No. 14-15408

United States Court of Appeals
for the
Ninth Circuit

LEONARD FYOCK *et al.*,

Plaintiffs-Appellants,

– v. –

CITY OF SUNNYVALE *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NO. 5:13-CV-05807-RMW

BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Everytown for Gun Safety has no parent corporations. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

/s/ Gregory Silbert
Gregory Silbert

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INTEREST OF *AMICUS CURIAE*

Everytown for Gun Safety ("Everytown") is a movement of Americans fighting for common-sense policies that will reduce gun violence and save lives.[1] Everytown was formed when two of the country's leading gun violence prevention organizations — Mayors Against Illegal Guns and Moms Demand Action for Gun Sense in America — joined forces to create a grassroots movement of more than 1.9 million members. Mayors Against Illegal Guns is a national coalition of current and former mayors from 44 states, from small towns and big cities, and from across the political spectrum. Everytown's mayors are united in their belief that respect for the Second Amendment goes hand-in-hand with common-sense laws that reduce gun violence and save lives. Co-founded in 2006 by the mayors of New York City and Boston, Michael Bloomberg and Thomas Menino, Mayors Against Illegal Guns includes the chief executives the country's five largest cities as well as more than 1,000 current and former mayors of cities and towns across the country. The coalition also included Tony Spitaleri, who was mayor of Sunnyvale, California when the voters of Sunnyvale — by an overwhelming, nearly two-to-one margin — enacted the ordinance at issue in this litigation ("the Ordinance").

[1] Appellants and Appellees have consented to the filing of this Brief of *Amicus Curiae* Everytown for Gun Safety In Support of Appellees.

SUMMARY OF ARGUMENT

Since before the founding of this country and still to this day, local communities have adopted gun laws that varied based on the specific needs of each community. These local laws have long been understood as consistent with the Second Amendment and our constitutional tradition. When an overwhelming majority of the citizens of Sunnyvale, California voted to adopt the Ordinance, they acted consistently with this tradition and enacted a law that plainly passes constitutional muster. The Ordinance does not burden Second Amendment rights: It is a presumptively lawful regulation in line with numerous historic regulations of weapons with enhanced lethality; plaintiffs have not shown that the magazines prohibited under the Ordinance are commonly owned or used for self-defense in Sunnyvale; and, multiple alternative channels for self-defense are available. But even if it did impinge on the Second Amendment, the Ordinance would easily satisfy the applicable intermediate scrutiny: the citizens of Sunnyvale undoubtedly have a substantial interest in protecting their community and the Ordinance reasonably advances their interest in reducing the dangers of gun violence. For all these reasons, this Court should affirm the district court's order denying plaintiffs' motion for a preliminary injunction.

ARGUMENT

I. VARIATIONS IN LOCAL GUN LAWS ARE PART OF A LONGSTANDING TRADITION THAT DEFINES THE CONTOURS OF THE RIGHT PROTECTED BY THE SECOND AMENDMENT.

The scope of the Second Amendment right to keep and bear arms is informed by "both text and history." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("*Heller*"). The historical analysis includes an examination of both "the pre-ratification historical background of the Second Amendment," and sources that "shed light on the public understanding of the Second Amendment in the period after its enactment or ratification." *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1151 (9th Cir. 2014), *en banc petition pending* (internal quotations, alterations, and citations omitted).

Historical inquiry shows that, both before and after ratification of the Second Amendment, gun laws were tailored to address local conditions. In particular, gun laws have always tended to be more restrictive in densely populated metropolitan areas, where risks from the misuse of firearms are greater, and less restrictive in rural and exurban regions, where those risks are more attenuated. Indeed, "firearm localism" may be the most longstanding characteristic of gun regulation. *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013).

Courts hearing Second Amendment challenges should bear in mind this history of firearm localism when reviewing local gun laws that respond to local

needs. The Ordinance is part of this long-standing tradition under the Second Amendment, and reflects Sunnyvale's substantial interest in enacting laws that help reduce gun violence within city limits.

A. Historically, Local Laws Regarding Gun Use And Possession Have Varied To Meet The Needs Of Each Community.

Historically and today, local gun laws have varied as dramatically as the country's myriad hamlets, villages, towns, and sprawling, densely populated metropolitan centers. Local firearm laws have always fallen along a broad spectrum, reflecting the different rules local polities have enacted to maintain public safety in widely divergent circumstances. This historic practice is fully consistent with our constitutional tradition.

The Supreme Court observed in *Heller* that "the Second Amendment . . . codified a preexisting right." 554 U.S. at 592 (emphasis omitted). As early as the 14th Century, the exercise of that right in England was subject to important limitations, especially in densely populated London and other crowded locations where members of the public congregated and arms could prove particularly dangerous — like "Fairs" and "Markets." *See* Blocher, 123 YALE L.J. at 112-13 (collecting statutes).

Local variations in gun laws continued in colonial America, both before and after the right to bear arms was enshrined in the Constitution. The "shooting of guns was prohibited in the cities of Philadelphia, New York, and Boston," the three

largest early American cities. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 162 (2007); *Heller*, 554 U.S. at 683 (Breyer, J., dissenting). These same cities also "regulated, for fire-safety reasons, the storage of gunpowder, a necessary component of an operational firearm." *Heller*, 554 U.S. at 684-85 (Breyer, J., dissenting) (citing Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 510-12 (2004)).[2]

Gunpowder restrictions were not limited to the largest cities in the country; states extended such restrictions to smaller cities and towns of varying sizes during the Founding era.[3] *See* Blocher, 123 YALE L.J. at 116-17. And, as states began incorporating towns throughout the 19th century, many of them expressly permitted these newly incorporated towns to enact locally-tailored gun laws. For instance, when incorporating the towns of Hartford, New Haven, New London,

[2] *See* Act of June 26, 1792, ch. 10, 1792 Mass. Acts 208; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; Act of Dec. 6, 1783, ch. 1059, 11. Pa. Stat. 209.

[3] *See, e.g.*, Act of Apr. 13, 1782, ch. XIV, § XLII, 1781-1782 Pa. Laws 25, 41-42 (regulating the storage of gunpowder in "any house, shop, cellar, store or other place" within the town limits of Carlisle, Pennsylvania); An Act to Prevent the Storage of Gun-powder in Larger Quantities than one Hundred Pounds, Within the City of Mobile, 1848 Ala. Laws 121 (regulating gunpowder in Mobile, Alabama); Act of Sept. 12, 1783, ch. LXXVI, § XLII, 1782-1783 Pa. Laws 124, 140 (regulating gun powder in Reading, Pennsylvania).

Norwich and Middletown, the Connecticut Legislature provided that local authorities had the express power "to make by-laws . . . relative to prohibiting and regulating the bringing in, and conveying out, or storing of gun-powder . . . ." An Act Incorporating the Cities of Hartford, New Haven, New London, Norwich and Middletown, ch. 1, § 20, 1836 Conn. Pub. Acts 104-05. Other states passed similar laws permitting local communities to regulate gunpowder.[4]

Local firearm laws carried forward, even in frontier lands, as the country expanded westward. In the so-called "Wild West," numerous towns and cities passed "blanket ordinances against the carrying of arms by anyone," which differed dramatically from gun rules in surrounding, unincorporated areas. ROBERT R. DYKSTRA, THE CATTLE TOWNS 121 (1983). These frontier towns nearly always proscribed the "carrying of dangerous weapons of any type, concealed or otherwise, by persons other than law enforcement officers," *id.*, and required visitors to leave their guns with local authorities at the city limits. *See*

[4] *See*, *e.g.*, An Act to Incorporate the City of Trenton, § 24, 1837 N.J. Laws 373 ("[I]t shall and may be lawful for the common council . . . to pass such ordinances . . . for regulating the keeping and transporting of gunpowder or other combustible or dangerous materials . . . ."); An Act to Incorporate the City of Key West, ch. 58, § 8, 1838 Fla. Laws 70 ("[T]he common council of said city shall have power and authority to prevent and remove nuisances . . . to provide safe storage of gun-powder . . . ."; An Act to Incorporate Nebraska City, § 25, 1867 Neb. Laws 68 ("The city council shall regulate the keeping and sale of gun-powder within the city . . . .").

ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 165 (2011).

There are numerous examples of laws that restricted gun ownership or use in Western towns. In an effort to suppress violence in Dodge City, local leaders passed a law imposing criminal penalties on "any person or persons found carrying concealed weapons in the city of Dodge." DYKSTRA, *supra* at 119. In 1879, out-of-town visitors were welcome in Dodge City — but not if they were armed; upon entering town, they would encounter a prominent billboard that read: "THE CARRYING OF FIREARMS STRICTLY PROHIBITED." WINKLER, *supra* at 165 (citation omitted). Similarly, in late 19th century Wichita, Kansas, when visitors entered the city they were required to deposit their guns at police headquarters. *See id.* at 122 (citing Kansas Statutes, 1868, p. 378). These laws were vigorously enforced. Perhaps the most famous gun fight in American history, the shoot-out at the OK Corral, took place after Wyatt Earp attempted to enforce a Tombstone, Arizona ordinance that prohibited the carrying of firearms within city limits. *See* WINKLER, *supra*, at 172-73. Throughout the 19th century — when, according to the popular imagination, society was more tolerant of gun carriage and usage — farmers and ranchers who could use guns without restriction in their home communities encountered sweeping restrictions on gun possession and use when they traveled to busy, crowded frontier towns.

Other 19th century state laws prohibited the discharge of guns within the limits of specific cities.[5] As far back as 1845, for example, the Connecticut legislature passed gun rules that applied within the city limits of New Haven, Connecticut — a city that currently is approximately the same size as Sunnyvale — and prohibited the firing of any firearms without permission of the mayor, except for military purposes. *See* 1845 Conn. Acts 10, An Act Prohibiting the Firing of Guns and Other Firearms in the City of New Haven, chap. 10.

Firearm laws adopted by Congress for the District of Columbia also reflect the enduring tradition of tailoring gun laws to local conditions. In 1932, Congress passed a law regulating possession in the District of firearms similar to those at issue here, banning "any firearm which shoots . . . *semiautomatically more than twelve shots without reloading*." Act of July 8, 1932, ch. 465, §§ 1, 8, 47 Stat. 650, 650, 652 (emphasis added). This Congressional regulation of local gun use and possession in Washington, D.C. predates the prohibition on gun possession by convicted felons that the Supreme Court, in *Heller*, identified as "presumptively lawful" by virtue of its longstanding history.[6] 554 U.S. at 626-27 n.26.

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[5] *See, e.g.*, Ohio Act of Feb. 17, 1831, ch. 834 § 6; Act of Dec. 3, 1825, ch. 292 § 3, 1825 Tenn. Priv. Acts 306; Act of Jan. 30, 1847, ch. 79, 1846-1847 Va. Acts 67; Act of Feb. 4, 1806, ch. 94, 1805-1806 Va. Acts 51.

[6] The first federal restrictions on gun purchases and possession by convicted felons were enacted through the Federal Firearms Act of 1938. *See* Federal Firearms Act of 1938, 52 Stat. 1250 (June 30, 1938).

B. California Courts Have Long Recognized The Appropriateness Of Tailoring Firearm Laws To Local Conditions.

Consistent with this historical tradition, California courts have long recognized that the state's firearms laws will and should vary county to county, area to area — and that such variation is constitutional. In *Galvan v. Superior Court of City & Cnty. of San Francisco*, the court observed that the "problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority." 70 Cal. 2d 851, 864, 452 P.2d 930, 938 (1969) (holding that a San Francisco ordinance requiring firearm registration was a constitutional exercise of local police power and was not preempted).

More than thirty years later, the California Supreme Court reiterated that tailoring gun laws to local conditions is an appropriate part of well-established constitutional tradition, observing that "[t]he need for the regulation or prohibition of the carrying of deadly weapons . . . may be much greater in large cities, where multitudes of people congregate, than in the country districts or thinly settled communities, where there is much less opportunity and temptation to commit crimes of violence for which such weapons may be used." *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 867, 44 P.3d 120, 128 (2002) (holding that a county may regulate the sale of firearms on its property). And, in *People v. Jenkins*, the Appellate Department of the Superior Court in Los Angeles upheld a

municipal ordinance that regulated carrying firearms in automobiles in California's largest city, observing that, "Los Angeles is a densely populated municipality. The danger from gun men in a large city is far greater than in a sparsely settled rural area and is a far more frequent occurrence." 207 Cal. App. 2d Supp. 904, 907, 24 Cal. Rptr. 410 (App. Dep't Super. Ct. 1962).

C. The Citizens Of Sunnyvale Acted Consistently With This Longstanding Tradition When They Enacted the Ordinance.

When an overwhelming majority of Sunnyvale's citizens voted to adopt the Ordinance, they acted consistently with this centuries-long tradition of firearm localism. In fact, the State of California had already decided that this issue should not be uniformly decided state-wide, but was appropriately resolved by different communities according to their own conditions.

California has taken certain policy choices off the table for local communities. Because of the heightened lethality of large capacity magazines ("LCMs") and their close association with heightened death tolls in mass shootings and killings of law enforcement officers, *see infra* at pp. 24-28, California's state legislators adopted a state LCM law that paralleled the federal Violent Crime Control and Law Enforcement Act of 1994, which banned the possession and transfer of magazines holding more than ten rounds that were not legally possessed

before 1994.[7] The California Legislature criminalized the manufacture, sale, or transfer of new LCMs in 1999. Cal. Stats. 1999, ch. 129, §§ 3, 3.5, codified at Cal. Penal Code § 32310; Cal. Penal Code § 16740. The state left to localities, however, whether to criminalize the possession of LCMs already in possession before the federal or state bans took effect.

In more rural parts of California, it may well be reasonable for communities to determine that the threat to public safety presented by preexisting LCMs is insufficient to justify prohibiting them. In California's most populous counties, by contrast, where residents are reminded daily of the high price of gun violence, it is equally reasonable to determine that the dangers posed by LCMs *do* justify a prohibition.

The voters of Sunnyvale reached that conclusion and embodied it in the Ordinance — just as their neighbors in San Francisco (through their duly elected representatives), made the same decision on the question left to them by the state legislature. Whether the citizens and elected representatives of these two cities have made a wise policy judgment is not for this Court to decide. This court must only decide whether the choice was a constitutional one. *See San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, No. C 13-05351

[7] *See* Pub. L. 103-322, Sept. 13, 1994, 108 Stat. 1796, 1998-2000, codified at 18 U.S.C. 922(w).

WHA, 2014 U.S. Dist. LEXIS 21370 (N.D. Cal. Feb. 19, 2014) ("*SFVPOA*"). As demonstrated below, it plainly was.

II. THE ORDINANCE BANNING LARGE-CAPACITY MAGAZINES IS CONSTITUTIONAL.

Like most of its sister circuits, this Court resolves a Second Amendment challenge to firearm regulations by conducting a two-step inquiry, which "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). The Ordinance easily meets this test, especially in light of the leeway that should be afforded to the type of locally tailored gun control measures that have existed before and since the ratification of the Second Amendment. As evident from a historical survey of laws enacted throughout the nation, local officials have long engaged in firearm localism with respect to weapons deemed highly dangerous — without infringing upon any lawful conduct protected by the Second Amendment. The Ordinance is no different. Moreover, any minimal burden that may exist is far outweighed by Sunnyvale's interest in protecting its citizens from weaponry with enhanced lethality such as LCMs.

A. The Ordinance Does Not Impinge Upon Conduct Protected By The Second Amendment.

Plaintiffs' claim that the Ordinance burdens conduct protected by the Second Amendment fails at the outset for at least two reasons. First, restrictions on the use and possession of weapons with enhanced lethality, like those imposed by the Ordinance, have traditionally been enacted at the local level and are among the "longstanding prohibitions" that *Heller* held were "presumptively lawful regulatory measures," outside the scope of the Second Amendment right. *Heller*, 554 U.S. at 626, 627 n.26. Weaponry with enhanced lethality that has little utility for self-defense or other lawful purposes accordingly has a weak claim, if any, to Second Amendment protection. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (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.'") (quoting *Heller*, 554 U.S. at 626). Indeed, the "historical tradition of prohibiting the carrying of dangerous and unusual weapons" is an "important limitation" on the Second Amendment right. *Heller*, 554 U.S. at 627 (internal citation omitted).

Second, plaintiffs have failed to introduce any evidence showing that, by barring possession of LCMs within city limits, the Ordinance infringes their Second Amendment rights — or those of any Sunnyvale residents. For these

reasons, the Ordinance does not infringe upon the core right to self-defense, or any other lawful purpose, protected by the Second Amendment.

1. Restrictions On Large Capacity Firearms Are Longstanding, Presumptively Lawful Regulations.

Even before the Second Amendment's ratification, early American laws banned the possession or carrying of weapons that the residents of various states or localities deemed especially dangerous. As high-capacity firearms developed — and began being used by organized crime during the Prohibition era — they, too, were highly regulated.

Prior to the Second Amendment's ratification, for example, a colonial law adopted in 1758 in New Jersey banned individuals from wearing weapons that lawmakers considered highly dangerous when carried concealed in population centers.[8] These types of policies persisted across the nation throughout the nineteenth century.[9]

Regulation of weapons that contemporary policymakers deemed highly dangerous carried through the Civil War period and into the early twentieth

[8] *See* The Grants, concessions, and Original Constitutions of the Province of New Jersey, 289 (1758) (banning certain unusual weapons considered especially dangerous).

[9] *See, e.g.*, Revised Statutes of Arkansas (1837) Division VIII, chap. 44, art. I, § 13; Act of Jan. 14, 1820, chap. 23 (regulating weapons considered especially dangerous); Act of Dec. 25, 1837, 1837 Ga. Laws 90. § 1 (same); Mass. Gen. Law (1850), chap. 194 §§ 1, 2 as codified in Mass. Gen. Stat., chap. 164 (1873) § 11 (same); Act of Jan. 27, 1838, chap. 137 at 1837-1838 Tenn. Pub. Acts 200 (same).

century, when states began restricting new weapons with enhanced lethality — like automatic machine guns and high-capacity, semi-automatic weapons. Many states enacted laws concerning the use of weapons capable of semi-automatically firing multiple bullets without reloading — sometimes as few as 5, 7, or 8. For instance, in 1929, Missouri enacted a law prohibiting the selling, transporting, and possessing of guns of any caliber capable of discharging more than *eight* cartridges successively without reloading, in which ammunition was fed from clips, disks, belts, or other separable mechanical device. *See* 1929 Mo. Laws 170, Crimes and Punishment, Prohibiting the sale delivery, transportation, possession, or control of machine rifles, machine guns and sub-machine guns, and providing penalty for violation of law: § 1. In the early 1930s, South Dakota and Virginia enacted laws that prohibited weapons capable of firing more than five and seven shots, respectively, rapidly or semi-automatically.[10] Numerous other states adopted similar laws, restricting the use of high-capacity firearms with enhanced lethality.[11]

[10] *See* 1933 S.D. Sess. Laws 245, An Act relating to Machine Guns, and to make uniform the law with reference thereto: § 1; 1933-34 Va. Acts 37, An Act to define the term "machine gun;" to declare the use and possession of a machine gun for certain purposes a crime and to prescribe the punishment therefor: § 1.

[11] *See, e.g.*, 1927 R. I. Pub. Laws 256, An Act to Regulate the Possession of Firearms: § 1. (prohibiting any weapon which shoots more than *twelve* shots semi-automatically without reloading); 1931 Ill. Laws 452, An Act to Regulate the Sale, Possession and Transportation of Machine Guns: § 1: (prohibiting guns of any caliber capable of discharging more than *eight* cartridges successively without reloading, in which ammunition is fed from clips, disks, belts, or other separable

Sunnyvale's voters chose to ban the possession of magazines that allow the user of a semi-automatic firearm to rapidly fire more than ten bullets without stopping to reload. Because such a restriction has a longstanding historical pedigree — indeed, one that predates "longstanding" gun regulations cited in *Heller* — it is a "presumptively lawful" measure that does not infringe the Second Amendment right.[12] *Heller*, 554 U.S. at 626, 627 n.26. For that reason alone, this Court should affirm the district court's decision.

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mechanical device); 1932 La. Acts 336-37, An Act to Regulate the Sale, Possession and Transportation of Machine Guns, and Providing a Penalty for a Violation Hereof. . . : § 1 (prohibiting guns of any caliber capable of discharging more than *eight* cartridges successively without reloading, in which ammunition is fed from clips, disks, belts, or other separable mechanical device); 1933 Tex. Gen. Laws 219, Anti-Machine Gun Law -An Act defining "machine gun" and "person"; making it an offense to possess or use machine guns. . . : § 1. (prohibiting possessing and using a weapon of any description by whatever name known, loaded or unloaded from which more than *five* (5) shots or bullets may be automatically discharged from a magazine by a single functioning of the firing device). Other states adopted restrictions that employed a higher threshold for restricting high capacity firearms; Act of June 2, 1927, No. 372, § 3, 1927 Mich. Laws 887, 888, (prohibiting possession of any "firearm which can be fired more than sixteen times without reloading").

[12] In evaluating a ban on LCMs, the Court of Appeals for the D.C. Circuit observed that it was unaware of historical regulations of LCMs, and therefore could not conclude that such laws were "longstanding and thereby deserving of a presumption of validity." *Heller II*, 670 F.3d at 1260. That court was, by its own admission, unaware of the numerous historical examples cited above, which establish the longstanding heritage of laws such as the Ordinance. In any event, the D.C. Circuit upheld the LCM ban under intermediate scrutiny.

2. Plaintiffs Have Failed To Establish That LCMs Are In Common Use For Lawful Purposes In Sunnyvale.

As demonstrated, the Ordinance is presumptively lawful and valid. But the district court concluded that the Ordinance imposes a burden on the Second Amendment right, albeit "only the most minor burden." *Fyock v. Sunnyvale*, No. C-13-5807-RMW, 2014 U.S. Dist LEXIS 29722, at *23 (N.D. Cal. Mar. 4, 2014). It should have found there is no burden at all, because plaintiffs failed to show that LCMs are widely distributed, commonly owned, or commonly used for self-defense or any other lawful purposes in Sunnyvale.

The record evidence — drawn from data collected by the NRA Institute for Legislative Action — shows that persons using guns for self-defense fire, on average, just over two shots per incident. *See* EOR 36 [Allen Decl. ¶¶ 7-9]. And "[o]ut of 279 incidents [studied], there were *no incidents* in which the defender was reported to have fired more than 10 bullets." *Id.* ¶ 9 (emphasis added). Even if the Ordinance had been applicable in all these cases, it would have had no effect on any of these defensive firearm uses — and would not have affected any shooter's Second Amendment rights. This is the only evidence in the record concerning the discharge of more than 10 rounds in actual incidents involving defensive gun use.

As in any constitutional challenge, Plaintiffs bear the burden of establishing the elements of a Second Amendment violation. This, they have failed to do:

while plaintiffs speculate that "[s]ome defensive gun uses (DGUs) are *likely* to require large numbers of rounds" because there could be multiple assailants or because shots might miss the target, their own witnesses concede that there is no evidence of defensive gun use requiring a shooter to fire more than 10 rounds without reloading.[13] Simply put, plaintiffs failed to show that LCMs are in common use for self-defense — in Sunnyvale or anywhere else — and thus failed to meet their burden of demonstrating that the Ordinance infringes the Second Amendment.

The district court nonetheless determined that LCMs "are in common use" for lawful purposes because gun owners possess LCMs in large numbers, purportedly "in the tens-of-millions." *Fyock*, 2014 U.S. Dist. LEXIS 29722, at **13-14. But the fact that people *possess* millions of LCMs yet virtually never *use* this enhanced capacity for self-defense — even when they find it necessary to discharge their weapons to ward off an assailant — shows that a restriction on the

[13] *See* EOR 19 [Kleck Decl. ¶ 21] (emphasis added); *see also* EOR 45-2 [Kleck Reply Decl. ¶ 2] ("[N]o one knows how many times LCMs are used defensively. I suspect that only a tiny fraction of DGUs involve over 10 rounds being fired."). Plaintiffs surmise that there might be as many as 10,000 defensive gun uses per year in which more than 10 rounds are fired in a single incident. EOR 45-2 [Kleck Reply Decl. ¶ 4]. But they submit no evidence of even one such use.

ability to rapidly fire more than 10 rounds without reloading does not infringe the Second Amendment's core purpose.[14]

In any event, plaintiffs failed to present any evidence about *who* owns these millions of LCMs, a crucial question in determining whether the Ordinance is constitutional. This failure is critical because "[t]here is strong evidence that gun ownership is concentrated." EOR 37 [Donohue Decl. ¶ 6]. Many individuals own multiple firearms and "the 20% of gun owners who own[] the most guns possess[] about 65% of the nation's guns." *Id.* LCM ownership is likely concentrated too, and while possession of LCMs might be common among certain communities, it may still be decidedly uncommon among others. Whatever may be true of other parts of the country, plaintiffs have advanced no evidence that LCMs are in common use for lawful purposes in a city like Sunnyvale, where restrictions on their purchase and sale have been in effect for two decades.

The Supreme Court has instructed courts to ask what weapons are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Surely the answer is different in rural Wyoming than on the streets of Sunnyvale or San Francisco. Plaintiffs have failed to offer any evidence that the LCMs banned by the Ordinance have been commonly used for lawful purposes in Sunnyvale at

[14] Indeed, the high possession rate of LCMs that plaintiffs assert only renders it more telling that plaintiffs are unable to point to even a *single* incident in which such evidently broadly possessed LCMs were used for defense of hearth and home.

any time, and especially since they were prohibited by federal law twenty years ago. That failure of proof dooms their claims.[15]

B. In Any Event, The Ordinance Satisfies Intermediate Scrutiny.

Even if this Court were to assume the Ordinance did burden a Second Amendment right, the Ordinance would withstand the "appropriate level of scrutiny." *Chovan*, 735 F.3d at 1136. Every court to consider an LCM ban like Sunnyvale's has upheld it under intermediate scrutiny. If this Court reaches the issue, it should do the same.

[15] Localism has long been a factor when assessing the burden placed on constitutional rights, and is appropriately considered when evaluating Second Amendment claims. Thus, "[g]eographic nonuniformity of constitutional requirements and proscriptions is a mainstay of American constitutionalism" and "constitutional rights are defined in part on the basis of community expectations and considerations." Mark Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1133, 1169 (1999). This principle is most famously applicable in the application of community standards to obscenity claims: Obscene materials fall outside the protection of the First Amendment, and the definition of obscenity depends on community standards. Such First Amendment jurisprudence is instructive when considering the burden of gun regulations on Second Amendment rights. *See Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014). Thus, when evaluating the Ordinance's constitutionality, it is appropriate to note plaintiffs' failure to establish the common use and possession of LCMs in Sunnyvale in addition to the "alternative channels for self-defense" that remain under the Ordinance, *id.* at 961, and Sunnyvale's substantial interest in reducing gun violence within its borders.

1. Intermediate Scrutiny Is Appropriate.

"[T]he level of scrutiny . . . depend[s] on (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right." *Id.* at 1138. Both factors point toward intermediate scrutiny here.

As the D.C. Circuit explained when addressing the identical issue: "Although we cannot be confident the prohibitions impinge at all upon the core right protected by the Second Amendment, we are reasonably certain the prohibitions do not impose a substantial burden upon that right. . . . [T]he plaintiffs present hardly any evidence that . . . magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport." *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) ("*Heller II*").[16]

Here, too, any burden imposed by the Ordinance is far outside the Second Amendment's core purpose of self-defense. As noted, plaintiffs' own evidence shows that LCMS are not frequently — if ever — used for this purpose. The

[16] *See also Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny because the challenged regulation did "not implicate the core Second Amendment right"); *Shew v. Malloy*, No. 3:13-cv-739, 2014 WL 346859 (D. Conn. Jan. 30, 2014) (evaluating an LCM ban under intermediate scrutiny); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, No. 13-cv-2915, 2013 U.S. Dist. LEXIS 182307 (W.D.N.Y. Dec. 31, 2013) (same).

LCMs prohibited by the Ordinance fall well outside the core of the constitutional right.

Nor does the Ordinance substantially burden plaintiffs' — or anyone else's — Second Amendment rights. The ban on LCMs is, at most, a regulation of how the Second Amendment right is exercised, akin to a content-neutral time, place and manner restriction of speech. It leaves open ample alternative channels for the effective use of guns for self-defense and other lawful purposes. As this Court recently observed in upholding a ban on hollow-point bullets, these types of restrictions do not "prevent the use of handguns or other weapons in self-defense." *Jackson*, 746 F.3d at 968. So, too, here. A regulation that does not destroy the Second Amendment right, and leaves open multiple avenues for its exercise, does not remotely approach the type of severe burden on a constitutional right that could justify strict scrutiny.

Plaintiffs disagree, contending that strict scrutiny should apply because the Ordinance is a "full and complete ban" on a purported "right to possess and use constitutionally protected magazines." App. Br. 28. But the Second Amendment affords no absolute right to use particular types of magazines, just as it affords no right to keep and carry "any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller*, 554 U.S. at 626, and just as "the First Amendment does not guarantee the right to communicate one's views at all times and places or in

any manner that may be desired," *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The right protected by the Second Amendment is "to keep and bear arms," especially for self-defense. "[F]irearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not." *Jackson*, 746 F.3d at 961.

Plaintiffs have not shown — because they cannot show — that their ability to use guns effectively for self-defense would be limited at all by the Ordinance. Because the Ordinance leaves them ample alternative means to exercise their Second Amendment rights, it should be assessed under intermediate scrutiny.

2. The Ordinance Survives Intermediate Scrutiny And Is Thus Constitutional.

To satisfy intermediate scrutiny, this Court requires (1) "the government's stated objective to be significant, substantial, or important" and (2) that there is "a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139 (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)). The Ordinance easily meets both requirements.

Sunnyvale plainly has a substantial interest in reducing the dangers of gun violence. The referendum enacting the Ordinance, approved by 66% of the voters, provided: "[T]he People of the City of Sunnyvale find 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 find that sensible gun safety measures provide some relief from that danger and are of benefit to the entire community." EOR 1-1. "It is self-evident that [Sunnyvale's] interest in reducing the fatality of shootings is substantial." *Jackson*, 746 F.3d at 969; *see also Heller II*, 670 F.3d at 1258 ("the Government's general interest in preventing crime is compelling"); *Shew*, 2014 WL 346859 at *9 (recognizing that the degree of a firearm's "lethalness" is "related to a compelling interest of crime control and public safety"); *SFVPOA*, 2014 U.S. Dist. LEXIS 21370 at *15 (recognizing the city's interest in "promoting public safety and preventing gun violence").

Turning to the second requirement, there is a reasonable fit between the Ordinance and the city's objective because the record evidence "more than fairly supports" Sunnyvale's conclusion that LCMs increase the dangers of gun violence. *Jackson*, 746 F.3d at 969.

When widely available, LCMs are frequently used in crime. During the enforcement of the federal Assault Weapons Ban between 1998 and 2004, the share of guns with LCMs that were used in crimes and recovered in Virginia declined 60 percent. *See* David Fallis & James Grimaldi, *VA Data Show Drop in Criminal Firepower During Assault Gun Ban*, WASH. POST, Jan. 23, 2011, *available at* http://wapo.st/Uiu1fX. After the federal ban expired, the share of

crime guns recovered in the state with LCMs increased each year through 2010, more than doubling from the 2004 low. *See id.*

It is also undisputed that LCMs are frequently used in mass shootings and this alone would have constituted sufficient justification for the residents of Sunnyvale to enact the Ordinance. *See* EOR 19 [Kleck Decl. ¶ 9]; *see also* EOR 39 [Koper Decl. ¶¶ 8-14]; EOR 36 [Allen Decl. ¶ 12]. Because they allow shooters to fire more rounds without stopping to reload, the number of deaths is higher in "mass shootings that involve[] large-capacity magazine guns than in other mass shootings." EOR 36 [Allen Decl. ¶ 14]; *see also* EOR 39 [Koper Decl. ¶¶ 19-25]. It is not difficult to see why. As a parent of one of the twenty-six people killed at Sandy Hook Elementary School reflected on the 30-round magazines used by the shooter:

> We have learned that in the time it took to reload, 11 children were able to escape. We ask ourselves every day, every minute . . . if those magazines had held 10 rounds, forcing the shooter to reload six more times, would our children be alive today?

Peter Applebome, *Legislators in Connecticut Agree on Broad New Gun Laws*, N.Y. TIMES, Apr. 1, 2013, *available at* http://www.nytimes.com/2013/04/02/nyregion/connecticut-legislators-agree-on-far-reaching-gun-control.html?pagewanted=all&_r=0. A media investigation of 62 mass shootings between 1982 and 2012 resulting in the death of at least four

people showed that, where magazine capacity could be determined, 86% of the incidents involved an LCM. *See* EOR 39 [Koper Decl. ¶ 14]; *see also SFVPOA*, 2014 U.S. Dist. LEXIS 21370 at *15 (recognizing the strong correlation of mass shootings with the use of LCMs).

In addition, "guns with LCMs have been used disproportionately in murders of police." EOR 39 [Koper Decl. ¶ 18]. In part, this is because LCMs take away the "2 or 3 second pause during which a criminal reloads his firearm[,which] can be of critical benefit to law enforcement." *Heller II*, 670 F.3d at 1264 (internal quotations omitted). A 2010 survey by the Police Executive Research Forum reported that since the federal ban on LCMs expired in 2004, 38 percent of police agencies reported seeing noticeable increases in criminals' use of semiautomatic firearms with LCMs.[17]

LCMs increase the fatalities and other harms inflicted when they are used in crime. One analysis found "a total victim differential of 22.58 killed or wounded in . . . LCM cases compared to 9.9 in . . . non-LCM/unknown LCM cases." EOR 39 [Koper Decl. ¶ 19]. Another analysis of mass shootings between 2009 and 2013, conducted by Mayors Against Illegal Guns, found that shootings involving LCMs or assault weapons resulted in an average of 151% more people shot and

[17] *See Guns and Crime: Breaking New Ground by Focusing on the Local Impact*, POLICE EXECUTIVE RESEARCH FORUM (May 2010), http://bit.ly/1rcCb4d (last visited May 12, 2014).

63% more deaths than in other incidents. *Analysis of Recent Mass Shootings*, MAYORS AGAINST ILLEGAL GUNS (Sept. 2013), http://bit.ly/R5K9zi (last visited June 24, 2014); *see also Heller II*, 670 F.3d at 1263 ("'[P]ermitting a shooter to fire more than ten rounds without reloading . . . greatly increase[s] the firepower of mass shooters.'") (citation omitted); *N.Y. State Rifle & Pistol Ass'n*, U.S. Dist. LEXIS 182307, at *54-55 (noting that "more people die when a [mass] shooter has a large-capacity magazine.").

In light of the evidence that LCMs dramatically increase the lethality of crime, the citizens of Sunnyvale could reasonably conclude that banning possession of LCMs in their densely populated city was a sensible means of protecting the public from gun violence, curtailing LCM use in mass and police shootings, and reducing deaths of innocent bystanders — thus furthering the paramount governmental interest in public safety. *See* EOR 39 [Koper Decl. ¶ 4]; *see also Shew*, 2014 WL 346859 at *n.51 (quoting expert's statement that a ban on high-capacity magazines particularly has "the potential to prevent and limit shootings . . . over the long-run").

Evaluating substantially similar evidence, the D.C. Circuit had no trouble upholding a virtually identical LCM ban under intermediate scrutiny: "Overall the evidence demonstrates that large-capacity magazines tend to pose a danger to innocent people and particularly to police officers, which supports the District's

claim that a ban on such magazines is likely to promote its important governmental interests." *Heller II*, 670 F.3d at 1264. Every other court to have considered the question has reached the same result. *See, e.g.*, *SFVPOA*, 2014 U.S. Dist. LEXIS 21370 at *15 (regulation of LCMs was "substantially related" to the city's interest in "promoting public safety" because of the "very high correlation between mass shootings and the use of magazines with the capacity to accept more than ten rounds"); *Shew*, 2014 WL 346859 at *9 ("limiting the number of rounds in a magazine promotes and is substantially related to the important governmental interest in crime control and safety"); *N.Y. State Rifle & Pistol Ass'n*, U.S. Dist. LEXIS 182307, at *54-55 (connection between the regulation and the policy easily surpasses the level of substantiality, based on statistics that high-capacity magazines were used in more than half of the mass shootings since 1982, their use in mass-shootings is rising, and more people die when shooters use them). This Court should do the same.

CONCLUSION

This country has a long history of enacting different gun laws in densely populated cities and towns than in rural and exurban areas. The Ordinance, affecting citizens of an urban area, is simply another example. The Ordinance, which leaves regular capacity magazines completely untouched, does not burden the core Second Amendment right and, like other laws that have markedly reduced

the use of LCMs in gun crimes, is substantially related to the important governmental interest of protecting the public safety. Sunnyvale's prohibition on LCMs is constitutional.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 6,866 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN SUPPORT OF APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system on June 24, 2014. I certify that all participants in the case who are registered CM/ECF users will be served a copy of the foregoing via the CM/ECF system.

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