

Intermediate scrutiny "require[s] (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139, *citing Chester*, 628 F.3d at 683. "Intermediate scrutiny does not require that [the law] be the least restrictive means" of achieving that objective. *Jackson*, 746 F.3d at 960; *see also id*. at 969-70 ("[I]ntermediate scrutiny does not require the least restrictive means of furthering a given end."). Nor is Sunnyvale required to prove

that its legislative judgments are empirically correct. Instead, Sunnyvale need only draw a "reasonable inference" that the Ordinance will "increase public safety and reduce firearm casualties" in order to establish the required "fit." *Jackson*, 746 F.3d at 966. In doing so, Sunnyvale "may rely on any evidence 'reasonably believed to be relevant' to substantiate its important interest" in public safety. *Id.* at 969, *quoting City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986).

The district court correctly held that the Ordinance easily satisfies this standard. The district court first recognized that "[p]ublic safety and crime prevention are compelling government interests." (Order at ER13; *U.S. v. Salerno*, 481 U.S. 739, 748-50 (1987) (noting that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest" and holding that the government's interest in preventing crime is compelling); *Schall v. Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted").)

The district court then correctly found that the "prevention of gun violence lies at the heart of the Sunnyvale ordinance." (Order at ER13.) As set forth in the declaration of Sunnyvale's mayor, in enacting the Ordinance, the Sunnyvale City Council was concerned by the threat to public safety posed by LCMs. *See* Spitaleri Decl., ER220-1, at ¶¶ 4, 10-11, 13. LCMs have played a devastating role in

numerous mass shootings nationwide. In addition, "studies . . . suggest that attacks with semiautomatics –including [assault weapons] or other semiautomatics with [magazines holding more than ten rounds] – result in more shots fired, persons wounded, and wounds per victim than do other gun attacks." *Heller II*, 670 F.3d at 1263 (internal quotations omitted); *see also Cuomo*, 2013 WL 6909955, at *17-18 ("Evidence also suggests that, quite simply, more people die when a shooter has a large-capacity magazine. . . . [I]n passing these provisions New York has made a public policy judgment that draws reasonable inferences from substantial evidence."). LCMs are also disproportionately used in the murders of law enforcement officers. *See supra* at 4 (prior to the federal ban, LCMs were used in somewhere between 31% to 41% of gun murders of police); *see also Heller II*, 670 F.3d at 1263-64 (concluding that "the evidence demonstrates that large-capacity magazines tend to pose a danger to innocent people and particularly to police officers").

The district court next recognized that Sunnyvale residents enacted the Ordinance out of a genuine concern for public safety and that the law, with its many exceptions and narrow focus on just those magazines having a capacity to accept more than ten rounds, is reasonably tailored to the asserted objective of protecting the public from gun violence. (Order at ER15.) In making this finding, the district court credited Sunnyvale's "pages of credible evidence, from study data

to expert testimony to the opinions of Sunnyvale public officials," all "indicating that the Sunnyvale ordinance is substantially related to the compelling government interest in public safety." *Id.* The fact that the Ordinance merely closes the last loophole in California state law—which has long banned the manufacture, sale, purchase and transfer of LCMs—further demonstrates that it is narrowly tailored. As the Ordinance is a sufficiently narrowly tailored means of serving vital government interests that is neither overly broad nor arbitrary, it should be upheld as constitutional. *See, e.g., Turner Broad. Sys., Inc. v. FCC* ("*Turner I*"), 512 U.S. 622, 662 (1994); *Heller II*, 670 F.3d at 1262; *Marzzarella*, 614 F.3d at 98.[12]

2. Every Court That Has Considered An LCM Possession Restriction Has Found It To Be Constitutional

The district court's finding comports with every other court that has addressed the constitutionality of a restriction on LCM possession. Each court has held that such a restriction does not violate the Second Amendment right to keep and bear arms. *See Heller II*, 670 F.3d at 1264; *San Francisco Veteran Police Officers*, 2014 WL 644395, at *7; *Cuomo*, 2013 WL 6909955, at *18; *Shew*, 2014 WL 346859, at *9.

[12] Any finding here that questions the constitutionality of Sunnyvale's limitation on LCM possession would necessarily also place the longstanding California law prohibiting the sale, manufacture and purchase of LCMs—not challenged here—at risk. The Court should instead find that Sunnyvale's reasonable restriction limiting the capacity of ammunition magazines is fully consistent with the right to keep and bear arms, and serves an important public safety purpose.

3. Sunnyvale Is Not Proscribed From Enacting Laws To Deter Crime Merely Because Those Laws Might Also Impact The Law-Abiding

Plaintiffs contend that the Ordinance may not restrict the use of LCMs by the "law-abiding" because "criminals" may misuse them. (App. Br. at 35.) This view is unsupported in fact and law. First, a vast majority (75%) of the guns used in mass shootings were obtained legally. (Order at ER14.) Second, it is well-established that the government may enact laws that affect the rights of the law-abiding in order to deter crime. For example, although the right to vote is constitutionally protected, the Supreme Court has held that a government may require the law-abiding to comply with measures against voter fraud. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). As another example, in the Second Amendment context, the Third Circuit recently held that even if there is nothing to fear when the law-abiding possess guns with obliterated serial numbers, the government may prohibit such possession to "serve[] a law enforcement interest in enabling the tracing of weapons." *Marzzarella*, 614 F.3d at 95-100. In fact, there is substantial evidence that prohibitions on LCMs reduce the availability of such magazines to criminals. (Order, ER14.)[13]

[13] As discussed above (*see* supra at 22-26), Plaintiffs' efforts to analogize the Ordinance's restriction on ammunition magazine size to the handgun ban in *Heller* are not persuasive. (App. Br. at 36-38.) *Heller* did not, as Plaintiffs contend, establish a categorical rule that a city cannot impose regulations on the use of "constitutionally protected arms" for the purpose of decreasing criminal access and

4. Plaintiffs' Complaints About The Sufficiency Of Sunnyvale's Evidence Are Without Merit.

Plaintiffs also contend that the district court erred in finding that Sunnyvale had submitted substantial evidence that the Ordinance "may reduce the threat of gun violence," and assert that the district court ignored Plaintiffs' evidence to the contrary. (App. Br. at 40-52.) In doing so, Plaintiffs improperly (1) request that this Court reweigh *de novo* the evidence provided by the parties; (2) claim that Sunnyvale must provide evidence definitively establishing that the Ordinance will actually achieve its public safety goals; and (3) argue that *Heller*—which did not even apply intermediate scrutiny—somehow instructs this Court to ignore evidence regarding the dangers of LCMs in its analysis (*id*. at 44-48).

As to the first point, review of a preliminary injunction is assessed under an abuse of discretion standard. As such, factual findings are reviewed only for "clear error," *i.e.*, the district court's decision must have "resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1262. The district court may not be reversed "simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Sports Form*, 686

---

misuse. (*Id*. at 36.) Rather, the *Heller* Court invalidated the handgun ban at issue because it found that the "American people have considered the handgun to be the quintessential self-defense weapon," and recognized that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." 554 U.S. at 629.

F.2d at 752. And this Court "is not empowered to substitute its judgment for that of the (district court)." *Id.* at 752. Plaintiffs' request for the Court to review the district court's factual findings *de novo* should not be countenanced.

As to the second point, contrary to Plaintiffs' assertions (App. Br. at 39), the district court's reasoning that "irrespective of how Sunnyvale's law impacts public safety, the means-end scrutiny test must concentrate more on the relationship between the challenged ordinance and public safety than on the exact effect the law may have" (Order at ER13) comports with the precedent of this Court and the Supreme Court. As this Court has stated, Sunnyvale must be given "a reasonable opportunity to experiment with solutions to admittedly serious problems." *Jackson*, 746 F.3d at 966, *quoting City of Renton*, 475 U.S. at 52. Sunnyvale need not establish with *certitude* that the Ordinance will actually achieve its desired end. Instead, Sunnyvale need only draw a "reasonable inference" that the Ordinance will "increase public safety and reduce firearm casualties" in order to establish the required "fit." *Jackson*, 746 F.3d at 966.

As the Supreme Court has stated, when applying the intermediate scrutiny standard, "[t]he question is not whether [the legislature], as an objective matter, was correct[;] ... [r]ather, the question is whether the legislative conclusion was ***reasonable*** and supported by substantial evidence in the record." *Turner Broadcasting Sys., Inc. v. FCC* ("*Turner II*"), 520 U.S. 180, 211, 117 S. Ct. 1174

(1997) (emphasis added). "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665, 114 S. Ct. 2445 (emphasis added); *see also Turner II*, 520 U.S. at 212, 117 S. Ct. 1174 ("Congress is allowed to make a rational predication [sic] of the consequences of inaction and of the effects of regulation in furthering governmental interests.") (internal quotation mark and citation omitted); *84 Video/Newsstand, Inc. v. Sartini*, 455 Fed. Appx. 541, 551 (6th Cir. 2011) ("This court has repeatedly held that [under intermediate scrutiny] governments are not required to demonstrate empirically that [their] proposed regulations will or are likely to [have their intended effects]") (internal quotation marks and citations omitted)). Even Plaintiffs admit that "the court is ill-equipped to deal with such issues [because] [t]hese are matters of policy." (App. Br. at 13.)

The Supreme Court has stressed, furthermore, that the government "does not bear the burden of providing evidence that rules out every theory ... that is inconsistent with its own." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437, 122 S. Ct. 1728, 152 L.Ed.2d 670 (2002).[14] Accordingly, Sunnyvale

[14] Several other circuits have instructed that courts should be especially deferential to legislative predictions when it comes to gun policy: "In the context of firearm regulation, the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Schrader v. Holder*, 704

need not prove that the Ordinance will *actually* further its asserted interests in order to prevail.

In any case, the district court did not abuse its discretion in relying on extensive expert opinion and empirical evidence from Sunnyvale demonstrating that the Ordinance is likely to reduce the threats to the safety of the public and law enforcement personnel. Sunnyvale's evidence included declarations from (1) Anthony Spitaleri, Sunnyvale's former Mayor, regarding the Ordinance and the reasons for its adoption (*see, e.g.*, ER219-22); (2) Frank Grgurina, Sunnyvale's police chief, regarding the impact that LCMs have had on Sunnyvale (*see, e.g.*, ER384-88); (3) Lucy Allen, an economic and statistical analysis expert analyzing the number of rounds of ammunition fired by individuals using a gun in self-defense and magazines used in mass shootings (SER167-76); (4) Dr. Koper, a renowned expert on the federal assault weapon ban, assessing the potential effect of a restriction on the possession of LCMs (*see, e.g.*, ER223-383); (5) John J. Donohue, a Stanford law professor (*see, e.g.*, ER389-412); and (6) James E. Yurgealitis, a firearms expert (SER177-86). In addition, Sunnyvale provided hundreds of pages of additional evidence, including congressional reports, media reports, and third party studies, demonstrating the required fit between the

---

F.3d 980, 990 (D.C. Cir. 2013), *quoting Kachalsky*, 701 F.3d at 97; *Schrader*, 704 F.3d at 990 ("It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments.").

Ordinance and Sunnyvale's important interest in public safety. (*See, e.g.*, SER6-81, 87-156, 165-66.)

Plaintiffs' attempt to discredit Dr. Koper relies on a misleading and incomplete characterization of his analysis. In the next sentence of Dr. Koper's 2004 report after the section cited by Plaintiffs (App. Br. at 42), Dr. Koper noted that the federal ban (which expired by its own terms in 2004) contained several important exemptions which blunted its full potential impact, especially in the short term, and opined that it is likely that the ban may have had a stronger impact in the longer term:

> "[T]he grandfathering provision of the AW-LCM ban guaranteed that the effects of this law would occur only gradually over time. Those effects are still unfolding and may not be fully felt for several years into the future, particularly if foreign, pre-ban LCMs continued to be imported into the U.S. in large numbers."

(ER343.)

In the declaration Dr. Koper submitted in this case, he explained that assault weapons and LCMs manufactured on or before the effective date of the federal ban were "grandfathered" in and thus remained legal to own and transfer. (Koper Decl., ER233, at ¶ 36.) In addition, the federal ban did not apply to a semiautomatic weapon possessing only one military-style feature listed in the ban's features test provision. (*Id*. at ¶ 37.) Thus, many civilian rifles patterned after military weapons were legal under the ban with only slight modifications.

(*Id*.) Assessing the results of an empirical study of LCM use in Virginia pre- and post-federal ban, Professor Koper opined that the ban may have had a stronger impact on the supply of LCMs to criminal users had it remained in effect. (*Id*. at ¶ 50.) Dr. Koper's declaration contains an extensive analysis of his own prior studies as well as other empirical data. (ER223-240.)[15]

In contrast, the "evidence" that Plaintiffs claim the district court "ignored" consists entirely of a few anecdotal, unverified stories (*e.g*., ER635-637); unreliable and misleading assertions regarding the use of LCMs in mass shootings (*e.g*., ER554-59, 566-67, 637-638; *see* SER198 and SER159-60); and general crime statistics that are irrelevant to Sunnyvale's public safety goals of preventing mass shootings and protecting law enforcement personnel (*e.g*., ER553).

For example, Plaintiffs argue that the district court "refused to consider" Dr. Kleck's analysis regarding the use of LCMs in mass shootings. (App. Br. at 50.) But, as Sunnyvale has already explained in its briefing to the district court, Dr. Kleck's analysis on this issue is flawed, and therefore unreliable.[16] (*See* SER198

[15] In any case, even if there are "conflicting views" of Dr. Koper's declaration, the Court need not "put [its] imprimatur" on his research, but merely must decide whether Sunnyvale has provided "substantial evidence for [the voters] making the judgment that [they] did." *Turner II*, 520 U.S. at 208, 117 S. Ct. 1174; *see also Gonzales v. Carhart*, 550 U.S. 124, 163, 127 S. Ct. 1610, 167 L.Ed.2d 480 (2007) (courts should give legislatures "wide discretion to pass legislation in areas where there is ... scientific uncertainty") (collecting cases).

[16] Dr. Kleck's claims regarding the frequency of use of LCMs in mass shootings,

and SER159-60) Even Dr. Kleck himself has conceded this. ER116 at ¶ 15 ("I would say that my phrasing of some of my findings was not sufficiently precise.").

As another example, Plaintiffs rely on Dr. Kleck's claims that individuals should be allowed to possess LCMs because they may need to fire "large numbers of rounds" to defend themselves. (ER560-564.) But this statement is based on speculation (*see, e.g.*, ER561 at ¶ 24, "[W]e do not know the number of [defensive gun uses] by crime victims that involved use of LCMs or the firing of more than 10 rounds") and general statistics that do not even relate to the use of LCMs (*see, e.g.*, ER 562 at ¶ 25, citing the percentage of U.S. adults that had used a gun "defensively"). Sunnyvale, on the other hand, presented empirical evidence from multiple sources—which the district court credited, and which Plaintiffs did not (and cannot) refute—showing that individuals seldom fire more than 2 shots in self-defense. (*See supra* at 4-5).[17]

---

as well as the impact of LCMs on the rate-of-fire and lethality in mass shootings, are flawed and misleading. For example, Kleck states that, of the 57 mass shootings between 1994 and July 2014 that he studied, "no LCM was used in . . . 35 incidents (or about 61%)." (Kleck Decl., ER556, at ¶ 14.) The appendix to Dr. Kleck's declaration reveals that his dataset of mass shootings included only *three* incidents where a standard-capacity magazine was used, 30 incidents where magazine capacity was *unknown*, and 22 incidents where an LCM was known to be used, *id*. at ER567-94. When Dr. Kleck states that LCMs were not used in 35 incidents, he actually means that *either* LCMs were not used *or* (in many more cases) magazine capacity was not reported (in 30 incidents).

[17] Further, Plantiffs' other expert, Mr. Ayoob, does not cite any evidence in support of his broad generalization that "virtuous citizens" are "most deleteriously

At worst, Plaintiffs merely raise the possibility that there is conflicting evidence in the record. But this is not enough to demonstrate that the fit between the Ordinance and Sunnyvale's interest in public safety is not reasonable. *Jackson*, 746 F.3d at 969 ("At most, [plaintiff's] evidence suggests that the lethality of hollow-point bullets is an open question, which is insufficient to discredit San Francisco's reasonable conclusions."); *Alameda Books*, 535 U.S. at 437–38, 122 S. Ct. 1728.[18]

Finally, as to the third point, Plaintiffs are incorrect when they assert that *Heller* stands for the proposition that evidence that LCMs are dangerous (*e.g.*, to police officers) is "irrelevant" to determining whether or not the Ordinance is substantially related to the government's interest in public safety. (App. Br. at 45-48.) Because the Court in *Heller* did not apply intermediate scrutiny, it did not assess whether there is a "reasonable fit" between the challenged regulation and the asserted objective of the regulation. As such, the fact that the Court in *Heller*

---

impacted by the magazine capacity limitation." (ER637 at ¶ 23.)

[18] In fact, many of the statements from Plaintiffs' experts actually support Sunnyvale's position regarding the dangers of LCMs to public safety. For example, Dr. Kleck admits that, in mass shootings "involv[ing] many victims," "large numbers of rounds are commonly fired." (ER553.) Further, Mr. Ayoob confirms that large-capacity magazines enable a shooter to fire repeatedly without needing to reload. (ER638 at ¶¶ 27-28) ("It takes even a world champion speed shooter a full second to reload with a fresh magazine…. By contrast, simply pulling the trigger again on a pistol that still has more ammunition in it can be accomplished in a fraction of a second.").

gave "no weight" to evidence regarding the "characteristics of handguns that make them particularly dangerous " (*id*. at 45) or the fact that "handguns pose particular dangers to police officers" (*id*. at 47) does not mean that this Court, in considering an unrelated law under a different standard of review, cannot consider such evidence.

Accordingly, the district court properly held that Plaintiffs are unlikely to succeed on the merits.

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS FAIL TO DEMONSTRATE THAT THE ORDINANCE WILL CAUSE THEM IRREPARABLE HARM

The remaining preliminary injunction factors also favor Sunnyvale. Plaintiffs contend that irreparable injury flows from the denial of their Second Amendment rights. (App. Br. at 52-53.) But, as the district court correctly recognized, because Plaintiffs "base their entire irreparable harm argument on irreparable harm being presumed if they are likely to succeed on the merits, Plaintiffs fail to demonstrate that enforcement of the Sunnyvale law will cause them irreparable harm." (Order at ER16.)[19]

[19] It is not clear that irreparable harm would be presumed. *See, e.g.*, *DISH Network Corp. v. FCC*, 653 F. 3d 771, 776-7 (9th Cir. 2011) (holding that under the Supreme Court's decision in *Winter*, 555 U.S. 7, even if the plaintiff could show it was likely to succeed on the merits of its constitutional claim, the court "would still need to consider whether it satisfied the remaining elements of the preliminary injunction test."); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc*., 654 F.3d 989, 998 (9th Cir. 2011) ("We conclude that presuming irreparable harm in a copyright

In addition, in view of the speculative nature of their claims that LCMs are necessary for self-defense, Plaintiffs cannot show that they are likely to suffer irreparable harm if they surrender their LCMs or store them outside of Sunnyvale while this lawsuit is pending. Indeed, Plaintiffs concede that Measure C does not "deprive[] them of the ability to keep a firearm for self-dense [sic]," (SER204), and that they can merely "purchase new compliant magazines" to replace their LCMs (SER201). Such a speculative showing of harm is insufficient to obtain injunctive relief. *Winter*, 555 U.S. at 21-22.[20]

IX. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE PUBLIC INTEREST FAVORS SUNNYVALE

The district court properly held that the public interest favors Sunnyvale, recognizing the public's interest in preventing gun violence and protecting the safety of its police officers. (ER17-18.) In doing so, the district court credited Sunnyvale's evidence that LCMs "present special danger to law enforcement officers" and specifically noted that Sunnyvale itself has experienced "the danger

---

infringement case is inconsistent with, and disapproved by, the Supreme Court's opinions in [*eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)] and *Winter*").

[20] Furthermore, although Plaintiffs now claim that they suffer irreparable harm "[e]very minute" that they are purportedly "stripped of their constitutional rights" (App. Br. at 54), they previously asked this Court to stay this appeal indefinitely, awaiting the outcome of other appeals raising Second Amendment issues. (Dkt. 13.) In support of their request, Plaintiffs argued that such a stay "will not unduly prejudice any other party." (*Id*. at 13.)

presented to police and the public by a criminal suspect armed with such magazines." (ER18.)

Plaintiffs cannot dispute that, by voting overwhelmingly in favor of the Ordinance, the public demonstrated its interest in preventing mass shootings and other gun violence. *See, e.g., Kafka v. Hagener*, 176 F. Supp. 2d 1037, 1045 (D. Mont. 2001) (finding that the public interest would not be advanced by granting plaintiffs' motion for preliminary injunction where the citizens enacted the law at issue by a majority vote because "[t]he public has indicated [its interest] directly" through the vote). In addition, as the district court acknowledged, there also "exists a public interest . . . in promoting Sunnyvale's decision to engage in direct democracy." (ER18.) *See also Incantalupo v. Lawrence Union Free School Dist. No. 15*, 652 F. Supp. 2d 314, 328 n. 11 (E.D.N.Y. 2009) (noting that "an injunction most assuredly would not serve the public interest, as it would amount to the Court disregarding democracy and substituting its own [] judgment for that of [the] elected officials").

X. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS HAVE NOT DEMONSTRATED THAT THE BALANCE OF HARDSHIPS TIPS IN THEIR FAVOR

The district court correctly recognized that Plaintiffs failed to establish that the balance of equities tips in their favor. (ER16-17.) Like a host of other jurisdictions, including the State of California, Sunnyvale restricts the possession

of LCMs in order to prevent their criminal use. The compelling public safety interest underlying the Ordinance tips the equities decisively away from Plaintiffs.

Plaintiffs contend that the harms to the public outweigh the benefits, relying on case law from other contexts making the straightforward point that it is never in the public interest for the government to violate constitutional rights. (App. Br. at 55, *citing Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("[P]ublic interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").) Of course that is generally true, but to pretend that there is no public interest in the sensible regulation of firearms is to ignore common sense as well as the teachings of numerous cases, including *Heller*.

The district court correctly recognized that "Sunnyvale has a compelling interest in the protection of public safety . . . the risk that a major gun-related tragedy would occur is enough to at least balance out the inconvenience to Plaintiffs in disposing of their now-banned magazines." (Order at ER17.) As the Fourth Circuit put it, "[t]his is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights." *Masciandaro*, 638 F.3d at 475.

CONCLUSION

The issue presented is not close. Every court that has addressed a Second Amendment challenge to an ammunition magazine capacity limitation like the Ordinance has applied intermediate scrutiny and upheld the limitation as constitutional. As in each of those cases, the Ordinance here serves the compelling public safety interest of preventing mass shootings and gun murders of police, while leaving ample opportunity for Sunnyvale citizens to use their firearms for lawful purposes. The district court did not abuse its discretion in denying the Plaintiffs' motion for a preliminary injunction. The Court should affirm.

Dated: June 17, 2014

FARELLA BRAUN + MARTEL LLP

By: /s/ Roderick M. Thompson
Attorney for Defendants-Appellees

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 11,739 words up to and including the signature lines that follow the brief's conclusions.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 17, 2014.

By: */s/ Roderick M. Thompson*

Roderick M. Thompson
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I filed an electronic PDF of **APPELLEES' ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 17, 2014. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: June 17, 2014

By: */s/ Roderick M. Thompson*
Roderick M. Thompson
Attorneys for Defendants-Appellees

ADDENDUM

INDEX TO ADDENDUM

Effective: January 1, 2012

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 6. Control of Deadly Weapons (Refs & Annos)
Title 1. Preliminary Provisions (Refs & Annos)
Division 2. Definitions (Refs & Annos)
➡➡ § 16740. Large-capacity magazine defined

As used in this part, “large-capacity magazine” means any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

(a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

(b) A .22 caliber tube ammunition feeding device.

(c) A tubular magazine that is contained in a lever-action firearm.

CREDIT(S)

(Added by Stats.2010, c. 711 (S.B.1080), § 6, operative Jan. 1, 2012.)

LAW REVISION COMMISSION COMMENTS

2010 Addition

Section 16740 continues former Sections 12020(c)(25) and 12079(b) without substantive change. [38 Cal.L.Rev.Comm. Reports 217 (2009)].

HISTORICAL AND STATUTORY NOTES

2012 Main Volume

Section 10 of Stats.2010, c. 711 (S.B.1080), provides:

"SEC. 10. Sections 7 and 9 of this act become operative on January 1, 2011. The remainder of this act becomes operative on January 1, 2012."

Derivation

Former § 12020, added by Stats.1953, c. 36, p. 653, § 1, amended by Stats.1961, c. 996, p. 2645, § 1; Stats.1965, c. 36, p. 915, § 2; Stats.1973, c. 732, p. 1316, § 2, eff. Sept. 25, 1973; Stats.1974, c. 141, p. 283, § 1, eff. April 4, 1974; Stats.1975, c. 1161, p. 2876, § 1; Stats.1976, c. 1139, p. 5160, § 302, operative July 1, 1977; Stats.1976, c. 1140, § 2; Stats.1976, c. 1140, § 3, operative July 1, 1977; Stats.1977, c. 857, p. 2596, § 1; Stats.1978, c. 70, p. 193, § 1, eff. March 29, 1978; Stats.1979, c. 78, p. 187, § 1, eff. May 22, 1979; Stats.1983, c. 1129, § 1; Stats.1984, c. 1414, § 3; Stats.1984, c. 1562, § 1.1; Stats.1986, c. 1421, § 1; Stats.1987, c. 1461, § 1; Stats.1988, c. 512, § 1; Stats.1988, c. 1191, § 1; Stats.1988, c. 1269, § 2.7; Stats.1989, c. 358, § 1; Stats.1990, c. 350 (S.B.2084), § 17; Stats.1990, c. 1690 (A.B.376), § 1; Stats.1993, c. 357 (A.B.1266), § 1; Stats.1993, c. 1139 (S.B.180), § 2; Stats.1994, c. 23 (A.B.482), § 4; Stats.1995, c. 128 (A.B.1222), § 2; Stats.1997, c. 158 (A.B.78), § 1; Stats.1997, c. 593 (A.B.202), § 1.5; Stats.1999, c. 111 (S.B.359), § 2, eff. July 13, 1999; Stats.1999, c. 129 (S.B.23), § 3.5; Stats.2000, c. 287 (S.B.1955), § 22; Stats.2001, c. 130 (S.B.578), § 1; Stats.2001, c. 937 (S.B.626), § 1; Stats.2004, c. 247 (A.B.1232), § 7, eff. Aug. 23, 2004; Stats.2008, c. 699 (S.B.1241), § 18.

Former § 12079, added by Stats.1999, c. 129 (S.B.23), § 6.

Stats.1917, c. 145, p. 221, § 1; Stats.1923, c. 339, p. 696, § 1; Stats.1925, c. 323, p. 542, § 1; Stats.1935, c. 753, p. 2120, § 1.

CROSS REFERENCES

Firearm defined for purposes of this Part, see Penal Code § 16520.

CODE OF REGULATIONS REFERENCES

Assault weapons and large-capacity magazines,

Large-capacity magazine permit record keeping, see 11 Cal. Code of Regs. § 5483.

Large-capacity magazine permit revocations, see 11 Cal. Code of Regs. § 5484.

Requirements for large-capacity magazine permits pursuant to Penal Code Section 32315, see 11 Cal. Code of Regs. § 5480.

Term length of large-capacity magazine permits, see 11 Cal. Code of Regs. § 5482.

Title and scope, see 11 Cal. Code of Regs. § 5459.

RESEARCH REFERENCES

Encyclopedias

Cal. Jur. 3d Criminal Law: Crimes Against Justice § 208, Firearms.

Cal. Jur. 3d Criminal Law: Crimes Against Justice § 211, Knives, Stabbing, or Bludgeoning Instruments.

UNITED STATES SUPREME COURT

Weapons, unlawful possession, knowledge, see Staples v. U.S., U.S.Okla.1994, 114 S.Ct. 1793, 511 U.S. 600, 128 L.Ed.2d 608, on remand 30 F.3d 108.

West's Ann. Cal. Penal Code § 16740, CA PENAL § 16740

Current with urgency legislation through Ch. 22 of 2014 Reg.Sess., Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on the 6/3/2014 ballot

END OF DOCUMENT

City of Rochester, NY
Sunday, January 12, 2014

Chapter 47. DANGEROUS ARTICLES

[HISTORY: Adopted by the Rochester City Council 11-25-1941. Amendments noted where applicable.]

§ 47-1. (Reserved)

Editor's Note: Former § 47-1, Squawkers, was repealed 11-10-1987 by Ord. No. 87-370.

§ 47-2. Darts, arrows and pointed instruments.

[Amended 6-22-1954; 10-13-1987 by Ord. No. 87-347]

No person shall sell, offer for sale, keep for sale, give, loan or lease to any person under 18 years of age any metal-tipped arrow or sharp pointed wooden or plastic arrow, or any sharp pointed wooden, plastic or metal instrument or weapon, so weighted and constructed as to be capable of being thrown or hurled to strike a person or object with its sharpest point, commonly known as a "dart"; or any sword, machete or knife other than a folding pocketknife with no blade more than three inches in length; nor shall any person under 18 years of age possess any such object. The provisions of this section shall not apply to the use of bows and arrows and darts in supervised recreation programs and on archery ranges.

§ 47-3. (Reserved)

Editor's Note: Former § 47-3, Writing implements made of glass, was repealed 11-10-1987 by Ord. No. 87-370.

§ 47-4. Storage and display of firearms, ammunition and explosives.

Editor's Note: Former § 47-4, Sale or gift of dangerous weapons, was repealed 3-16-1993 by Ord. No. 93-62.

[Added 9-24-1996 by Ord. No. 96-297]

A. Purpose and intent. The Council finds that it is necessary to regulate the commercial storage, possession and display of firearms, ammunition or explosives pursuant to § 139-d of the General Municipal Law in order to provide for the public health, safety and welfare of all persons in the City of Rochester. The Council finds that the location of such activities close to residential uses is not compatible with residential uses and can pose a danger to residents through fire or explosion or as a result of burglaries at such locations. The Council therefore intends to regulate the location of such activities and to place additional regulations upon those activities in order to assure that such activities arc conducted in a safe manner. The restrictions found herein shall be in addition to restrictions found in Chapter **120** of the Municipal Code, Zoning Code, and whichever regulations are more restrictive shall be

applicable to any potential location where such activities are to be conducted.

[Amended 11-19-2002 by Ord. No. 2002-354]

B. Location. The storage, possession or display of firearms, ammunition or explosives within a building occupied by a residential use, or within a building located within 100 feet of any residential use, which distance shall be measured from the closest point of the building, or portion thereof, used for the storage, possession or display of firearms, ammunition or explosives to the nearest point of the lot line of the property with a residential use, is hereby prohibited.

C. Standards of design, construction and maintenance of buildings and structures in which firearms, ammunition or explosives are stored.

(1) Perimeter doorways. All perimeter doorways shall meet one of the following:

(a) A windowless steel security door equipped with a high-security cylinder lock;

(b) A windowed metal door that is equipped with a high-security cylinder lock. If the window has an opening of five inches or more measured in any direction, the window shall be covered with steel bars of at least one-half-inch diameter no further than six inches apart, or metal grating of at least nine gauge which has no spaces larger than six inches wide measured in any direction, affixed to the exterior or interior of the door; or

(c) A metal grate or a metal folding scissors gate of at least nine gauge which has no spaces larger than six inches wide measured in any direction that is padlocked and affixed to the premises independent of the door and doorframe when the premises is not open for business.

(2) Windows. All windows shall be covered with steel bars of a least one-half-inch diameter no further than six inches apart; or metal grating of at least nine gauge which has no spaces larger than six inches wide measured in any direction, affixed to the exterior or interior of the window frame; or a metal grate or a metal folding scissors gate of at least nine gauge which has no spaces larger than six inches wide measured in any direction that is padlocked and affixed to the premises independent of the door and doorframe when the premises is not open for business.

(3) Heating, ventilating, air-conditioning and service openings. All heating, ventilating, air-conditioning and service openings shall be secured with steel bars, metal grating or an alarm system.

(4) Alarm systems. Any building or structure used for the storage, possession and display of firearms, ammunition or explosives shall be protected by an alarm system which, when activated, directly notifies either a security guard on duty at the location, the Emergency Communications Center (through a designated line other than 911), an answering service or a central station, of a fire or smoke or intrusion or attempted intrusion into the premises. If an answering service or central station is used, the answering service or central station shall provide the service of receiving on a continuous basis through trained employees, emergency signals from the alarm systems and, thereafter, immediately relaying the message by live voice to 911.

D. Visibility of interior to be maintained at all times. The interior of any building or structure used for the storage, possession and display of firearms, ammunition or explosives shall be visible through any windows at all times when open for business, and no drapes or blinds should be used that would block the view of police or passersby who might observe unusual activity within the premises. The exterior of the premises shall be illuminated at night and during the hours when business is not conducted within.

E. Combustible materials. Combustible materials shall not be stored in any building or structure or

that portion thereof used for the storage, possession and display of firearms, ammunition or explosives.

F. Fire-extinguishing equipment. Fully operable listed fire-extinguishing equipment shall be maintained in any building or structure used for the storage, possession and display of firearms, ammunition or explosives and made easily accessible.

G. Smoking and open flames prohibited. Smoking, matches, spark-producing devices and open flames shall be prohibited in any building or structure or that portion thereof used for the storage, possession and display of firearms, ammunition or explosives.

H. Standards of security for storage of firearms, ammunition or explosives.

(1) Storage of ammunition and explosives. All ammunition and explosives shall be stored in compliance with 9 NYCRR 1176 et seq. and 12 NYCRR 39 et seq. Further, all ammunition when being displayed shall be kept in locked cases or behind the counter in an area not accessible to the public.

(2) Storage of firearms when open for business.

(a) No firearms shall be stored, exhibited or displayed in windows of the premises.

(b) Firearms storage or inventory areas shall be physically separated from counter and display areas and access to these areas shall be carefully controlled.

(c) All firearm display cases shall be kept locked and secured at all times and not readily accessible to the public. All keys to such display cases shall not leave the control of authorized personnel.

(d) Trigger locks which disable firearms and prevent them from functioning must be locked to each firearm at all times, or the firearms must be secured in a locked case or be otherwise locked, or the firearms must be dispensed in an area behind the counter that is not accessible to the public. These requirements shall not apply to a firearm being shown to a customer, being repaired, or otherwise being worked on.

(3) Storage of firearms when not open for business. When not open for business, all firearms shall be stored in accordance with one of the following:

(a) All firearms shall be stored in a locked fireproof safe or vault located in the business premises;

(b) All firearms must be secured by a hardened steel rod or cable of at least 1/8 inch in diameter through the trigger guard of the firearm. The steel cord or cable shall be secured with a hardened steel lock that has a shackle. The lock and shackle shall be protected or shielded from the use of a bolt cutter and the rod or cable shall be anchored in a manner that prevents the ready removal of the firearms from the premises; or

(c) All firearms shall be secured in a manner that prevents the ready removal of the firearms from the premises, as approved by the Chief of Police or the Chief's designee.

I. The regulations provided for herein shall not apply to the personal possession, use or ownership of firearms or ammunition therefor.

§ 47-5. Firearms, shotguns, rifles and other dangerous weapons.

*Editor's Note: For additional provisions relating to firearms, see Ch. **43**, Cemeteries, § **43-11**, and Ch. **79**, Parks, § **79-5**.*

[Amended 9-11-1951; 1-11-1955; 5-10-1960; 1-27-1970 by Ord. No. 70-36; 5-28-1974 by Ord. No. 74-180; 5-27-1986 by Ord. No. 86-163; 3-16-1993 by Ord. No. 93-62]

A. Purpose and intent. The Council finds that violent crime is a serious problem in the City and

firearms and other dangerous weapons are frequently used in the commission of crimes, particularly homicides and assaults. The possession of such weapons also often leads to accidental deaths and injuries. The possession and use of assault weapons and ammunition feeding devices for criminal purposes is increasing and poses a serious danger to public safety. The use of weapons by persons under the influence of drugs and/or alcohol can readily lead to serious injury or death. The possession of weapons in public facilities and places also poses a serious danger to public safety. The possession of toy or imitation weapons which substantially duplicate actual weapons poses a danger to the person possessing the weapon and to others. In order to promote and protect the health, safety and welfare of the public, the Council finds it necessary to place restrictions upon the possession and use of such weapons. The restrictions imposed by this section are intended to be in addition to restrictions found in state law and are not intended to conflict with state law provisions.

B. As used in this section, the following terms shall have the meanings indicated:

AIR GUN

Any pistol, revolver, rifle or shotgun which fires projectiles by means of a spring or compressed air or other gas, instead of an explosive.

[Amended 12-15-2009 by Ord. No. 2009-410 *Editor's Note: This ordinance provided an effective date of 1-11-2010.* **]**

AMMUNITION

Explosives suitable to be fired from a firearm, machine gun, pistol, revolver, rifle, shotgun, assault weapon or other dangerous weapon.

AMMUNITION FEEDING DEVICE

Magazines, belts, feedstrips, drums or clips capable of being attached to or utilized with any center-fire rifle, shotgun or pistol which employs the force of the expanding gases from a discharging cartridge to chamber a fresh round after each single pull of the trigger which, in the case of a rifle or shotgun holds in excess of five cartridges, or in the case of a pistol holds in excess of 17 cartridges.

ASSAULT WEAPON

(1) Any center-fire rifle or shotgun which employs the force of the expanding gases from a discharging cartridge to chamber a fresh round after each single pull of the trigger, and which is loaded or capable of being loaded with a combination of more than six cartridges in the ammunition feeding device and chamber combined. For the purposes of this section, a weapon is capable of being loaded if it is possessed by one who, at the same time, possesses:

(a) In the case of a rifle, a fixed or detachable ammunition feeding device which is attached to or utilized with or capable of being attached to or utilized with such rifle and which has a capacity of more than five cartridges; or

(b) In the case of a shotgun, an ammunition feeding device which is attached to or utilized with or capable of being attached to or utilized with such shotgun and which has a capacity of more than five cartridges.

(2) A center-fire rifle or shotgun which employs the force of expanding gases from a discharging cartridge to chamber a fresh round after each single pull of the trigger, and which has:

(a) A flash suppressor attached to the weapon reducing muzzle flash;

(b) A grenade launcher;

(c) A sighting device making a target visible at night;

(d) A barrel jacket surrounding all or a portion of the barrel to dissipate heat therefrom; or

(e) A multi-burst trigger activator.

(3) Any stockless pistol grip shotgun.

(4) The following weapons manufactured prior to the effective date of this section. [NOTE: This section was found unconstitutional by the Honorable Charles J. Siragusa, Supreme Court Justice, Monroe County, in Citizens for a Safer Community v. City of Rochester, Index No. 93-08421.]

(5) For purposes of this section, the term "assault weapon" shall not include any of the following:

(a) Any weapon which has been modified to render it permanently inoperable or permanently make it a device no longer defined as an "assault weapon";

(b) Weapons that do not use cartridges or shells;

(c) Manually operated bolt-action weapons, lever-action weapons, slide-action weapons or single-shot weapons;

(d) Multiple-barrel weapons, revolving-cylinder weapons except shotguns, weapons that use exclusively a rotary Mannlicher-style magazine; or

(e) Any antique firearm as defined in § 265.00 of the New York State Penal Law or any curio or relic as defined under United States law which is possessed by a licensed collector in accordance with United States Law.

DISPOSE OF

To dispose of, give away, give, lease, loan, keep for sale, offer, offer for sale, sell, transfer or otherwise dispose of.

DRUG

Any substance listed in § 3306 of the Public Health Law of the State of New York.

DWELLING

As defined in Chapter **120** of the Municipal Code, Zoning Code.

[Amended 11-19-2002 by Ord. No. 2002-354]

FIREARM

Any pistol or revolver; or a shotgun having one or more barrels less than 18 inches in length or any weapon made from a shotgun (whether by alteration, modification or otherwise) if such weapon as modified has an overall length of less than 26 inches; or a rifle having one or more barrels less than 16 inches in length or any weapon made from a rifle (whether by alteration, modification or otherwise) if such weapon as modified has an overall length of less than 26 inches. For purposes of this definition, the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. Such definition, except as otherwise indicated, shall include both loaded and unloaded firearms, except that it shall not include any antique firearm as defined in federal or New York State law or any curio or relic as defined under United States law which is possessed by a licensed collector in accordance with United States law.

PARK

As defined in § **79-1** of the Municipal Code.

POSSESS

Have physical possession or otherwise to exercise dominion or control over. The presence in an automobile of any firearm, rifle or shotgun which is openly visible is presumptive evidence of its possession by all persons occupying such automobile at the time such

firearm, rifle or shotgun is found, except if such firearm, rifle or shotgun is found in a vehicle for hire.

PUBLIC FACILITY

Any building or facility owned, leased, operated or controlled by or on behalf of any government, municipality or public authority or corporation within the boundaries of the City, except buildings or facilities used for educational purposes.

PUBLIC PLACE

Any street, including the sidewalk portion thereof, park, playground, recreation area, cemetery or lot owned, leased, operated or controlled by or on behalf of any government, municipality or public authority or corporation within the boundaries of the City, which is generally accessible to the public, except grounds used for educational purposes.

RIFLE

A weapon designed or redesigned, made or remade and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

SHOTGUN

A weapon designed or redesigned, made or remade and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

C. No person shall possess a loaded or unloaded firearm, rifle, shotgun or air gun, or a dagger, dangerous knife, dirk, razor or stiletto, in a public place or public facility in the City. This prohibition shall not apply to:

(1) A police officer or peace officer authorized to possess the same;

(2) A government employee or licensed security guard authorized or required by employment or office to possess the same while acting within the scope of such employment;

(3) A person in the military service of the State of New York or the United States when duly authorized to possess the same;

(4) A person transporting a rifle or shotgun in a motor vehicle in the City in accordance with the provisions of § 11-0931, Subdivision 2, of the New York State Environmental Conservation Law, or otherwise transporting an unloaded rifle, shotgun or air gun in the City, provided that the same is completely enclosed or contained in a nontransparent carrying case and either:

(a) Said carrying case is locked; or

(b) A locking device is attached to the weapon and locked in a manner so as to prevent the weapon from being fired;

(5) An authorized person who, for the purpose of shooting practice, possesses a weapon at an established target range in a public place other than a park or public facility;

(6) A person voluntarily surrendering the same in accordance with the provisions of § 265.20 of the Penal Law; or

(7) Possession of a firearm by a person licensed to carry a firearm pursuant to § 400.00 of the Penal Law or possession or transportation by a gunsmith or dealer in firearms in accordance with a license issued by the State of New York or the United States, except that this subsection shall not apply in a park or a public facility other than a parking garage.

D. No person shall store a firearm, rifle, shotgun or air gun in a dwelling in the City unless said

firearm, rifle, shotgun or air gun is completely enclosed or contained in a nontransparent locked carrying case or in a locked gun rack, cabinet, closet or safe, or a locking device is attached to the weapon and locked in a manner so as to prevent the weapon from being fired. This requirement shall not apply to a rifle, shotgun or licensed firearm carried on the body of the owner or within such close proximity of the owner that the owner can retrieve it as quickly and easily as if it were carried on the owner's body.

E. No person shall dispose of any firearm, rifle, shotgun, air gun or ammunition in the City. This prohibition shall not apply to:
   (1) A gunsmith or dealer in firearms duly licensed by the State of New York or the United States;
   (2) A person disposing of the same to a gunsmith or dealer in firearms duly licensed by the State of New York or the United States;
   (3) A person voluntarily surrendering the same in accordance with the provisions of § 265.20 of the Penal Law;
   (4) A person disposing of a licensed firearm in accordance with law;
   (5) Disposition by intestate or testamentary bequest; or
   (6) A person disposing of a rifle, shotgun, air gun or ammunition to a family member.

F. No person shall possess an assault weapon or an ammunition feeding device in the City. This prohibition shall not apply to:
   (1) A police officer or peace officer authorized to possess the same;
   (2) A person in the military service of the State of New York or the United States when duly authorized to possess the same;
   (3) A person voluntarily surrendering the same in accordance with the provisions of § 265.20 of the Penal Law; or
   (4) A gunsmith or dealer in firearms duly licensed by the State of New York or the United States for weapons to be used by police officers or persons in the military service or for delivery outside of the City.

G. No person shall dispose of an assault weapon or ammunition feeding device in the City. This prohibition shall not apply to:
   (1) A person voluntarily surrendering the same in accordance with the provisions of § 265.20 of the Penal Law; or
   (2) A gunsmith or dealer in firearms duly licensed by the State of New York or the United States for weapons to be used by police officers or persons in the military service or for delivery outside of the City.

H. No person shall carry a firearm, shotgun, rifle or air gun in the City while such person has 1/10 of 1% or more by weight of alcohol in the person's blood as shown by chemical analysis of the person's blood, breath, urine or saliva.

I. No person shall carry a firearm, shotgun, rifle or air gun in the City while in an intoxicated condition.

J. No person shall carry a firearm, shotgun, rifle or air gun in the City while the person's ability to safely carry such weapon is impaired by the use of a drug.

K. Any person who carries a firearm, shotgun, rifle or air gun in this City shall be deemed to have given consent to a breath test and a chemical test of the person's breath, blood, urine or saliva for the purpose of determining the alcoholic or drug content of the person's blood, provided that any test is administered at the direction of a police officer having reasonable grounds therefor. A chemical test must be administered within two hours after such person has been placed under arrest for a violation of this section or any other law or ordinance involving the use or possession of a firearm, rifle, shotgun or air gun, or within two hours after

a breath test indicates that alcohol has been consumed by such person. Upon the trial of any action arising out of an arrest for a violation of Subsection **H**, **I** or **J** of this section, the court shall admit evidence of the amount of alcohol or drugs in the blood of the person carrying the firearm, shotgun, rifle or air gun as shown by a test administered pursuant to this section. Evidence of a refusal to submit to a chemical test shall be admissible in any trial, proceeding or hearing based upon a violation of such subsections, but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and the person persisted in such refusal.

L. [NOTE: This section was found unconstitutional by the Honorable Charles J. Siragusa, Supreme Court Justice, Monroe County, in Citizens for a Safer Community v. City of Rochester, Index No. 93-08421.]

M. Discharge of weapons; permits.

(1) No person shall discharge an air gun, shotgun, rifle, assault weapon, machine gun, submachine gun or a firearm of any kind or description in the City, except police officers, peace officers, members of the military and persons holding permits as in this subsection provided.

(2) The Chief of Police is hereby authorized to grant permits for the discharge of shotguns at clay pigeons at any particular location or for the discharge of weapons at target ranges subject to such restrictions and conditions as the Chief may deem necessary. Any person holding such a permit shall obey all the restrictions and conditions contained herein.

N. The owner of a firearm, shotgun, rifle, assault weapon, machine gun or submachine gun, which becomes lost or stolen, shall report the loss or theft to the Rochester Police Department within 24 hours after the loss or theft is discovered or reasonably should be discovered. The owner of such a weapon shall store the weapon in a safe and secure manner as required in Subsection **D** of this section and shall check such weapon at least once each week, or immediately upon returning to the City if the owner is absent from the City for more than one week. Failure to perform such a check shall not be a defense to a prosecution for a violation of this subsection.

[Added 9-15-1998 by Ord. No. 98-345 *Editor's Note: This ordinance also relettered former Subsections N and O as Subsections **O** and **P**.* **]**

O. Notwithstanding the penalties contained in § **47-8**, a violation of any provision of this section shall be punishable by a fine not to exceed $1,000 or by imprisonment not to exceed 180 days, or by both such fine and imprisonment.

P. The provisions of this section are severable, and if any of its provisions shall be held unconstitutional or invalid, the decision of the court shall not affect or impair any of the remaining provisions of the same. It is hereby declared to be the intention of the Council that this section would have been adopted had such unconstitutional or invalid provision not been included herein. If any term or provision of this section shall be declared unconstitutional, invalid or ineffective in whole, or in part, by a court of competent jurisdiction, then to the extent that it is not constitutional, invalid or ineffective, such term or provision shall be in force and effect, nor shall such determination be deemed to invalidate the remaining terms or provisions thereof.

§ 47-6. (Reserved)

*Editor's Note: Former Subsection A of § **47-6**, Barbed wire, as amended, was redesignated as § **39-307D** and former Subsection B was deleted 4-15-1997 by Ord. No. 97-133.*

§ 47-7. Discarded refrigerators and other containers.

[Added 9-8-1953]

It shall be unlawful for any person, firm or corporation to leave outside of any building or dwelling in a place accessible to children any abandoned, unattended or discarded icebox, refrigerator or any other container of any kind which has an airtight door or lock which may not be released for opening from inside of said icebox, refrigerator or container. It shall be unlawful for any person, firm or corporation to leave outside of any building or dwelling in a place accessible to children any abandoned, unattended or discarded icebox, refrigerator or any other container of any kind which has an airtight snap-lock or other device thereon without first removing the said snap-lock or doors from said icebox, refrigerator or container.

§ 47-8. Penalties.

[Amended 7-22-1969 by Ord. No. 69-329]

Any person or corporation violating any of the provisions of this chapter shall, upon conviction be punishable by a fine not exceeding $150, or by imprisonment not exceeding 15 days, or by both such fine and imprisonment, or by a penalty of not less than $5 nor more than $500 to be recovered by the City of Rochester in a civil action.

Print

Municipal Code of Chicago

CHAPTER 8-20 WEAPONS

8-20-010 Definitions.

For purposes of this chapter the following terms shall apply:

"The Act" means the Illinois Firearm Owners Identification Card Act, 430 ILCS 65/1 et seq., as amended.

"Ammunition" means any self-contained cartridge or shotgun shell, by whatever name known, which is designed to be used or adaptable to use in a firearm; excluding however:

(1) any ammunition used exclusively for line-throwing, signaling, or safety and required or recommended by the United States Coast Guard or Interstate Commerce Commission; or

(2) any ammunition designed exclusively for use with a stud or rivet driver or other similar industrial ammunition.

"Antique firearm" has the same meaning ascribed to that term in 18 U.S.C. § 921(a)(16).

"Assault weapon" means any of the following, regardless of the caliber of ammunition accepted:

(a) (1) A semiautomatic rifle that has the ability to accept a detachable magazine and has one or more of the following:

(A) a folding, telescoping or detachable stock;

(B) a handgun grip;

(C) a forward grip;

(D) a threaded barrel;

(E) a grenade, flare or rocket launcher; or

(F) a barrel shroud.

(2) A semiautomatic rifle that has a fixed magazine with the capacity to accept more than 10 rounds, except for an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

(3) A semiautomatic version of an automatic rifle.

(4) Any part, combination of parts, component, device, attachment, or accessory that is designed or functions to accelerate the rate of fire of a semiautomatic rifle but not convert the semiautomatic rifle into a machine gun.

(5) A semiautomatic shotgun that has one or more of the following:

(A) a folding, telescoping or detachable stock;

(B) a handgun grip;

(C) a fixed magazine with the capacity to accept more than 5 rounds;

(D) a forward grip; or

(E) a grenade, flare or rocket launcher.

(6) A semiautomatic handgun that has the ability to accept a detachable magazine and has one or more of the following:

(A) the capacity to accept a detachable magazine at some location outside of the handgun grip;

(B) a threaded barrel;

(C) a barrel shroud; or

(D) a second handgun grip.

(7) A semiautomatic version of an automatic handgun.

(8) A semiautomatic handgun with a fixed magazine that has the capacity to accept more than 15 rounds.

(9) A machine gun.

(10) All of the following rifles, including any copies or duplicates thereof with the capability of any such weapon:

(A) All AK types, including the following:

(i) AK, AK47, AK47S, AK-74, AKM, AKS, ARM, MAK90, MISR, NHM90. NHM91, Rock River Arms LAR-47, SA85, SA93, Vector Arms AK-47, VEPR, WASR-10, and WUM

(ii) IZHMASH Saiga AK

(iii) MAADI AK47 and ARM

(iv) Norinco 56S, 56S2, 84S, and 86S

(v) Poly Technologies AK47 and AKS.

(B) All AR types, including the following:

(i) AR-10

(ii) AR-15

(iii) Armalite M15 22LR Carbine

(iv) Armalite M15-T

(v) Barrett REC7

(vi) Beretta AR-70

(vii) Bushmaster ACR

(viii) Bushmaster Carbon 15

(ix) Bushmaster MOE series

(x) Bushmaster XM15

(xi) Colt Match Target Rifles

(xii) DoubleStar AR rifles

(xiii) DPMS Tactical Rifles

(xiv) Heckler & Koch MR556

(xv) Olympic Arms

(xvi) Remington R-15 rifles

(xvii) Rock River Arms LAR-15

(xviii) Sig Sauer SIG516 rifles

(xix) Smith & Wesson M&P15 rifles

(xx) Stag Arms AR rifles

(xxi) Sturm, Ruger & Co. SR556 rifles.

(C) Barrett M107A1.

(D) Barrett M82A1.

(E) Beretta CX4 Storm.

(F) Calico Liberty Series.

(G) CETME Sporter.

(H)\ Daewoo K-1. K-2, Max 1, Max 2, AR 100. and AR 110PC.

(I) Fabrique Nationale/FN Herstal FAL, LAR, 22 FNC, 308 Match, L1A1 Sporter, PS90, SCAR, and FS2000.

(J) Feather Industries AT-9.

(K) Galil Model AR and Model ARM.

(L) Hi-Point Carbine.

(M) HK-91, HK-93, HK-94, HK-PSG-1, and HK USC.

(N) Kel-Tec Sub-2000, SU-16, and RFB.

(O) SIG AMT, SIG PE-57, Sig Sauer SG 550, and Sig Sauer SG 551.

(P) Springfield Armory SAR-48.

(Q) Steyr AUG.

(R) Sturm, Ruger Mini-14 Tactical Rife M-14/20CF.

(S) All Thompson rifles, including the following:

(i) Thompson M1SB

(ii) Thompson T1100D

(iii) Thompson T150D

(iv) Thompson T1B

(v) Thompson T1B100D

(vi) Thompson T1B50D

(vii) Thompson T1BSB

(viii) Thompson T1-C

(ix) Thompson T1D

(x) Thompson T1SB

(xi) Thompson T5

(xii) Thompson T5100D

(xiii) Thompson TM1

(xiv) Thompson TM1C.

(T) UMAREX UZI Rifle.

(U) UZI Mini Carbine, UZI Model A Carbine, and UZI Model B Carbine.

(V) Valmet M62S, M71S, and M78.

(W) Vector Arms UZI Type.

(X) Weaver Arms Nighthawk.

(Y) Wilkinson Arms Linda Carbine.

(11) All of the following handguns, including any copies or duplicates thereof with the capability of any such weapon:

(A) All AK-47 types, including the following:

(i) Centurion 39 AK handgun

(ii) Draco AK-47 handgun

(iii) HCR AK-47 handgun

(iv) IO, Inc. Hellpup AK-47 handgun

(v) Krinkov handgun

(vi) Mini Draco AK-47 handgun

(vii) Yugo Krebs Krink handgun.

(B) All AR-15 types, including the following:

(i) American Spirit AR-15 handgun

(ii) Bushmaster Carbon 15 handgun

(iii) DoubleStar Corporation AR handgun

(iv) DPMS AR-15 handgun

(v) Olympic Arms AR-15 handgun

(vi) Rock River Arms LAR 15 handgun.

(C) Calico Liberty handguns.

(D) PSA SA58 PKP FAL handgun.

(E) Encom MP-9 and MP-45.

(F) Heckler & Koch model SP-89 handgun.

(G) Intratec AB-10, TEC-22 Scorpion, TEC-9, and TEC-DC9.

(H) Kel-Tec PLR 16 handgun.

(I) The following MAC types:

(i) MAC-10

(ii) MAC-11

(iii) Masterpiece Arms MPA A930 Mini Pistol, MPA460 Pistol. MPA Tactical Pistol, and MPA Mini Tactical Pistol

(iv) Military Armament Corp. Ingram M-11

(v) Velocity Arms VMAC.

(J) Sig Sauer P556 handgun.

(K) Sites Spectre.

(L) All Thompson types, including the following:

(i) Thompson TA510D

(ii) Thompson TA5.

(M) All UZI types, including Micro-UZI.

(12) All of the following shotguns, including any copies or duplicates thereof with the capability of any such weapon:

(A) Franchi LAW-12 and SPAS 12.

(B) All IZHMASH Saiga 12 types, including the following:

(i) IZHMASH Saiga 12

(ii) IZHMASH Saiga 12S

(iii) IZHMASH Saiga 12S EXP-01

(iv) IZHMASH Saiga 12K

(v) IZHMASH Saiga 12K-030

(vi) IZHMASH Saiga 12K-040 Taktika.

(C) Streetsweeper.

(D) Striker 12.

(13) All belt-fed semiautomatic firearms, including TNW M2HB.

(14) Any combination of parts from which a firearm described in subparagraphs (1) through (13) can be assembled.

(15) The frame or receiver of a rifle or shotgun described in subparagraph (1), (2), (5), (9), (10), (12), (13), or (18).

(16) A sawed-off shotgun.

(17) A short-barrel rifle.

(18) A .50 caliber rifle.

(b) An "assault weapon" shall not include any firearm that:

(1) is manually operated by bolt, pump, lever, or slide action:

(2) has been rendered permanently inoperable. "Permanently inoperable" means a firearm which is incapable of discharging a projectile by means of an explosive and incapable of being restored to a firing condition; or

(3) is an antique firearm.

(c) For purposes of this definition of "assault weapon" the following terms apply:

(1) "barrel shroud" means a shroud that is attached to, or partially or completely encircles, the barrel of a firearm so that the shroud protects the user of the firearm from heat generated by the barrel. The term

does not include (i) a slide that partially or completely encloses the barrel; or (ii) an extension of the stock along the bottom of the barrel which does not completely or substantially encircle the barrel.

(2) "detachable magazine" means an ammunition feeding device that can be removed from a firearm without disassembly of the firearm action.

(3) "fixed magazine" means an ammunition feeding device that is permanently fixed to the firearm in such a manner that it cannot be removed without disassembly of the firearm.

(4) "folding, telescoping, or detachable stock" means a stock that folds, telescopes, detaches or otherwise operates to reduce the length, size, or any other dimension, or otherwise to enhance the concealability, of a firearm.

(5) "forward grip" means a grip located forward of the trigger that functions as a handgun grip.

(6) "rocket" means any simple or complex tubelike device containing combustibles that on being ignited liberate gases whose action propels the device through the air and has a propellant charge of not more than 4 ounces.

(7) "grenade, flare or rocket launcher" means an attachment for use on a firearm that is designed to propel a grenade, flare, rocket, or other similar device.

(8) "handgun grip" means a grip, a thumbhole stock, or any other part, feature or characteristic that can function as a grip.

(9) "threaded barrel" means a feature or characteristic that is designed to allow for the attachment of a device such as a firearm silencer or a flash suppressor.

(10) "belt-fed semiautomatic firearm" means any repeating firearm that:

(i) utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round;

(ii) requires a separate pull of the trigger to fire each cartridge; and

(iii) has the capacity to accept a belt ammunition feeding device.

(11) ".50 caliber rifle" means a centerfire rifle capable of firing a .50 caliber cartridge. The term does not include any antique firearm, any shotgun including a shotgun that has a rifle barrel, or any muzzle-loader which uses black powder for hunting or historical re-enactments.

(12) ".50 caliber cartridge" means a fixed cartridge in .50 BMG caliber, either by designation or actual measurement, that is capable of being fired from a centerfire rifle. ".50 caliber cartridge" does not include any memorabilia or display item that is filled with a permanent inert substance or that is otherwise permanently altered in a manner that prevents ready modification for use as live ammunition or shotgun ammunition with a caliber measurement that is equal to or greater than .50 caliber.

"Corrections officer" means wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense.

"Department" means the department of police.

"Duty-related firearm" shall mean any firearm which is authorized by any law enforcement agency or employer to be utilized by their personnel in the performance of their official duties.

"Firearm" means any device, by whatever name known, which is designed or restored to expel a projectile or projectiles by the action of any explosive, expansion of gas or escape of gas. Provided, that such term shall not include:

(1) any pneumatic gun, spring gun, paint ball gun or B-B gun which either expels a single globular projectile not exceeding .18 inch in diameter and which has a maximum muzzle velocity of less than 700 feet per second or breakable paint balls containing washable marking colors;

(2) any device used exclusively for line- throwing, signaling, or safety and required or recommended by the United States Coast Guard or Interstate Commerce Commission; or

(3) any device used exclusively for firing explosives, rivets, stud cartridges, or any similar industrial ammunition.

"Firearm case" means any firearm case, carrying box, shipping box or other similar container that is designed for the safe transportation of the firearm.

"FOID" means the Firearm Owner's Identification Card issued pursuant to the Act.

"High capacity magazine" means a magazine, belt, drum, feed strip, or similar device, including any such device joined or coupled with another in any manner, that has an overall capacity of more than 15 rounds of ammunition. A "high capacity magazine" does not include an attached tubular device to accept, and capable of operating only with, .22 caliber rimfire ammunition.

"Laser sight accessory" means a laser sighting device which is either integrated into a firearm or capable of being attached to a firearm.

"Licensed shooting range facility" means a shooting range facility that is duly licensed pursuant to Chapter 4-151.

"Licensee of a licensed shooting range facility" or "licensee" means any person issued a shooting range facility license under Chapter 4-151.

"Machine gun" means any firearm which can fire multiple rounds of ammunition by a single function of the firing device or one press of the trigger.

"Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses.

"Sawed-off shotgun" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon, as modified, has an overall length of less than 26 inches.

"Short-barreled rifle" means a rifle having one or more barrels less than 16 inches in length, and any weapon made from a rifle, whether by alteration, modification, or otherwise, if such weapon, as modified, has an overall length of less than 26 inches.

"Superintendent" means the superintendent of the department or his designated representative.

"Safety mechanism" means a design adaption or nondetachable accessory that lessens the likelihood of unanticipated use of the handgun.

"Trigger lock" means a device that when locked in place by means of a key, prevents a potential user from pulling the trigger of the firearm without first removing the trigger lock by use of the trigger lock's key.

"Manager", "Employee", "Range Master", "CCL", "Shooting range patron" and "Shooting range facility" have the meaning ascribed to those terms in Section 4-151-010.

(Added Coun. J. 7-2-10, p. 96234, § 4; Amend Coun. J. 7-6-11, p. 3073, § 4; Amend Coun. J. 1-17-13, p. 45370, § 4; Amend Coun. J. 7-17-13, p. 57262, § 1; Amend Coun. J. 9-11-13, p. 59869, § 3)

8-20-085 High capacity magazines and certain tubular magazine extensions – Sale and possession prohibited – Exceptions.

(a) It is unlawful for any person to carry, possess, sell, offer or display for sale, or otherwise transfer any high capacity magazine or tubular magazine extension for a shotgun. This section shall not apply to corrections officers, members of the armed forces of the United States, or the organized militia of this or any other state, and peace officers, to the extent that any such person is otherwise authorized to acquire or possess a high capacity magazine or tubular magazine extension for a shotgun, and is acting within the scope of his duties, or to any person while in the manufacturing, transportation or sale of high capacity magazines or tubular magazine extension for a shotgun to people authorized to possess them under this section.

(b) Any high capacity magazine or tubular magazine extension for a shotgun carried, possessed, displayed, sold or otherwise transferred in violation of this section is hereby declared to be contraband and shall be seized by and forfeited to the city.

(Added Coun. J. 7-2-10, p. 96234, § 4; Amend Coun. J. 7-17-13, p. 57262, § 1)

Formerly cited as DC ST 1981 § 6-2361

Effective: April 27, 2013

West's District of Columbia Code Annotated 2001 Edition Currentness
Division I. Government of District.
Title 7. Human Health Care and Safety. (Refs & Annos)
Subtitle J. Public Safety.
Chapter 25. Firearms Control.
Unit A. Firearms Control Regulations.
Subchapter VI. Possession of Ammunition.

➡➡ § 7-2506.01. Persons permitted to possess ammunition.

(a) No person shall possess ammunition in the District of Columbia unless:

(1) He is a licensed dealer pursuant to subchapter IV of this unit;

(2) He is an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties when possessing such ammunition;

(3) He is the holder of the valid registration certificate for a firearm of the same gauge or caliber as the ammunition he possesses; except, that no such person shall possess one or more restricted pistol bullets; or

(4) He holds an ammunition collector's certificate on September 24, 1976; or

(5) He temporarily possesses ammunition while participating in a firearms training and safety class conducted by a firearms instructor.

(b) No person in the District shall possess, sell, or transfer any large capacity ammunition feeding device regardless of whether the device is attached to a firearm. For the purposes of this subsection, the term "large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition. The term "large capacity ammunition feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

CREDIT(S)

Formerly cited as DC ST 1981 § 6-2361

(Sept. 24, 1976, D.C. Law 1-85, title VI, § 601, 23 DCR 2464; Mar. 16, 1978, D.C. Law 2-62, § 2, 24 DCR 5780; Aug. 2, 1983, D.C. Law 5-19, § 4, 30 DCR 3328; Mar. 31, 2009, D.C. Law 17-372, § 3(n), 56 DCR 1365; Sept. 26, 2012, D.C. Law 19-170, § 2(n), 59 DCR 5691; Apr. 27, 2013, D.C. Law 19-295, § 2(c), 60 DCR 2623.)

HISTORICAL AND STATUTORY NOTES

Prior Codifications

1981 Ed., § 6-2361.

1973 Ed., § 6-1861.

Effect of Amendments

D.C. Law 17-372 designated subsec. (a); and added subsec. (b).

D.C. Law 19-170 rewrote subsec. (a)(3); in subsec. (a)(4), substituted “1976; or” for “1976.”; and added subsec. (a)(5). Prior to amendment, subsec. (a)(3) read as follows:

“(3) He is the holder of the valid registration certificate for a firearm of the same gauge or caliber as the ammunition he possesses; except, that no such person shall possess restricted pistol bullets; or”

D.C. Law 19-295, in subsec. (a)(3), substituted “possess one or more restricted” for “possess restricted”.

Emergency Act Amendments

For temporary (90 day) amendment of section, see § 2(d) of Second Firearms Control Emergency Amendment Act of 2008 (D.C. Act 17-502, September 16, 2008, 55 DCR 9904).

For temporary (90 day) amendment of section, see § 2(d) of Second Firearms Control Congressional Review Emergency Amendment Act of 2008 (D.C. Act 17-601, December 12, 2008, 56 DCR 9).

For temporary (90 day) amendment of section, see § 3(n) of Firearms Registration Emergency Amendment Act of 2008 (D.C. Act 17-651, January 6, 2009, 56 DCR 911).

For temporary (90 day) amendment of section, see § 2(n) of Firearms Emergency Amendment Act of 2012 (D.C. Act 19-352, May 11, 2012, 59 DCR 5116).

For temporary (90 day) amendment of section, see § 2(n) of the Firearms Amendments Congressional Review Emergency Amendment Act of 2012 (D.C. Act 19-394, July 18, 2012, 59 DCR 8694).

Formerly cited as DC ST 1981 § 6-2361

For temporary (90 day) amendment of section, see § 2(n) of the Firearms Second Congressional Review Emergency Amendment Act of 2012 (D.C. Act 19-510, October 26, 2012, 59 DCR 12808).

Legislative History of Laws

For legislative history of D.C. Law 1-85, see Historical and Statutory Notes following § 7-2501.01.

For legislative history of D.C. Law 2-62, see Historical and Statutory Notes following § 7-2501.01.

For legislative history of D.C. Law 5-19, see Historical and Statutory Notes following § 7-2501.01.

For Law 17-372, see notes following § 7-2501.01.

For history of Law 19-170, see notes under § 7-2501.01.

For history of Law 19-295, see notes under § 7-2501.01.

LIBRARY REFERENCES

Key Numbers

Weapons 4.

Westlaw Topic No. 406.

ALR Library

Adequacy Of Defense Counsel's Representation Of Criminal Client Regarding Prior Convictions, 14 A.L.R. 4th 227.

Statutory Presumption Of Possession Of Weapon By Occupants Of Place Or Vehicle Where It Was Found, 87 A.L.R. 3rd 949.

Encyclopedias

C.J.S. Weapons §§ 9 to 10.

NOTES OF DECISIONS

Formerly cited as DC ST 1981 § 6-2361

1. Validity

The unlawful possession of ammunition (UA) statute was unconstitutional as applied to defendant; defendant's UA conviction was based solely on proof that the defendant possessed handgun ammunition in his home, solely, that is, on proof of conduct protected by the Second Amendment, and nothing more was proved at trial to show that the defendant was disqualified from exercising his Second Amendment rights, in that there was no evidence that he possessed ammunition for an illegal purpose or that he failed to comply with applicable registration requirements for a firearm corresponding to the ammunition. Herrington v. U.S., 2010, 6 A.3d 1237. Weapons 106(3)

While proper registration is an affirmative defense to unlawful possession of ammunition (UA), the prosecution may assume the burden of charging and proving beyond a reasonable doubt that the defendant lacked the necessary registration in order to satisfy the Second Amendment, and by doing so, the prosecution would establish that the defendant indeed was disqualified from exercising his Second Amendment right to possess handgun ammunition in the home, application of the UA statute to the defendant in such a case would not be unconstitutional. Herrington v. U.S., 2010, 6 A.3d 1237. Weapons 106(3)

Convictions for carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and unlawful possession of ammunition (UA) did not constitute plain error, despite argument that the convictions were in violation of the Second Amendment as construed by the United States Supreme Court in *District of Columbia v. Heller*, in which the Supreme Court held that the Second Amendment forbade an absolute prohibition on handgun possession in the home; statutes were not facially invalid under *Heller*, and defendant was not in his own home at the time of offenses. Little v. U.S., 2010, 989 A.2d 1096. Criminal Law 1030(2)

Finding that prosecution of defendant for carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and unlawful possession of ammunition (UA) did not violate his Second Amendment rights under *Heller*, which invalidated statutes banning handgun possession in the home, was not plain error; there was no evidence that when the police saw defendant toss pistol to the ground he was even within boundary lines or curtilage of his home, much less inside home itself, and no evidence linked defendant's possession of gun to any arguable motive of self-defense that had impelled him to remove gun from his home. Sims v. U.S., 2008, 963 A.2d 147. Criminal Law 1030(2)

Formerly cited as DC ST 1981 § 6-2361

Defendant's claims that Second Amendment barred his prosecution for carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and unlawful possession of ammunition (UA) and that these statutes were constitutionally invalid on their face in light of *Heller*, which held that the Second Amendment conferred an individual right to keep and bear arms, were not preserved for appeal since the record revealed no indication that defendant raised these claims in the trial court. Sims v. U.S., 2008, 963 A.2d 147. Criminal Law 1030(2)

District of Columbia firearms statutes did not violate constitutional right to keep and bear arms of defendant convicted of carrying pistol without license, possession of unregistered firearm, and unlawful possession of ammunition under those statutes. D.C.Code 1981, §§ 6-2311, 6-2361, 22-3204; U.S.C.A. Const.Amend. 2. Sandidge v. U.S., 1987, 520 A.2d 1057, certiorari denied 108 S.Ct. 193, 484 U.S. 868, 98 L.Ed.2d 145. Weapons 106(3); Weapons 112(2)

A statute criminalizing the possession of ammunition in all but four narrowly defined circumstances was constitutional under the Second Amendment as applied to defendant, even though defendant pointed to the United State Supreme Court's decision in District of Columbia v. Heller that the Second Amendment was violated by the District's ban on handgun possession in the home and its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense; defendant was a convicted felon, and the Supreme Court made clear in Heller that the Second Amendment provided no constitutional protection to convicted felons. D.C. v. Lewis, 136 WLR 2609 (Super. Ct. 2008).

2. In general

Defendant's ownership of vehicle where pistol was found, his operation of that vehicle, and circumstances showing his knowledge that pistol was in the trunk of the vehicle are sufficient to sustain conviction under this section. United States v. Duncan, 115 WLR 2517 (Super. Ct. 1987); United States v. Joseph, 892 F.2d 118 (D.C.Cir.1989); Thompson v. United States, App. D.C., 567 A.2d 907 (1989).

Constructive possession of weapon requires proof that defendant knew of the weapon's location, had ability to exercise dominion and control over it, and intended to exercise such dominion and control. D.C.Code 1981, §§ 6-2311(a), 6-2361, 22-3214(a). In re M.I.W., 1995, 667 A.2d 573. Weapons 167

To support conviction based on firearm and ammunition offenses, government was required to prove defendant had actual or constructive possession of firearms, and where defendant was not found in actual possession of firearms, government had to prove that defendant had constructive possession of firearms. D.C.Code 1981, §§ 6-2311(a), 6-2361(3), 22-3204(a, b). Taylor v. U.S., 1995, 662 A.2d 1368. Weapons 164

Carrying pistol without a license, possession of unregistered firearm, and possession of unregistered ammunition are general intent crimes, and no specific intent to use gun (or ammunition) need be proved in order to obtain conviction. D.C.Code 1981, §§ 6-2311, 6-2361, 22-3204. Bsharah v. U.S., 1994, 646 A.2d 993. Weapons 169; Weapons 170

Formerly cited as DC ST 1981 § 6-2361

Assault defendant who voluntarily turned over weapon to investigating officers was not immune from prosecution for possessing unregistered firearm and unregistered ammunition absent compliance with statutory requirement that weapon be unloaded and securely wrapped in package at time of surrender. D.C.Code 1981, §§ 6-2311(a), 6-2361(3). Yoon v. U.S., 1991, 594 A.2d 1056, amended on rehearing in part 610 A.2d 1388. Weapons 170

Convictions for offenses of possession of unregistered firearm and possession of unregistered ammunition did not merge with defendant's conviction for carrying unlicensed pistol, since registration offenses concerned firearm in question while licensing offense related to personal qualifications of particular individual to carry pistol in district. D.C.Code 1981, §§ 6-2311(a), 6-2361(3), 22-3204. Irby v. U.S., 1991, 585 A.2d 759. Criminal Law 30

In prosecution for unlawful possession of ammunition, fact that defendant is holder of valid registration certificate for firearm of same gauge or caliber as ammunition he possessed is an affirmative defense. D.C.Code 1981, § 6-2361(3). Logan v. U.S., 1985, 489 A.2d 485. Weapons 170

In prosecution for unlawful possession of ammunition, Government is required to prove only that defendants possessed ammunition as defined by Code to establish essential element of offense. D.C.Code 1981, § 6-2361. Logan v. U.S., 1985, 489 A.2d 485. Weapons 164

Constructive possession of an unregistered weapon or ammunition requires knowledge of the presence of the weapon or ammunition and the existence of dominion and control over them. D.C.Code 1981, §§ 6-2311, 6-2361, 11-707(a); §§ 22-2202, 22-2205 (Repealed). Easley v. U.S., 1984, 482 A.2d 779. Weapons 167

It is absolutely clear from this section and §§ 6-2311, 6-2313, 6-2323 and 6-2375 and the language and phrasing of other provisions of the Firearms Control Regulations Act of 1975 that the Act focuses equally, if not more, on the person than on the firearm. This dual emphasis fully comports with the purpose of the Act to freeze the handgun population within the District of Columbia by expanding and strengthening the then preexisting firearm registration standards and to prescribe criminal penalties for the violation of its provisions. District of Columbia v. Rowan, 116 WLR 2353 (Super. Ct. 1988).

Although neither a machine gun nor its ammunition is registerable, it is a violation of the registration statute to possess them. United States v. Smith, 118 WLR 2277 (Super. Ct. 1990).

2.5. Aiders and abettors

Eighteen year-old defendant had standing to assert Second Amendment challenge to charges for unregistered firearm and unlawful possession of ammunition if he could show he met statutory requirements for obtaining registration certificate and license to possess firearms by showing, at evidentiary hearing, that application was accompanied by notarized statement of his parent or guardian that he had permission to own and use firearm to be registered and that parent or guardian assumed civil liability for all damages resulting from actions of defendant in use of firearm to be registered. Headspeth v. District of Columbia, 2012, 53 A.3d 304. Weapons 106(3)

Formerly cited as DC ST 1981 § 6-2361

Instruction that stated that an aider and abettor is legally responsible for the acts of other persons that are the "natural and probable consequence" of the crime in which he intentionally participates was not plain error in armed robbery (AR) prosecution, even though "natural and probable consequence" language in the aiding and abetting instruction had been rejected since defendant's trial, as defendant could not demonstrate that his substantial rights were affected, in light of overwhelming evidence that defendant was an active participant in the robbery. Little v. U.S., 2010, 989 A.2d 1096. Criminal Law 1038.1(3.1)

3. Procedure generally

Because unauthorized possession of ammunition is offense in District of Columbia, and possession of rifle clip may be offense, testimony concerning drug defendant's alleged possession of those items implicated rule dealing with evidence of other crimes. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.; D.C.Code 1981, §§ 6-2302(2, 9), 6-2311, 6-2361. U.S. v. Ruffin, C.A.D.C.1994, 40 F.3d 1296, 309 U.S.App.D.C. 265, certiorari denied 115 S.Ct. 1716, 514 U.S. 1074, 131 L.Ed.2d 575. Criminal Law 373.2

Defendant was entitled to have jury trial for charges of possession of unregistered firearm and unlawful possession of ammunition, where each charge carried a maximum authorized punishment of more than six months' confinement. U.S.C.A. Const. Art. 3, § 2, cl. 3; Amend. 6; D.C.Code 1981, §§ 6-2311, 6-2361, 6-2376. Henry v. U.S., 2000, 754 A.2d 926. Jury 22(2)

Exclusion of any reference to defendant's rights, under federal Firearms Owners' Protection Act (FOPA), to transport weapon between two states in which it was lawful to carry weapon so long as weapon was unloaded and inaccessible deprived defendant of instruction on significant part of his theory of case and created erroneous impression that defendant had been engaged in criminal conduct immediately prior to his handing pouch containing loaded pistol to police officer at entrance to Capitol Building, which misleading incriminatory impression about defendant's earlier actions had no probative value whatsoever in prosecution for carrying pistol without a license, possession of unregistered firearm and possession of ammunition for unregistered firearm. 18 U.S.C.A. § 921 et seq.; D.C.Code 1981, §§ 6-2311, 6-2361, 22-3204. Bieder v. U.S., 1995, 662 A.2d 185. Weapons 330

Trial court did not abuse its discretion in curtailing scope of defendant's cross-examination of arresting officer regarding personnel regulations and practices, in prosecution for carrying pistol without license, possession of unregistered firearm, unlawful possession of ammunition, possession of phencyclidine and possession of marijuana; defendant proffered no facts or follow-up questions which would have supported theory that officer's own personnel record was such that he had any incentive to misrepresent circumstances justifying arrest. D.C.Code 1981, §§ 6-2311(a), 6-2361(3), 22-3204, 33-541(d). Deneal v. U.S., 1988, 551 A.2d 1312. Witnesses 373

In prosecution for unlawful possession of ammunition, jurors could infer that ammunition was live from fact that ammunition was recovered from pistol thrown out of defendants' car. D.C.Code 1981, § 6-2361. Logan v. U.S., 1985, 489 A.2d 485. Weapons 244

Formerly cited as DC ST 1981 § 6-2361

3.5. Constructive possession

Constructive possession of a weapon and ammunition may be sole or joint. Carter v. United States, 2008, 957 A.2d 9. Weapons 167

3.7. Government agency

Defendant did not show that he was an employee of a governmental agency and, thus, did not show that the federal Law Enforcement Officers Safety Act (LEOSA) exempted him from prosecution in the District of Columbia for carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and unlawful possession of ammunition (UA); defendant did not show that his employer, which had "corporation" in its name, was a governmental component, and although defendant argued in part that his employer was acting as a governmental agent when its employees were protecting property and keeping the peace, defendant did not cite any authority that LEOSA was referring to agency law when it used "governmental agency." Thorne v. U.S., 2012, 55 A.3d 873, certiorari denied 134 S.Ct. 340, 187 L.Ed.2d 158. Weapons 203(3)

4. Admissibility of evidence

Juvenile defendant's confession to ownership of guns was insufficiently corroborated and was insufficient to support conviction for unlawful possession of an unregistered firearm and unlawful possession of ammunition; while defendant's statements were voluntary, his admission to possessing the guns bore the hallmarks of a less than trustworthy confession in that he confessed only after persistent questioning by a number of officers in a small apartment that, while a familiar environment, had been filled with police officers for nearly an hour and a half, and the officers repeatedly made clear that they were willing to arrest defendant's grandfather, despite his illness and even though they did not believe the guns were his, and defendant's description of the guns only indicated that he at some point saw the guns, not that he owned them. In re K.A., 2013, 60 A.3d 442. Criminal Law 413.94(24)

Defense counsel was entitled, under rule of completeness, to question arresting officer regarding statements defendant made to officer at time of arrest, in order to refute other officer's testimony that defendant had not mentioned having a permit for gun, in prosecution for weapon and drug offenses; government's theory of case was that defendant had kept gun in car to protect marijuana in trunk, but defendant's innocent explanation for why gun was in car tended to undermine that theory and thus was highly relevant to the defense, not only for refuting intent element of gun and ammunition offenses, but also for rebutting defendant's alleged awareness of marijuana in the trunk. Cox v. U.S., 2006, 898 A.2d 376. Criminal Law 396(2)

5. Weight and sufficiency of evidence

There was no manifest miscarriage of justice in defendant's convictions under District of Columbia law based on proof that defendant was not licensed to carry arms and that two pistols recovered in his estranged wife's apartment were not registered in his name, even though defendant alleged evidence was insufficient in that record search was fatally flawed because he did not reside at his estranged wife's address and that record search had been limited to registrations

and licenses in defendant's name at that address, where there was no claim that search using defendant's correct address would have uncovered any exculpatory license or registration record and where defendant's prior convictions would have made it unlawful for him to own, possess, or register pistol. D.C.Code 1981, §§ 6-2311(a), 6-2312(a)(2), 6-2361, 22-3202, 22-3204. U.S. v. Jackson, C.A.D.C.1987, 824 F.2d 21, 262 U.S.App.D.C. 294, certiorari denied 108 S.Ct. 715, 484 U.S. 1013, 98 L.Ed.2d 665. Weapons 291(5)

Evidence was insufficient to support two defendants' convictions for carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and possession of unregistered ammunition (UA), even though the government presented proof that neither defendant had a license or registration for a pistol; the government's theory was that defendants aided and abetted a conspirator in his possession and carrying of a pistol, and the government did not present evidence that the coconspirator lacked a license and firearm registration on the day in question. Walker v. U.S., 2009, 982 A.2d 723. Weapons 291(5)

Evidence was sufficient to show that defendant had constructive possession of gun and ammunition found in vehicle that he had been driving, so as to support convictions for possession of an unregistered firearm (UF), unlawful possession of ammunition (UA), and carrying a pistol without a license (CPWL); gun was located next to where defendant had been sitting and was immediately visible to law enforcement officer when he walked toward driver's side of vehicle. Carter v. United States, 2008, 957 A.2d 9. Weapons 291(5)

Evidence was sufficient to find that defendant was in at least constructive possession of gun found in his station wagon, and thus, was sufficient to support convictions for possessory weapons offenses; government's evidence established that defendant owned the station wagon and that he was its driver on the night he was arrested, and police officers testified that the loaded revolver was on the car's floor at defendant's right thigh. White v. U.S., 2000, 763 A.2d 715. Weapons 291(3)

Conviction of unlawful possession of unregistered ammunition was supported by evidence that defendant, who had purchased restaurant, found ammunition owned by seller in office, put that ammunition in his desk drawer, and made no attempt for several months to return ammunition to seller. D.C.Code 1981, § 6-2361. Ko v. U.S., 1998, 722 A.2d 830, certiorari denied 119 S.Ct. 1512, 526 U.S. 1094, 143 L.Ed.2d 664. Weapons 291(5)

There was sufficient evidence that defendant constructively possessed live round of ammunition found on bookshelf in his sleeping quarters to support conviction for ammunition possession; cooccupant of apartment testified that ammunition was not his and that no one else brought guns or ammunition into apartment. D.C.Code 1981, § 6-2361(3). Bright v. U.S., 1997, 698 A.2d 450. Weapons 291(3)

In prosecution for carrying pistol without license, possession of unregistered firearm, and unlawful possession of ammunition, there was sufficient proof of operability of defendant's pistol; eyewitness testimony, as well as testimony of police officers that gun was fully loaded with live ammunition when recovered, established operability. D.C.Code 1981, §§ 6-2311(a), 6-2361(3), 22-3204(a). Key v. U.S., 1991, 587 A.2d 1072. Weapons 281; Weapons 291(3); Weapons 291(5)

Formerly cited as DC ST 1981 § 6-2361

Evidence, which established that end of machine gun protruding from under driver's seat of automobile was unconcealed at juvenile's feet and so close that he would have virtually kicked it during the 15 to 20 minutes that he was alone in backseat of automobile, was sufficient to support finding of constructive possession and therefore evidence supported adjudication of delinquency based upon unlawful possession of a machine gun and ammunition. D.C.Code 1981, §§ 6-2361, 22-3214(a). In re F.T.J., 1990, 578 A.2d 1161. Infants 2640(11)

Juveniles' proximity to a pistol and ammunition in plain view in crack house was not sufficient to support adjudications of delinquency for possession of unregistered firearm and unlawful possession of ammunition where there was no evidence that juveniles, who were two of six persons roughly equidistant from the contraband, harbored the intent to guide the destiny of the weapon or the live rounds and where juveniles were found not guilty of any connection with the drugs. D.C.Code 1981, §§ 6-2311, 6-2361. Matter of T.M., 1990, 577 A.2d 1149. Infants 2483

Evidence that defendants possessed ammunition was sufficient for conviction of unlawful possession of ammunition, where defendants failed to produce registration certificate for pistol of same caliber. D.C.Code 1981, § 6-2361. Logan v. U.S., 1985, 489 A.2d 485. Weapons 291(3)

Although the police officer who found the gun and five rounds of ammunition testified that two inches of the gun's handle were visible, where the officer was looking through the front windshield, and was using a flashlight, defendants were sitting in the backseat in the dark, and front seat was a bench seat, rather than two bucket seats, thus diminishing likelihood that defendants saw gun, there was insufficient evidence from which to reasonably conclude that defendants knew gun was in car and, thus, insufficient evidence from which to sustain defendants' convictions of possession of an unregistered weapon and ammunition therefor. D.C.Code 1981, §§ 6-2311, 6-2361, 11-707(a); §§ 22-2202, 22-2205 (Repealed). Easley v. U.S., 1984, 482 A.2d 779. Weapons 291(5)

Defendants' knowledge and their ability to control gun and ammunition therefor could not be inferred from evidence that they and their codefendants had just committed a crime together where there was no evidence that defendants or their codefendants used gun during crime. D.C.Code 1981, §§ 6-2311, 6-2361, 11-707(a); §§ 22-2202, 22-2205 (Repealed). Easley v. U.S., 1984, 482 A.2d 779. Weapons 291(5)

5.5. Instructions

Instruction that stated that an aider and abettor is legally responsible for the acts of other persons that are the “natural and probable consequence” of the crime in which he intentionally participates was not plain error in prosecution for assault with a dangerous weapon (ADW), aggravated assault while armed (AAWA), possession of a firearm during a crime of violence (PFCV), carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and unlawful possession of ammunition (UA), even though “natural and probable consequence” language in the aiding and abetting instruction had been rejected since defendant's trial, as defendant could not demonstrate that his substantial rights were affected, in light of overwhelming evidence that defendant “knowingly and intelligently” participated in the commission of such offenses. Little v. U.S., 2010, 989 A.2d 1096. Criminal Law 1038.1(3.1)

6. Review

Formerly cited as DC ST 1981 § 6-2361

Trial court did not abuse its discretion in denying motion for mistrial as to defendant's convictions for carrying a pistol without a license (CPWL), felon in possession of a firearm (FIP), possession of an unregistered firearm (UF), possession of unregistered ammunition (UA), and obstruction of justice, despite contention that trial court's silence in face of jury note informing judge that it had not reached unanimous verdict had coercive impact on jurors; note did not indicate that jury was unable to reach unanimous verdict, but rather simply stated that it did not have one yet, and judge correctly interpreted note as status update, not announcement of deadlock, from which no coercive potential could have flowed. Wynn v. U.S., 2013, 80 A.3d 211. Criminal Law 865(1)

Because defendant did not raise his Second Amendment claims at trial, appellate court would review for plain error defendant's claims that right of the people to keep and bear arms, recognized in the Second Amendment, encompassed the possession of handgun ammunition in the home and that the unlawful possession of ammunition (UA) statute unconstitutionally criminalized all such possession and that the UA statute was unconstitutional as applied to him. Herrington v. U.S., 2010, 6 A.3d 1237. Criminal Law 1030(2)

Admission of Drug Enforcement Administration (DEA) report, indicating in part that plastic bag recovered contained 4.5 grams of 84 percent pure crack cocaine, in violation of the Confrontation Clause, did not render defendant's three gun-related convictions unconstitutional; defendant indicated that weapon found was for personal use and identified the weapon as a rare type of handgun. Smith v. U.S., 2009, 966 A.2d 367, amended on rehearing. Criminal Law 1168(2)

Entry of judgment on convictions for carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and unlawful possession of ammunition (UA) was not plain error, even though defendant argued that the convictions were obtained in violation of the Second Amendment as construed by the United States Supreme Court in *District of Columbia v. Heller*, in which the Supreme Court held that the Second Amendment forbade any absolute prohibition of handguns held and used for self defense in the home; the jury found that defendant used the gun in question to assault another, and no evidence was presented that defendant possessed the gun for purposes of self defense. Howerton v. U.S., 2009, 964 A.2d 1282. Criminal Law 1030(2)

Defendant's claim on appeal, alleging that gun control statutes denied him rights protected by the Second Amendment, was foreclosed by prior binding precedents of Court of Appeals, which rejected claim. Andrews v. U.S., 2007, 922 A.2d 449. Courts 90(3); Weapons 106(3)

Trial judge's failure to take any action on his own initiative when prosecutor alluded to defendant's parole status at trial for unlawful possession of unregistered ammunition was not plain error, since fact that defendant was on parole had been brought out by defense counsel and it was arguably relevant to defendant's claim that he had forgotten about ammunition kept in his desk drawer. D.C.Code 1981, § 6-2361. Ko v. U.S., 1998, 722 A.2d 830, certiorari denied 119 S.Ct. 1512, 526 U.S. 1094, 143 L.Ed.2d 664. Criminal Law 1037.2

DC CODE § 7-2506.01

Formerly cited as DC ST 1981 § 6-2361

Current through June 9, 2014

END OF DOCUMENT

Effective: January 1, 2012

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 6. Control of Deadly Weapons (Refs & Annos)
Title 4. Firearms (Refs & Annos)
Division 10. Special Rules Relating to Particular Types of Firearms or Firearm Equipment (Refs & Annos)
Chapter 5. Large-Capacity Magazine (Refs & Annos)
Article 1. Rules Governing Large-Capacity Magazines (Refs & Annos)

➡➡ § 32390. Nuisance status of large-capacity magazines

Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any large-capacity magazine is a nuisance and is subject to Section 18010.

CREDIT(S)

(Added by Stats.2010, c. 711 (S.B.1080), § 6, operative Jan. 1, 2012.)

LAW REVISION COMMISSION COMMENTS

2010 Addition

With respect to a large-capacity magazine, Section 32390 continues the first part of the first sentence of former Section 12029 without substantive change.

See Section 16740 (“large-capacity magazine”). [38 Cal.L.Rev.Comm. Reports 217 (2009)].

HISTORICAL AND STATUTORY NOTES

2012 Main Volume

Section 10 of Stats.2010, c. 711 (S.B.1080), provides:

“SEC. 10. Sections 7 and 9 of this act become operative on January 1, 2011. The remainder of this act becomes

operative on January 1, 2012."

Derivation

Former § 12029, added by Stats.1953, c. 36, p. 656, § 1, amended by Stats.1963, c. 1677, p. 3263, § 3; Stats.1973, c. 732, p. 1318, § 3, eff. Sept. 25, 1973; Stats.1974, c. 141, p. 284, § 1.5, eff. Apr. 4, 1974; Stats.1987, c. 1461, § 3; Stats.1988, c. 512, § 3; Stats.1988, c. 1269, § 3.

Stats.1917, c. 145, p. 221, § 4; Stats.1923, c. 339, p. 698, § 7.

CROSS REFERENCES

Large-capacity magazine defined for purposes of this Part, see Penal Code § 16740.

LIBRARY REFERENCES

2012 Main Volume

Weapons 112, 146, 163.
Westlaw Topic No. 406.
C.J.S. Weapons §§ 9 to 10, 13 to 15.

RESEARCH REFERENCES

Treatises and Practice Aids

2 Witkin, California Criminal Law 4th Crimes Against Public Peace and Welfare § 263, Nuisances.

13 Witkin, California Summary 10th Equity § 150, Other Statutes.

West's Ann. Cal. Penal Code § 32390, CA PENAL § 32390

Current with urgency legislation through Ch. 22 of 2014 Reg.Sess., Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on the 6/3/2014 ballot

END OF DOCUMENT