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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

LEONARD FYOCK, SCOTT HOCHSTETLER, WILLIAM DOUGLAS, DAVID PEARSON, BRAD SEIFERS, and ROD SWANSON,

Plaintiffs,

vs.

THE CITY OF SUNNYVALE, THE MAYOR OF SUNNYVALE, ANTHONY SPITALERI, in his official capacity, THE CHIEF OF THE SUNNYVALE DEPARTMENT OF PUBLIC SAFETY, FRANK GRGURINA, in his official capacity, and DOES 1-10,

Defendants.

**CASE NO: CV 13-05807 RMW**

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

Date: February 21, 2014
Time: 9:00 a.m.
Location: San Jose Courthouse
Courtroom 6 – 4th Floor
280 South 1st Street
San Jose, CA 95113

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Plaintiffs seek preliminary relief to prevent the forced removal of constitutionally protected magazines from their homes. They are not asking for military or police firepower. This case is not about grenade launchers or automatic firearms. It involves the possession of common magazines that are standard for many of the most popular firearms in the country. Retired and active police officers, like millions of individuals, routinely choose them for in-home self-defense. The City speculates its ban may reduce violent crime. But it ignores that criminal misuse of constitutionally protected items does not justify the outright ban of all legitimate uses by law-abiding citizens. Instead, the City asks the Court to require those seeking to vindicate their right to use protected arms to establish they are used and required with sufficient frequency in actual self-defense emergencies. Unsurprisingly, the City offers no support for this novel requirement.

## I. GOVERNMENT-INVENTED DESCRIPTIONS OF MAGAZINES AS "LARGE CAPACITY" ARE RARE AND DO NOT CHANGE THE FACT THAT SUCH MAGAZINES ARE STANDARD

Proponents of magazine bans often refer to the disfavored magazines as "large capacity" or "mega magazines," or they describe them as typically associated with military arms. Mot. 5. In similar fashion, the City creates its own definition of "large capacity magazines" as those over ten rounds and throughout its opposition refers only to magazines under ten rounds as "standard capacity." Opp'n 2, 18, 23. The City does so with full knowledge (or remarkable ignorance) that magazines over ten rounds are standard equipment for many of the most popular handgun models available. Mot. 4, 9, 13. It ignores testimony from an expert firearms historian explaining that a firearm's "standard" magazine capacity is that which it was intended to have. Helsley Decl. ¶ 3. And it disregards that the vast majority of jurisdictions do not consider magazines over ten rounds to be "large capacity." Indeed, Plaintiffs found only *six states* that do. Monfort Supp. Decl. ¶¶ 9,12-13, Exs. H-O. Rather than admit its ban covers many standard magazines, the City attempts to unilaterally redefine "standard." Its obvious hope is that the Court will adopt the falsehood that magazines over ten rounds are not standard, but unusual, military-type equipment owned by only fringe members of society. But try as it might, the City cannot refute that they are standard for millions of common firearms.

## II. EXPERT TESTIMONY CONCERNING MEASURE C'S IMPACT ON RESIDENTS' SAFETY

### A. The City Has Neither Shown Its Ban Will Reduce Crime Nor Rebutted the Ban's Negative Impact on Public Safety

The City theorizes that banning magazines over ten rounds will enhance public safety, relying almost exclusively on statements by Dr. Christopher Koper that such bans may reduce their use in crime. Opp'n 5 n.1, 24-25; Koper Decl. ¶¶ 50, 57-58; *but see* Pls.' Objs. ¶ 10-15. But in 2004, before he was drafted to testify in support of the City's ban, Dr. Koper stated that "we cannot clearly credit the [federal magazine] ban with any of the nation's recent drop in gun violence." Koper Decl., Ex. C, p. 96. Even if his present belief could be verified, the City establishes no causal link between use of these magazines in crime and increased casualties. And no data suggests that bans would positively impact public safety. Kleck Decl. ¶ 33; Kleck Suppl. Decl. ¶¶ 25-29. Indeed, Dr. Koper's 2004 report also concluded that "there has been no discernible reduction in the lethality and injuriousness of gun violence" as a result of the nationwide ban. Koper Decl., Ex. C, p. 96. This is unsurprising. While one might possess a magazine over ten rounds in the commission of a crime, it is undisputed that few crimes involve more than ten shots fired. Mot. 19. Ultimately, the use of such magazines makes no difference in the outcome of the nearly all gun crimes. The City provides no evidence that it does. Its only claim regarding increased shots fired refers to semiautomatic firearms generally, without distinction between arms with magazines over ten rounds and those without. Opp'n 4; Koper Decl. ¶¶ 20-25. And Dr. Koper recently stated that the Jersey City study, the most comprehensive data set referenced in support of these claims, cannot support a finding that pistols with magazines over ten rounds are more lethal than revolvers. Monfort Decl., Ex. G, pp. 185-87; Koper Decl., Ex. C, p. 84.

On the other hand, Dr. Gary Kleck explains that bans on magazines over ten rounds do not further public safety because, even if they could prevent criminals from obtaining such magazines: (1) criminals rarely fire more than ten shots; and (2) mass shooters virtually never need such magazines to inflict as much harm as they do. Kleck Decl. ¶¶ 7-8.

The City does not dispute Dr. Kleck's first point, but nonetheless advocates banning these magazines as "mass shootings involving [them] injure and kill more people" than others. Opp'n 3.

But the City provides no evidence that use of these magazines, and not other factors like the lethality of the shooters' intentions, were responsible for the higher casualty count. Without such, this association is spurious and irrelevant. Kleck Suppl. Decl. ¶¶ 25-29.

Similarly, the City fails to dispute that magazine capacity only makes a difference in mass shootings if the shooter has one firearm and one magazine or if a bystander is willing to subdue the shooter during a magazine change, and that such scenarios are exceedingly rare. Kleck Decl. ¶¶ 10-11; Kleck Suppl. Decl. ¶¶ 16-24. Improperly incorporating a brief from another case and avoiding further exceeding page limits, Pls.' Objs. ¶ 5, the City attempts to sew doubt by simply mischaracterizing Dr. Kleck's statements, Kleck Suppl. Decl. ¶¶ 31-46. The City itself provides just one example of Dr. Kleck using imprecise language to describe the prevalence of these magazines in mass shootings, a point he attributes to various assumptions regarding the reporting of such incidents. Kleck Suppl. Decl. ¶ 15.

As evidence to counter Dr. Kleck's conclusions, the City provides only three events—*just one in the last 18 years*—during which potential victims subdued mass shooters. Opp'n 17. But reference to the 2011 Gabrielle Giffords shooting, the only incident Dr. Kleck hadn't previously addressed, Kleck Suppl. Decl. ¶ 16, as support for the City's claims is problematic as media accounts are unclear whether the shooter was subdued because he was reloading or because his magazine failed. Kleck Suppl. Decl. ¶¶ 16, 22. The City also references the Sandy Hook tragedy, but offers only speculation that a break in the shooting, which allowed people to escape, was due to a magazine change. Kleck Suppl. Decl. ¶¶ 17-18.

Again, it is extremely rare that magazine capacity would ever make a difference in a mass shooting. Kleck Decl. ¶¶ 7-8. And there is no evidence to suggest that taking magazines from the homes of the law abiding would have any impact in those very few instances it does. Dr. Koper himself recently conceded that he could not say that bans would likely reduce mass shootings or the number of people injured in those incidents. Monfort Suppl. Decl., Ex. G, pp. 185-87.

Plaintiffs also provided declarations from a criminologist, a renowned self-defense expert and a firearms expert, explaining the reasons why these magazines are effective and, in some cases, crucial for self-defense. Ayoob Decl. ¶¶ 4-34; Helsley Decl. ¶¶ 11-14; Kleck Decl. ¶¶

20-34. They concluded that lacking these magazines in such situations makes a victim less safe. The City provides no expert in any of those relevant fields in opposition. Instead, it dismisses Plaintiffs' concerns, citing economist Lucy Allen, for its claim that self-defense situations where over ten rounds were fired are not widespread, making these magazines unnecessary. Opp'n 13-15. Allen's conclusion, however, was based on a fatally flawed analysis of "databases" of just 279 self-reported accounts of defensive gun uses. Opp'n 14, n.10. Any conclusions drawn from these stories are highly suspect. Kleck Suppl. Decl. ¶¶ 1-14; Pls.' Objs. ¶¶ 16-17.

Ultimately, it cannot be known with any degree of certainty how frequent self-defense situations requiring more than ten rounds actually are. Kleck Decl. ¶¶ 2-3. But it is clear that such incidents needn't be all that frequent to be more widespread than crimes in which these magazines actually affected the number of casualties. As Dr. Kleck points out, the number of such crimes "may well be as low as three in the past 30 years." Kleck Decl. ¶¶ 21-28, 43-47. On the other hand, we know that self-defense incidents requiring more than ten shots are not so uncommon. Plaintiffs, providing just a sampling of such events, describe *six* in the last 15 years alone. Ayoob Decl. ¶¶ 4-16; *see also* Kleck Suppl. Decl. ¶¶ 11-14. On balance, taking magazines from law- abiding citizens is detrimental to their safety.

### B. The Constitutionality of Categorical Bans on Protected Arms Does Not Turn on Empirical Judgments About the Costs and Benefits of Prohibition

The City believes the Ordinance could potentially increase public safety. Plaintiffs have offered substantial evidence that the City's law endangers lives. But ultimately, neither would be determinative. The Supreme Court made clear that the validity of bans on common arms is not to be determined by balancing Second Amendment rights against government interests. That balance has already been struck. "The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Dist. of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). Arms in common use for lawful purposes are protected by the Constitution. *Id.* at 624. It is not the government's role to decide whether one's right to those arms is actually worthwhile or whether the continued possession of those arms is in their best interest. *But see* Opp'n 15 (claiming that the banned magazines are not appropriate for "responsible" self-defense, a "requirement" that draws *no* support from case law).

If there were any lingering doubt, the Supreme Court dispelled it when it instructed that Second Amendment cases will not "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *McDonald v. City* of *Chicago*, 130 S. Ct. 3020, 3050 (2010). As Judge Posner wrote for the Seventh Circuit, "the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts." *Moore v. Madigan*, 702 F.3d 933, 939 (2012).

## III. MAGAZINES OVER TEN ROUNDS ARE IN COMMON USE FOR LAWFUL PURPOSES AND ARE THUS PROTECTED UNDER THE SECOND AMENDMENT

The Second Amendment protects arms "in common use" for lawful purposes. Mot. 6. As millions of Americans possess firearms equipped with the prohibited magazines, their protection is not in doubt. Mot. 4-5, 8-9. Although *Heller* required no elaborate showing that handguns are commonly chosen for self-defense, 554 U.S. at 629, and it is the City's burden to prove its law does not restrict protected conduct, *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013) (citing with approval *Ezell v. City of Chicago*, 651 F.3d 684,701-04 (7th Cir. 2011)), Plaintiffs offer substantial evidence that it does. The City does not counter most of it, but implausibly claims the magazines are not in common use or are otherwise unprotected Opp'n 8-17.[1]

The City first argues that protections for magazines and other firearm components are not determined by common usage because they are not "arms." Opp'n 9-10. Instead, it advances a novel test affording protection to components only if banning them would render firearms wholly inoperable. Opp'n 10.The argument is without merit, and this new approach finds no support in any court opinion to date. That *Heller* does not discuss magazines or ammunition is unsurprising, given that it had a firearms ban before it. But magazines and ammunition are as crucial to an operable firearm as the firearm itself. One would expect protections of these items to mirror those of firearms. This is no doubt why every circuit to consider the protection of various firearm components has employed a common use analysis. Mot. 6-7. The City ignores these cases, including authority from the Ninth Circuit. And it offers no authority for its new test.

[1] The City repeatedly references the State's sales ban. Opp'n 1, 5, 13, 22. But even if it did not "grandfather" in millions of these magazines in California, *Heller* plainly sets a *national* standard for common use. 554 U.S. at 628 (handguns are preferred by "American society").

The City next claims that magazines over ten rounds are unprotected because they are "dangerous and unusual." Opp'n 10-11, 15-18. Alone, the fact that a firearm is "dangerous" does not distinguish it from any other. It is the very nature of firearms to be dangerous. The further requirement that an arm be "unusual"comports with *Heller*'s emphasis on protecting arms in common use. 554 U.S. at 624-25, 628-29. The City argues that the magazines are too dangerous for "responsible" self-defense, Opp'n 15-16, but provides no evidence that they are *also* unusual. Instead, it tries unsuccessfully to attack portions of Plaintiffs' substantial evidence to the contrary. The City first complains that Plaintiffs' evidence, including a declaration and report from the National Shooting Sports Foundation (NSSF), does not establish the number of firearms sold with magazines over ten rounds. Opp'n 12-13. But NSSF is the trade association for the firearms industry. Curcuruto Decl. ¶ 2. It is *uniquely* situated to gather and provide estimates of the number of magazines in circulation based on federal data and input from industry members familiar with magazine markets. Even if it weren't, NSSF's estimates are consistent with those of the City's own expert. Curcuruto Decl. ¶¶ 8, 13; Koper Decl.¶ 36 (73.3 to 98.3 million such magazines.)

Plaintiffs also provide advertisements depicting common firearms that are sold standard with magazines over ten rounds. Monfort Decl. ¶ 4 & Ex. C. Oddly the City questions the ability of this evidence to establish the number of those guns sold. Opp'n 13. But Plaintiffs never suggest it does. This evidence is probative because it shows a significant share of firearms on the market come *standard* with magazines over ten rounds. Mot. 4, 9. This is particularly compelling when coupled with evidence regarding the consumer shift toward such firearms and their popularity for self-defense. Helsley Decl. ¶ 10; Ayoob Suppl. Decl., Ex. E. The City cannot seriously contend that some of the most popular firearms on the market, purchased by millions after passing required background checks, are not commonly possessed for lawful purposes.

The City finally suggests that the millions of magazines in circulation are held by a "small number of enthusiasts." Opp'n 12-13. It bases its claim on studies showing that 20% of gun owners own 65% of the firearms in America. Even if these studies were reliable and this pattern of gun ownership applies equally to magazine ownership, each person would own roughly three

magazines on average, placing them in the hands of some *twenty-five million* people.

This should end the inquiry. But even under the novel hurdles imposed by the *Heller II* panel to avoid strict scrutiny, the banned magazines are either "well-suited to or preferred for the purpose of self-defense or sport." 670 F.3d 1244, 1262 (D.C. Cir. 2011). In fact, they are both.

Regarding their sporting use, the City never disputes that these magazines are suitable, and in fact essential, in the nation's most popular competitive shooting sports. *But see* Mot. 12 n.9. The City's reference to a federal restriction on importing certain firearms with magazines over ten rounds does not establish that magazines are not commonly selected for sport. Opp'n 4. Such magazines are widely manufactured, sold, and used in the U.S. for various sporting purposes even if the ATF has not exempted them from limited importation restrictions.

That magazines over ten rounds are also suitable for self-defense is clear. Having additional ammunition increases the chance of surviving an attack.[2] To support this rather obvious point, Plaintiffs provide real-life examples of attacks that required over ten rounds. Ayoob Decl. ¶¶ 4-16. They also show that magazines over ten rounds were developed for self-defense and that they are marketed for and purchased by millions for that purpose. Helsley Decl. ¶¶ 4-11; Monfort Decl., ¶¶ 4-5 & Ex. C. And they describe how the realities of criminal attacks make increased ammunition capacity preferable. For instance, it is extremely difficult to change magazines when facing attack and rarely does a victim have extra magazines. Additional rounds also aid in defense against the threat of multiple attackers, each taking multiple shots to neutralize. Mot. 11-12.

Instead of addressing these points, the City claims that rarely more than a few shots are fired in self-defense, criminals often retreat when being shot at, and 30% of the time an attacker will be stopped with a single shot. Opp'n 14 n.10. But the City's claims are based on flawed analyses of a sampling of self-defense stories, not a comprehensive digest. Part II.A., *supra*; Pls.' Objs. ¶¶ 16-17. Indeed, the City cites one study that includes only examples of *successful* self-

[2] The City warns that if magazines over ten rounds are suitable for self-defense, machine guns must also be protected. Opp'n 16. This is false. Courts must still find that the restricted arms are in common use for lawful purposes, not simply that they could be useful. Unlike firearms with magazines over ten rounds, machine guns are not preferred by millions for self-defense, and the Supreme Court has explicitly upheld restrictions on these arms. *Heller*, 554 U.S. at 624-25.

defense, skewing the statistics by omitting scenarios in which defense was ineffective. Thompson Decl., Ex. 13. Regardless, consider what its evidence *also* tells us. At times more than a few bullets are necessary. Criminals do not always retreat or expire when shot at. And multiple shots are required to incapacitate an aggressor 70% of the time. The benefit of additional ammunition for self-defense is clear—and the City's evidence is in harmony with Plaintiffs' on this point.[3]

This is why millions prefer and routinely select the prohibited magazines, and firearms equipped with them, for that purpose. Plaintiffs provide substantial evidence of this. They establish that firearms with standard magazines over ten rounds—specifically marketed for self-defense—are among the most popular-selling firearms in the country. Mot. 12-13. Indeed, Glock handguns holding 15-17 rounds are "hugely popular" for self-defense. Mot. 13. And the entire handgun market moved to pistols because they are able to hold more ammunition. Mot. 12.

The City ignores this evidence, and instead asks this Court to require Plaintiffs to prove a sufficient frequency with which the prohibited arms are used and actually needed in a self-defense emergency. Opp'n 13-15. In the City's view, the government may flatly ban protected arms that are commonly possessed for self-defense (i.e., they aren't protected after all), unless Americans often use and require those arms for that purpose. The City's novel approach finds no support in *Heller*. Not even *Heller II* goes so far. And the City provides no authority that does.

The City's approach would allow bans on virtually any firearms. Most people will never need to discharge a firearm in self-defense at all. Even fewer will require a particular firearm to effectively defend themselves. But if frequency and necessity of use controlled, handguns would not be protected from government bans because people seldom are attacked and, when they are, a shotgun will usually do just fine. Conversely, the City could remove shotguns from the homes of the law abiding because, while most owners might use them frequently for duck hunting or recreation, most will never use them to shoot at intruders, and a handgun or a rifle would suffice.

The banned magazines, like other types of arms, are commonly chosen and kept by law-abiding citizens for self-defense should they need them. *See Heller*, 554 U.S. at 584 ("bear arms"

[3] The City goes out of its way to appease law enforcement by implausibly reading the ban to exempt *off-duty officers* and their *personal magazines*, Grgurina Decl., Ex. A, acknowledging that magazines over ten rounds are suitable for law enforcement duties *and* in-home self-defense.

is to be "armed and ready . . . in a case of conflict"). Second Amendment protection has little to do with the frequency of actual or necessary uses of particular arms in self-defense. Plaintiffs will likely never need to discharge more than ten rounds (or any ammunition) in self-defense. But much like having fire insurance, millions of Americans choose to have these standard magazines and not need them, rather than risk needing them and not having them.

Short of taking testimony from the tens of millions of Americans who own magazines with capacities over ten rounds, Plaintiffs provide substantial evidence that these magazines are typically possessed for lawful purposes. The City largely ignores this evidence or dismisses it as indirect. Opp'n 14. It neither disputes its veracity nor offers conflicting evidence. In sum, the City has not proven the banned magazines are not in common use for lawful purposes.

## IV. THE CITY'S BAN MAY BE STRICKEN WITHOUT RESORT TO MEANS-END SCRUTINY

The Ordinance is unconstitutional regardless of the level of scrutiny applied. Mot. 13-15. The government has a legitimate interest in regulating protected arms to prevent criminal access, but laws depriving virtuous citizens of lawful use are necessarily invalid. The City ignores the weight of authority invalidating laws that ban constitutionally protected conduct without resort to any level of scrutiny. Mot. 14-15. Instead, it argues that law-abiding citizens enjoy no right to possess arms "in common use"—arms protected by the Second Amendment. Opp'n 11-12.

Limiting *Heller*'s exhaustive analysis of Second Amendment rights by its application to the handgun ban before it, the City seems to suggest that only sweeping bans on arms as commonly chosen for self-defense as handguns necessarily conflict with constitutional guarantees. Opp'n 11-12. This reads *Heller* far too narrowly. When *Heller* turned to applying the Second Amendment to D.C.'s handgun ban, it had already laid out its common use test for determining which arms are protected. 554 U.S. at 629. Far from announcing some requirement that arms must be the most commonly used to be safe from prohibition, the Supreme Court simply needed not long detain itself over whether handguns were in common use. *Id.* Without elaboration, it concluded "[i]t is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon" and "handguns are the most popular weapon chosen by Americans for self-defense in the home." *Id.* Common use of

handguns for the lawful purpose of self-defense was plain to see. Equally obvious was that their "complete prohibition" would violate the constitution under any standard. *Id.*

The City describes as "perverse" a test authorizing law-abiding citizens to possess protected arms because those protections are dependant upon use by the American public. Opp'n 12. The City finds fault with this standard, claiming it prevents regulation of even the most dangerous arms. Not so. The City may not like *Heller*'s announcement of protection for common arms, but it is bound by it. And the Supreme Court's common use framework does not foreclose restrictions on arms suitable strictly for military use. Federal laws prohibiting such arms will surely continue to be enacted as new arms are developed, much like the nationwide restrictions we see today. But as to arms that plainly have civilian applications, where it is unlikely support could be gathered to enact a federal ban, such arms rightly attain constitutional protection as they become commonly chosen for lawful purposes—as *Heller* instructed. 554 U.S. at 624.

Contrary to the City's claim, a small group will not drive protections. Opp'n 12. Such would hardly establish "common use." Magazines over ten rounds are protected not because a small number of "enthusiasts" are "stockpiling" them, but because they are lawfully used by tens of millions of Americans. Mot. 9. More importantly, arms that are commonly owned will not become "immune from regulation." Opp'n 11. Constitutional protection doesn't prevent regulation—it prevents prohibition. And while the City often calls its law a "regulation," it is not. The Ordinance removes protected arms from the homes of the law abiding. It is an outright ban.

Again, the Second Amendment would mean little if the government could ban protected arms, so long as it does so in small enough increments. Mot. 16, n.11. The City never addresses this point, but it warrants consideration. The City asks this Court to hold that it may ban protected arms so long as it leaves ample alternative arms available such that it doesn't effectively disarm residents. Opp'n 20; *Heller II*, 670 F.3d at 1261. Beyond *Heller*'s express instruction that it is "no answer" to suggest that other arms are available, the problem with this approach is revealed in the following application. Handguns (in common use for lawful purposes) are a "class" of protected arms. Broken down into various "subclasses," the City may permissibly ban a subclass of protected handguns, as the ban plainly would not keep anyone from possessing and using all or

even most handguns. And if Los Angeles then banned a second subclass, there likewise would be no constitutional violation. Chicago could validly ban a third subclass, New York a fourth, and so on until each ban on a subclass of handguns is upheld. But as the City continues to ban subclasses of protected arms, at some point, residents would be deprived of "ample alternative" arms. Would the last ban the City enacted then become unconstitutional, despite being valid elsewhere? Would its previously enacted bans suddenly become unconstitutional? Plainly the government cannot ban the possession of protected arms just because it doesn't ban all or most of them in one fell swoop.

In short, the Ordinance is inimical to Second Amendment protections for standard-capacity magazines. It is appropriately stricken without expedition into the " 'levels of scrutiny' quagmire." *See United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc).

## V. IF THE COURT ADOPTS A MEANS-END APPROACH, STRICT SCRUTINY MUST APPLY

Magazines over ten rounds are protected by the Second Amendment. A flat prohibition on their possession by all law-abiding citizens for in-home self-defense *commands* strict scrutiny.

In selecting a level of heightened scrutiny, *Chovan* considered the law's proximity "to the core of the Second Amendment" and "the severity of the law's burden." 735 F.3d at 1138. The City incorrectly views these prongs as elements, suggesting that a law must both impact core conduct and impose a severe burden to trigger strict scrutiny. Opp'n 7 & n.6. But *Chovan* does not compel such a mechanical approach. *Chovan* and the cases it relies on settled on intermediate scrutiny after finding the laws at issue to be outside the core and to place varying degrees of burden on the right. 735 F.3d 1138; *Heller II*, 670 F.3d at 1266; *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010); *Marzzarella*, 614 F.3d at 97. *Chovan* does not foreclose application of strict scrutiny to laws that, although not reaching the core of the right, nonetheless severely burden protected conduct. And in no way does it require intermediate scrutiny for any law striking the very center of the right's core unless the burden is independently deemed severe. If we are guided by First Amendment principles—and *Chovan* holds that we are, 735 F.3d at 1138—laws regulating core conduct command strict scrutiny no matter how severe the burden. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Indeed, the only

case to analyze *Chovan* in this Circuit held that "[a] regulation that threatens a core Second Amendment right is subject to strict scrutiny, while a less severe regulation that does not encroach on a core Second Amendment right is subject to intermediate scrutiny." *Morris v. U.S. Army Corps of Enginrs*., No. 13-00336, slip op. at 3 (D. Idaho Jan. 10, 2014); *see also* Mot. 14.

Regardless, the City's ban substantially burdens core conduct, taking protected arms from the homes of law-abiding citizens. There is no harm more severe. The City trivializes this harm, claiming: (1) the availability of other arms suitable for self-defense alleviates the burden; and (2) that few people have access to these magazines and fewer need to fire more than ten shots in self-defense. Opp'n 13, 22-23. Plaintiffs address these points in turn.

Relying on *Heller II*, the City argues for intermediate scrutiny because its magazine ban does not "prevent a person from keeping a suitable and commonly used weapon for protection in the home." Opp'n 20 (quoting 670 F.3d at 1261). It also cites two recent district court opinions from the Second Circuit, which applied only intermediate scrutiny to bans on "assault weapons" and magazines over ten rounds as they " 'do not effectively disarm individuals or substantially affect their ability to defend themselves.' " *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, No. 13-291S, 2013 WL 6909955, at *13 (W.D.N.Y. Dec. 31, 2013) (quoting *Heller II*, 670 F.3d at 1262); *Shew v. Malloy*, No. 13-739, 2014 WL 346859, at *7 (D. Conn. Jan. 30, 2014) (quoting *Heller II*, 670 F.3d at 1262).[4] But these cases simply highlight the constitutional problem with bans on subclasses of protected arms, *see* Part IV, *supra*, which by their nature leave alternative arms available for self-defense and would, in the City's view, warrant only intermediate scrutiny. Taking the City's argument to its natural conclusion, only total bans on all arms require strict scrutiny because alternative avenues for self-defense will always remain. Surely this cannot be. Judge Kavanaugh's dissent in *Heller II* provides the most adept response to this flawed reasoning:

[4] The City's string cite of pre-*Heller state* court cases are not the weight of authority the City suggests. Opp'n 21. As state rights often differ significantly from their federal counterparts, the relevance of these cases is highly suspect. Further, not one case deals strictly with bans on magazines over ten rounds; most involve "assault weapons" bans, one involves magazines over 21 rounds, and *just one* deals with the magazines at issue here. Opp'n 21. What's more, the City references pre-*Heller* cases upholding bans on "entire classes of weapons, such as pistols or other concealable firearms," Opp'n 21-22, n.14—the very sort of laws *Heller* found invalid under *any test*. These cases simply show that courts have wrongly upheld bans on common, protected arms.

> [It's] a bit like saying books can be banned because people can always read newspapers. That is not a persuasive or legitimate way to analyze a law that directly infringes an enumerated constitutional right. **Indeed, *Heller* itself specifically rejected this mode of reasoning:** "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."

*Id.* at 1289 (quoting 554 U.S. at 629) (Kavanaugh, J., dissenting) (emphasis added); *see also Cincinnati v. Discovery Network*, 507 U.S. 410, 418 (1993) (striking "categorical prohibition on the use of newsracks"). In any event, *Heller II* itself suggests that strict scrutiny is appropriate here because the magazines are well-suited to and preferred for self-defense. Mot. 10-13, 17-18.

The City also claims *Marzzarella* supports application of intermediate scrutiny to any law that leaves one "free to possess any otherwise lawful firearm." Opp'n 22. But *Marzzarella* does not stand for so much. In reviewing a ban on unmarked firearms, the court found it significant that Mr. Marzarella could possess the exact same firearm with a serial number, a feature that "does not impair the use or functioning of a weapon *in any way*. . . ." *Marzzarella*, 614 F.3d at 94 (emphasis added). The same is not true of limits on capacity, which *do* impact functionality.

The City next claims the burden is "minor" because most self-defense scenarios require fewer than ten shots, dismissing Plaintiffs' safety concerns when more shots are necessary. Opp'n 23. But the severity of burden on one's rights does not rest on the number of people who see their rights violated, but on how severe that burden is for each person harmed. *Heller* required no showing that the need to use handguns in self-defense arose with any regularity, just that such arms are commonly owned for that purpose. 554 U.S. at 629. Likewise, it is not required that the number of times people fire more than ten shots in self-defense is sufficiently high before the burden is significant. *See* Part III, *supra*. Even if the need to expend more than ten rounds is rare, when the government dictates that one may not have more than ten rounds available for self-defense, the consequences cannot be any more severe for those facing that very situation.

## VI. UNDER ANY LEVEL OF HEIGHTENED SCRUTINY, THE CITY'S BAN IS INVALID

If the *government* fails to prove the restricted conduct is not protected by the Second Amendment, it must prove that its law survives heightened scrutiny. *Chovan*, 735 F.3d at 1136-37. Under heightened scrutiny, the City "must present more than mere anecdote and supposition." *United States v. Playboy Entmt. Grp., Inc.*, 529 U.S. 803, 822 (2000). It must defend its law with

actual evidence. *Chester*, 628 F.3d at 683. The City has not met its burden.

The City provides little more than its theory that magazine bans promote public safety. Opp'n 24-25. But its claim is rooted in flawed statistical arguments and supposition, "evidence" that would be unacceptable in other rights contexts. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). It points to nothing more than Dr. Koper's belief that such laws, if in effect long enough, may impact crime by depressing the supply of the banned items to criminals. Opp'n at 24-25; Koper Decl. ¶¶ 57-58. But Dr. Koper's present belief is not supported by any empirical research on capacity-based magazine bans, including his own study regarding the federal ban. *See* Part II.A., *supra*; Pls.' Objs. ¶ 13. Really, the City provides only speculation that such bans reduce use of the banned magazines in crime. And it offers *no* evidence that taking handgun magazines from law-abiding citizens will reduce violent crime. These unsupported conclusions, if even considered by the voters, are not " 'reasonable inferences from substantial evidence' " Opp'n 24 (quoting *Cuomo*, 2013 WL 6909955, at **17-18).

On the other hand, the City ignores the magazine ban's negative impact on public safety. After explaining the disparate impact that magazine limits have on those acting in self-defense in comparison to violent offenders who control the circumstances of their crimes, a self-defense expert and a criminologist found the ban will disadvantage law-abiding citizens defending against criminal attacks. Ayoob Decl. ¶¶ 4-34; Kleck Decl. ¶ 20-34. An impact that "is more likely, on net, to harm the safety of [the City's] citizens than to improve it." Kleck Decl. ¶ 34. The City provides *no expert in any relevant field* to rebut the weight of this evidence—only the memory of one law enforcement official who claims not to recall an instance where Sunnyvale residents could not defend themselves without a magazine over ten rounds. Opp'n 23; Grgurina Decl. ¶ 3; *but see* Pls.' Objs. ¶¶ 21-23. Of course, this "evidence" says nothing of how often they *have* been available and used for self-defense (by Sunnyvale residents or anyone).[5]

But even if the law could increase public safety, banning possession of protected arms by the law abiding is not a valid means of reducing criminal misuse of those arms. Mot. 21-22, 25.

[5] Interestingly, the City limits its universe to Sunnyvale when considering how often one might need a magazine over ten rounds in self-defense, even though it must look to the entire country to argue gun crimes involving such magazines are common. Opp'n 13, 16, 22-23.

The City never attempts to establish, as it must, that the Ordinance is not "substantially broader than necessary" to meet its objectives ("reasonable fit" requires that the law is "not more extensive than necessary"). Mot. 18, 21; *Morris*, No. 13-00336, slip op. at 7; *but see* Opp'n 23-25. Instead of targeting criminal acquisition and use of these magazines, the City removes them from the homes of the law abiding. Mot. 21. It seems the City believes its purposes cannot be met if any such magazines remain in law-abiding residents' homes because they may be stolen. Opp'n 24. But prohibiting the exercise of Second Amendment rights based on the acts of the law breaking offends notions of constitutional liberty. Mot. 22 & n.17. If taking protected arms from law-abiding citizens is substantially related to reducing criminal misuse of those arms, the City could strip any protected arms from the law abiding (so long as it confiscates them in small enough increments to avoid strict scrutiny, apparently). *See* Parts IV-V, *supra*.

The City ignores that *Heller* itself would have been decided differently if this were so. Opp'n 20-21; *but see* Mot. 22. Even though handguns make up the majority of guns stolen and are involved in the vast majority of firearm-related homicides in the United States, *Heller*, 554 U.S. at 697-98 (Breyer, J., dissenting), a flat ban on the possession of these protected arms lacks the necessary fit under *any level* of scrutiny, *id.* at 628-29 (maj. opn.). The City never explains why a ban on handguns, which are overwhelmingly preferred by criminals, is not substantially related to public safety interests. Nor does it explain how removing magazines from the law abiding is any more related to that interest, even though such magazines are used far less often in crime.

## VII. CONCLUSION

Plaintiffs are likely to succeed on the merits, and they satisfy the remaining factors for preliminary relief. Mot. 23-24. The Court should preserve the status quo as this case proceeds.

Dated: February 10, 2014

MICHEL & ASSOCIATES, P.C.

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

**IN THE UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

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| LEONARD FYOCK, SCOTT HOCHSTETLER, WILLIAM DOUGLAS, DAVID PEARSON, BRAD SEIFERS, and ROD SWANSON,<br><br>Plaintiffs,<br><br>vs.<br><br>THE CITY OF SUNNYVALE, THE MAYOR OF SUNNYVALE, ANTHONY SPITALERI, in his official capacity, THE CHIEF OF THE SUNNYVALE DEPARTMENT OF PUBLIC SAFETY, FRANK GRGURINA, in his official capacity, and DOES 1-10,<br><br>Defendants. | **CASE NO: CV13-05807 RMW**<br><br>**CERTIFICATE OF SERVICE** |

IT IS HEREBY CERTIFIED THAT:

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

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

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

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

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Anthony P. Schoenberg
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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 10, 2014.

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