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8 Attorneys for Respondents  
CITY OF SUNNYVALE and SUNNYVALE CITY  
9 COUNCIL

10  
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 IN AND FOR THE COUNTY OF SANTA CLARA

13  
14 U.S. FIREARMS COMPANY LLC, a  
limited liability company;  
15 ERIC W. FISHER; and THE NATIONAL  
SHOOTING SPORTS FOUNDATION,  
16 INC., a non-profit trade association,

17 Petitioners,

18 vs.

19 CITY OF SUNNYVALE and  
SUNNYVALE CITY COUNCIL,

20 Respondents,  
21  
22  
23

Case No. 113cv257353

**DECLARATION OF ANTHONY P.  
SCHOENBERG IN SUPPORT OF  
RESPONDENTS' OPPOSITION TO  
ORDER TO SHOW CAUSE RE  
PRELIMINARY INJUNCTION**

24 I, Anthony P. Schoenberg, declare as follows:

25 1. I am an attorney licensed to practice law in the State of California, and a partner of  
26 the law firm Farella Braun + Martel LLP, counsel of record for Respondents City of Sunnyvale  
27 and Sunnyvale City Counsel (collectively "Sunnyvale") in the above-captioned action. I have  
28

1 personal knowledge of the facts set forth in this declaration, or I am informed and believe that  
2 they are true, and if called to do so, I could and would competently testify to the same.

3 2. Measure C passed in Sunnyvale with 66.55% of the vote. A true and correct copy  
4 of the Sunnyvale City Council's resolution confirming the election results is attached hereto as  
5 Exhibit A.

6 3. I have confirmed that a petition for review regarding the decision in *Parker v.*  
7 *State of Calif.*, 221 Cal. App. 4th 340 (2013) was filed on December 16, 2013. At the time of my  
8 signing this declaration, the California Supreme Court has not yet determined whether it will  
9 review the *Parker* decision.

10 4. Under current California law, when a California licensed firearms dealer sells a  
11 firearm, he or she generally must fill out a Dealer's Record of Sale ("DROS") issued by the  
12 California Department of Justice Bureau of Firearms. A true and correct copy of the DROS form  
13 is attached hereto as Exhibit B.

14 5. Under current Federal law, when a Federal Firearms License holder sells a firearm,  
15 he or she generally must fill out a Firearms Transaction Record ("Form 4473") issued by the  
16 United States Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives. A  
17 true and correct copy of Form 4473 is attached hereto as Exhibit C.

18 6. Respondents took the deposition of Petitioner Eric Fisher on December 27, 2013.  
19 A true and correct copy of excerpts of the deposition of Eric Fisher is attached hereto as Exhibit  
20 D.

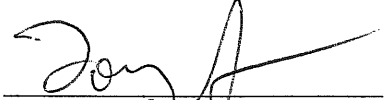
21 7. Petitioner Eric Fisher produced to my firm a computer screenshots purporting to  
22 show the sales figures for U.S. Firearms. True and correct copies of these documents, Bates  
23 labeled USF0001-USF0004, are attached hereto as Exhibit E.

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8. A true and correct copy of the law journal article *The Limits of Fourth Amendment Injunctions*, 7 J. on Telecomm. & High Tech. L. 127 (2009), by Orin S. Kerr, is attached hereto as Exhibit F.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30th day of December 2013 in San Francisco, California.

  
\_\_\_\_\_  
Anthony P. Schoenberg

# **EXHIBIT A**

**RESOLUTION NO. 621-13**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SUNNYVALE DECLARING THE CANVASS OF RETURNS AND RESULTS OF THE CONSOLIDATED GENERAL AND SPECIAL MUNICIPAL ELECTION HELD ON NOVEMBER 5, 2013**

WHEREAS, the City Council of the City of Sunnyvale duly called and ordered held in the City of Sunnyvale on Tuesday, November 5, 2013, a consolidated general and special municipal election and submitted to the voters:

Measure A proposing amendments to the Sunnyvale City Charter concerning changing the City's general municipal elections from odd-numbered years to even-numbered years with the next general municipal election scheduled for 2016; and

Measure B proposing an amendment to the City's Municipal Code to increase the City's transient occupancy tax (TOT) rate from 9.5% to 10.5%; and

Measure C proposing an amendment to the City's Municipal Code to require specified gun safety measures; and

WHEREAS, the Santa Clara County Registrar of Voters was requested to perform all necessary election procedures for the consolidated general and special municipal election; and

WHEREAS, the Santa Clara County Registrar of Voters did canvass the returns of the consolidated general and special municipal election, and did certify to this City Council the results of the votes cast at said election, which results are attached as Exhibit "A" and incorporated herein by reference.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SUNNYVALE AS FOLLOWS:

1. The statement of the final results by the County of Santa Clara Registrar of Voters as shown in Exhibit "A" and the results of the votes cast at the consolidated general and special municipal election are hereby ratified, confirmed and approved.
2. The total numbers of votes cast in the City of Sunnyvale at the consolidated general and special municipal election and the number of votes cast in each precinct for and against the ballot measures, are as set forth in the Certification of Election Results from the County of Santa Clara Registrar of Voters, as shown in Exhibit "A".
3. At the consolidated general and special municipal election, the following amendment to the Charter of the City of Sunnyvale was submitted to the voters, and the number of votes cast for and against the measure is as follows:

<b>MEASURE A</b>		<b><u>VOTE</u></b>	<b><u>NUMBER</u></b>	<b><u>PERCENT</u></b>
	To help reduce the City's elections costs through consolidation with County and State elections, shall the Sunnyvale City Charter be amended to change the City's general municipal elections from odd-numbered years to even-numbered years, with the next general municipal election scheduled for 2016, and to provide a one time, one year extension to councilmember terms, and create a temporary one year mayoral term to enable the transition to even-numbered year elections?	<b>YES</b>	<b>13,259</b>	<b>72.06%</b>
		<b>NO</b>	<b>5,142</b>	<b>27.94%</b>

4. At the consolidated general and special election, the following amendment to the Municipal Code of the City of Sunnyvale was submitted to the voters, and the number of votes cast for and against the measure is as follows:

<b>MEASURE B</b>		<b><u>VOTE</u></b>	<b><u>NUMBER</u></b>	<b><u>PERCENT</u></b>
	Shall the Sunnyvale Municipal Code be amended to increase the transient occupancy tax rate (commonly called "hotel tax") charged to persons who occupy hotel or motel rooms in the City for 30 days or less from 9.5% to 10.5% in order to help maintain the City's ability to fund basic services such as public safety and streets, trees, and sidewalk maintenance, and to keep parity with neighboring cities' hotel tax rates, effective January 1, 2014?	<b>YES</b>	<b>12,647</b>	<b>68.58%</b>
		<b>NO</b>	<b>5,799</b>	<b>31.42%</b>

5. At the consolidated general and special municipal election, the following amendment to the Municipal Code of the City of Sunnyvale was submitted to the voters, and the number of votes cast for and against the measure is as follows:

<b>MEASURE C</b>		<b><u>VOTE</u></b>	<b><u>NUMBER</u></b>	<b><u>PERCENT</u></b>
	Shall the City of Sunnyvale adopt a gun safety ordinance to require: 1) reporting to police, within 48 hours, known loss or theft of a firearm; 2) storing firearms in residences in a locked container or disabling them with a trigger lock when not in the owner's immediate possession; 3) prohibiting the possession of ammunition magazines capable of holding more than 10 rounds, with certain exceptions; and 4) logging and tracking of ammunition sales within the City of Sunnyvale?	<b>YES</b>	<b>12,404</b>	<b>66.55%</b>
		<b>NO</b>	<b>6,235</b>	<b>33.45%</b>

6. Measures A, B, and C each required approval of a majority of voters to be effective, and because this Resolution declares that a majority of voters voting on Measures A, B, and C did vote in favor of each measure, they are each deemed adopted, as of the date of this Resolution, by the electors of the City of Sunnyvale. The City Attorney is directed to prepare amendments to the City Charter and the Municipal Code in accordance therewith.

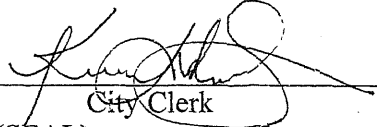
7. The total number of ballots cast in the City of Sunnyvale at the consolidated general and special municipal election was 19,032 and the total number of votes given in each precinct of the City of Sunnyvale was as set forth in the canvass by the Registrar of Voters of Santa Clara County.

8. The City Clerk of the City of Sunnyvale hereby is instructed to enter this Resolution on the minutes of the City Council as a statement of the results of the 2013 consolidated general and special municipal election.

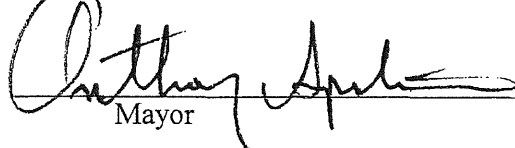
Adopted by the City Council at a regular meeting held on November 26, 2013, by the following vote:

AYES: SPITALERI, GRIFFITH, MOYLAN, WHITTUM, MEYERING, MARTIN-  
MILIUS, DAVIS  
NOES: NONE  
ABSTAIN: NONE  
ABSENT: NONE

ATTEST:

  
\_\_\_\_\_  
City Clerk  
(SEAL)

APPROVED:

  
\_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Joan A. Borger, City Attorney









8	City of Sunnyvale Measure A - City of Sunnyvale - Election Date
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GRD. Totals - Page 7

	REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure A - City of Sunnyvale - Election Date	YES	NO
Santa Clara County	55233	19032	34.5%		13259	5142
US Representative, District 17	55233	19032	34.5%		13259	5142
State Senate, District 10	22	6	27.3%		5	0
State Senate, District 13	55211	19026	34.5%		13254	5142
Assembly District 24	55211	19026	34.5%		13254	5142
Assembly District 25	22	6	27.3%		5	0
State Board of Equal. District 2	55233	19032	34.5%		13259	5142
Supervisory District 3	25338	7598	30.0%		5100	2255
Supervisory District 5	29886	11433	38.2%		8159	2887
City of Sunnyvale	55233	19032	34.5%		13259	5142

B	City of Sunnyvale Measure A - City of Sunnyvale - Election Date
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VBM Totals - Page 7

	REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure A - City of Sunnyvale - Election Date	
				YES	NO
Santa Clara County	55233	15060	27.3%	10594	4011
US Representative, District 17	55233	15060	27.3%	10594	4011
State Senate, District 10	22	6	27.3%	5	0
State Senate, District 13	55211	15054	27.3%	10589	4011
Assembly District 24	55211	15054	27.3%	10589	4011
Assembly District 25	22	6	27.3%	5	0
State Board of Equal, District 2	55233	15060	27.3%	10594	4011
Supervisory District 3	25338	5955	23.5%	4059	1732
Supervisory District 5	29865	9105	30.5%	6535	2279
City of Sunnyvale	55233	15060	27.3%	10594	4011

8	City of Sunnyvale Measure A - City of Sunnyvale - Election Date
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PCT. Totals - Page 7

	REGISTRATION	BALLOTS CAST	TURNOUT (%)		Measure A - City of Sunnyvale - Election Date	
					YES	NO
Santa Clara County	55233	3972	7.2%		2665	1131
US Representative, District 17	55233	3972	7.2%		2665	1131
State Senate, District 10	22	0	0.0%		0	0
State Senate, District 13	55211	3972	7.2%		2665	1131
Assembly District 24	55211	3972	7.2%		2665	1131
Assembly District 25	22	0	0.0%		0	0
State Board of Equal. District 2	55233	3972	7.2%		2665	1131
Supervisorial District 3	25338	1644	6.5%		1041	523
Supervisorial District 5	29895	2328	7.8%		1624	608
City of Sunnyvale	55233	3972	7.2%		2665	1131

7	City of Sunnyvale Measure A - City of Sunnyvale - Election Date
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure A - City of Sunnyvale - Election Date	
					YES	NO
PCT 4001	PCT	794	60	7.6%	31	22
	VBM	794	212	26.7%	130	76
PCT 4002	PCT	1349	92	6.8%	47	36
	VBM	1349	331	24.5%	214	101
PCT 4004	PCT	639	68	10.6%	36	31
	VBM	639	143	22.4%	101	38
PCT MAIL 4005	PCT	41	0	0.0%	0	0
	VBM	41	16	39.0%	13	3
PCT 4006	PCT	970	50	5.2%	27	19
	VBM	970	220	22.7%	138	77
PCT 4007	PCT	1190	62	5.2%	44	17
	VBM	1190	320	26.9%	210	102
PCT MAIL 4008	PCT	22	0	0.0%	0	0
	VBM	22	6	27.3%	5	0
PCT 4010	PCT	1229	74	6.0%	40	29
	VBM	1229	378	30.8%	258	104
PCT 4011	PCT	1340	85	6.3%	49	34
	VBM	1340	286	21.3%	194	88
PCT MAIL 4012	PCT	16	0	0.0%	0	0
PCT MAIL 4012	VBM	16	0	0.0%	0	0
PCT 4013	PCT	907	74	8.2%	51	18
	VBM	907	215	23.7%	162	48
PCT 4016	PCT	1252	59	4.7%	38	19
	VBM	1252	321	25.6%	225	85
PCT 4017	PCT	905	42	4.6%	27	12
	VBM	905	204	22.5%	140	54
PCT 4019	PCT	960	98	10.2%	55	33
	VBM	960	244	25.4%	156	82
PCT 4022	PCT	1188	115	9.7%	78	33
	VBM	1188	272	22.9%	150	80
PCT 4023	PCT	1133	118	10.4%	88	25
	VBM	1133	346	30.5%	241	98
PCT 4026	PCT	1157	81	7.0%	50	23
	VBM	1157	263	22.7%	171	85
PCT 4034	PCT	1169	117	10.0%	67	25
	VBM	1169	421	36.0%	292	116
PCT 4035	PCT	1129	89	7.9%	50	34
	VBM	1129	287	25.3%	207	79
PCT 4036	PCT	876	61	7.0%	37	20
	VBM	876	254	29.0%	200	52
PCT 4038	PCT	1151	109	9.5%	67	35
PCT 4038	VBM	1151	322	28.0%	224	86
PCT 4039	PCT	995	88	8.8%	67	18
	VBM	995	370	37.2%	273	83
PCT 4041	PCT	1336	110	8.2%	70	35
	VBM	1336	515	38.6%	381	113

7	City of Sunnyvale Measure A - City of Sunnyvale - Election Date
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure A - City of Sunnyvale - Election Date	
					YES	NO
PCT 4043	PCT	780	80	7.7%	37	19
	VBM	780	250	32.1%	192	44
PCT 4045	PCT	1223	81	6.6%	47	34
	VBM	1223	285	23.3%	191	83
PCT 4046	PCT	1404	99	7.1%	66	29
	VBM	1404	241	17.2%	150	86
PCT 4050	PCT	1255	51	4.1%	33	16
	VBM	1255	219	17.5%	157	57
PCT 4051	PCT	1341	64	4.8%	41	18
	VBM	1341	424	31.6%	303	105
PCT 4052	PCT	1313	96	7.3%	58	36
	VBM	1313	407	31.0%	300	96
PCT 4053	PCT	1371	154	11.2%	105	45
	VBM	1371	451	32.9%	307	130
PCT 4058	PCT	1148	62	5.4%	48	11
	VBM	1148	217	18.9%	152	60
PCT 4059	PCT	1400	84	6.0%	58	26
PCT 4059	VBM	1400	350	25.0%	226	116
PCT 4083	PCT	1455	69	4.7%	45	23
	VBM	1455	310	21.3%	223	79
PCT 4070	PCT	1321	88	6.7%	54	28
	VBM	1321	479	36.3%	333	135
PCT 4071	PCT	1313	130	9.9%	94	33
	VBM	1313	422	32.1%	300	104
PCT 4075	PCT	1073	87	8.1%	61	19
	VBM	1073	329	30.7%	239	83
PCT 4085	PCT	927	82	8.9%	55	25
	VBM	927	356	38.4%	259	92
PCT 4086	PCT	1179	90	7.6%	72	16
	VBM	1179	493	36.7%	307	102
PCT 4087	PCT	915	30	3.3%	15	13
	VBM	915	147	16.1%	94	40
PCT MAIL 4089	PCT	154	0	0.0%	0	0
	VBM	154	36	23.4%	27	5
PCT 4099	PCT	655	36	5.5%	26	7
	VBM	655	144	22.0%	100	39
PCT 4101	PCT	662	48	7.3%	28	18
	VBM	662	148	22.4%	103	39
PCT 4103	PCT	1307	114	8.7%	78	29
PCT 4103	VBM	1307	308	23.6%	203	98
PCT 4113	PCT	937	88	9.4%	73	12
	VBM	937	391	41.7%	300	84
PCT 4117	PCT	785	49	6.2%	36	12
	VBM	785	175	22.3%	127	44
PCT 4118	PCT	942	91	9.7%	74	17
	VBM	942	287	30.5%	221	61

November 5, 2013. Santa Clara County Consolidated Election.

EXHIBIT A

7	City of Sunnyvale Measure A - City of Sunnyvale - Election Date
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure A - City of Sunnyvale - Election Date	
					YES	NO
PCT 4119	PCT	1303	79	6.1%	53	24
	VBM	1303	306	23.5%	218	86
PCT 4122	PCT	1046	87	8.3%	69	16
	VBM	1046	314	30.0%	231	76
PCT 4126	PCT	1111	67	6.0%	50	15
	VBM	1111	350	31.5%	254	86
PCT 4128	PCT	870	55	6.3%	46	8
	VBM	870	248	28.5%	177	68
PCT 4129	PCT	1076	71	6.6%	51	17
	VBM	1076	363	33.7%	258	94
PCT 4130	PCT	927	62	6.7%	43	17
	VBM	927	235	25.4%	174	53
PCT 4131	PCT	1151	66	5.7%	49	14
	VBM	1151	182	15.8%	123	50
PCT 4154	PCT	1141	80	7.0%	61	16
PCT 4154	VBM	1141	296	25.9%	219	71
GRAND TOTALS		55,233	19,032	34.5%	13,259	5,142



9	City of Sunnyvale Measure B - City of Sunnyvale - TOT
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GRD, Totals - Page 8

	REGISTRATION	BALLOTS CAST	TURNOUT (%)		Measure B - City of Sunnyvale - TOT	
					YES	NO
Santa Clara County	55233	19032	34.5%		12657	5799
US Representative, District 17	55233	19032	34.5%		12657	5799
State Senate, District 10	22	6	27.3%		3	2
State Senate, District 13	55211	19026	34.5%		12654	5797
Assembly District 24	55211	19026	34.5%		12654	5797
Assembly District 25	22	6	27.3%		3	2
State Board of Equal, District 2	55233	19032	34.5%		12657	5799
Supervisory District 3	25338	7598	30.0%		4836	2519
Supervisory District 5	29895	11433	38.2%		7821	3280
City of Sunnyvale	55239	19032	34.5%		12657	5799

9	City of Sunnyvale Measure B - City of Sunnyvale - TOT
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VBM Totals - Page 8

	REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure B - City of Sunnyvale - TOT YES	NO
Santa Clara County	55233	15060	27.3%	10311	4328
US Representative, District 17	55233	15060	27.3%	10311	4328
State Senate, District 10.	22	6	27.3%	3	2
State Senate, District 13	55211	15054	27.3%	10308	4326
Assembly District 24	55211	15054	27.3%	10308	4326
Assembly District 25	22	6	27.3%	3	2
State Board of Equal. District 2	55233	15060	27.3%	10311	4328
Supervisory District 3	25338	5955	23.5%	3930	1855
Supervisory District 5	29895	9105	30.5%	6381	2473
City of Sunnyvale	55233	15060	27.3%	10311	4328

9	City of Sunnyvale Measure B - City of Sunnyvale - TOT
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PCT. Totals - Page 8

	REGISTRATION	BALLOTS CAST	TURNOUT (%)		Measure B - City of Sunnyvale - TOT YES	NO
Santa Clara County	55233	3972	7.2%		2346	1471
US Representative, District 17	55233	3972	7.2%		2346	1471
State Senate, District 10	22	0	0.0%		0	0
State Senate, District 13	55211	3972	7.2%		2346	1471
Assembly District 24	55211	3972	7.2%		2346	1471
Assembly District 25	22	0	0.0%		0	0
State Board of Equal. District 2	55233	3972	7.2%		2346	1471
Supervisory District 3	25338	1644	6.5%		906	664
Supervisory District 5	29895	2328	7.8%		1440	807
City of Sunnyvale	55233	3972	7.2%		2346	1471

EXHIBIT A

November 5, 2013, Santa Clara County Consolidated Election.

B	City of Sunnyvale Measure B - City of Sunnyvale - TOT
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure B - City of Sunnyvale - TOT	
					YES	NO
PCT 4001	PCT	794	60	7.6%	33	22
	VBM	794	212	26.7%	132	75
PCT 4002	PCT	1349	92	6.8%	37	47
	VBM	1349	331	24.5%	196	114
PCT 4004	PCT	639	68	10.6%	39	28
	VBM	639	143	22.4%	100	40
PCT MAIL 4005	PCT	41	0	0.0%	0	0
	VBM	41	16	39.0%	7	9
PCT 4006	PCT	970	50	5.2%	24	23
	VBM	970	220	22.7%	126	94
PCT 4007	PCT	1190	62	5.2%	32	29
	VBM	1190	320	26.9%	190	124
PCT MAIL 4008	PCT	22	0	0.0%	0	0
	VBM	22	6	27.3%	3	2
PCT 4010	PCT	1229	74	6.0%	39	32
	VBM	1229	378	30.8%	249	118
PCT 4011	PCT	1340	85	6.3%	49	35
	VBM	1340	286	21.3%	181	97
PCT MAIL 4012	PCT	16	0	0.0%	0	0
PCT MAIL 4012	VBM	16	0	0.0%	0	0
PCT 4013	PCT	907	74	8.2%	32	37
	VBM	907	216	23.7%	148	63
PCT 4016	PCT	1252	59	4.7%	35	24
	VBM	1252	321	25.6%	230	81
PCT 4017	PCT	905	42	4.6%	24	15
	VBM	905	204	22.5%	136	61
PCT 4019	PCT	960	98	10.2%	56	35
	VBM	960	244	25.4%	156	77
PCT 4022	PCT	1188	115	9.7%	75	33
	VBM	1188	272	22.9%	171	96
PCT 4023	PCT	1133	118	10.4%	79	36
	VBM	1133	346	30.5%	229	112
PCT 4026	PCT	1157	81	7.0%	44	33
	VBM	1157	283	22.7%	178	75
PCT 4034	PCT	1169	117	10.0%	77	34
	VBM	1169	421	36.0%	303	107
PCT 4035	PCT	1129	89	7.9%	52	32
	VBM	1129	297	26.3%	191	92
PCT 4036	PCT	876	61	7.0%	29	26
	VBM	876	254	29.0%	167	86
PCT 4038	PCT	1151	109	9.5%	51	52
PCT 4038	VBM	1151	322	28.0%	222	91
PCT 4039	PCT	995	88	8.8%	62	24
	VBM	995	370	37.2%	263	98
PCT 4041	PCT	1338	110	8.2%	65	42
	VBM	1336	515	38.6%	365	109

8	City of Sunnyvale Measure B - City of Sunnyvale - TOT
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure B - City of Sunnyvale - TOT	
					YES	NO
PCT 4043	PCT	780	60	7.7%	39	18
	VBM	780	250	32.1%	181	59
PCT 4045	PCT	1223	81	6.6%	47	33
	VBM	1223	285	23.3%	197	78
PCT 4046	PCT	1404	98	7.1%	47	47
	VBM	1404	241	17.2%	167	65
PCT 4050	PCT	1255	51	4.1%	23	26
	VBM	1255	219	17.5%	137	78
PCT 4051	PCT	1341	64	4.8%	42	20
	VBM	1341	424	31.6%	317	97
PCT 4052	PCT	1313	96	7.3%	56	39
	VBM	1313	407	31.0%	284	113
PCT 4053	PCT	1371	154	11.2%	83	66
	VBM	1371	451	32.9%	289	144
PCT 4058	PCT	1148	62	5.4%	35	23
	VBM	1148	217	18.9%	132	63
PCT 4059	PCT	1400	84	6.0%	57	26
PCT 4059	VBM	1400	350	25.0%	232	105
PCT 4063	PCT	1455	69	4.7%	43	24
	VBM	1455	310	21.3%	218	87
PCT 4070	PCT	1321	88	6.7%	47	36
	VBM	1321	479	36.3%	326	142
PCT 4071	PCT	1313	130	9.9%	82	45
	VBM	1313	422	32.1%	279	125
PCT 4078	PCT	1073	87	8.1%	59	20
	VBM	1073	329	30.7%	223	101
PCT 4085	PCT	927	82	8.9%	51	18
	VBM	927	358	38.4%	257	82
PCT 4086	PCT	1179	90	7.6%	55	32
	VBM	1179	433	36.7%	315	104
PCT 4087	PCT	915	30	3.3%	14	14
	VBM	915	147	16.1%	99	37
PCT MAIL 4088	PCT	154	0	0.0%	0	0
	VBM	154	36	23.4%	22	11
PCT 4089	PCT	655	36	5.5%	17	18
	VBM	655	144	22.0%	98	41
PCT 4101	PCT	662	48	7.3%	25	21
	VBM	662	148	22.4%	105	39
PCT 4103	PCT	1307	114	8.7%	67	41
PCT 4103	VBM	1307	309	23.6%	219	82
PCT 4113	PCT	937	88	9.4%	65	21
	VBM	937	391	41.7%	283	102
PCT 4117	PCT	785	49	6.2%	28	20
	VBM	785	175	22.3%	127	44
PCT 4118	PCT	942	91	9.7%	60	31
	VBM	942	267	28.5%	196	85

B	City of Sunnyvale Measure B - City of Sunnyvale - TOT
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure B - City of Sunnyvale - TOT	
					YES	NO
PCT 4119	PCT	1303	79	6.1%	52	23
	VBM	1303	906	23.5%	223	80
PCT 4122	PCT	1046	87	8.3%	58	28
	VBM	1046	314	30.0%	203	104
PCT 4126	PCT	1111	67	6.0%	51	15
	VBM	1111	350	31.5%	257	88
PCT 4128	PCT	870	55	6.3%	39	15
	VBM	870	248	28.5%	193	52
PCT 4129	PCT	1076	71	6.6%	42	26
	VBM	1076	363	33.7%	259	98
PCT 4130	PCT	927	62	6.7%	31	29
	VBM	927	235	25.4%	167	61
PCT 4131	PCT	1151	68	5.7%	43	21
	VBM	1151	182	15.8%	120	51
PCT 4154	PCT	1141	80	7.0%	44	34
PCT 4154	VBM	1141	296	25.9%	213	79
GRAND TOTALS		55,233	19,032	34.5%	12,657	5,799

10	City of Sunnyvale Measure C - City of Sunnyvale - Gun Safety
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GRD. Totals - Page 9

	REGISTRATION	BALLOTS CAST	TURNOUT (%)		Measure C - City of Sunnyvale - Gun Safety YES	NO
Santa Clara County	55233	19032	34.5%		12404	6235
US Representative, District 17	55233	19032	34.5%		12404	6235
State Senate, District 10	22	6	27.3%		4	1
State Senate, District 13	55211	19026	34.5%		12400	6234
Assembly District 24	55211	19026	34.5%		12400	6234
Assembly District 25	22	6	27.3%		4	1
State Board of Equal. District 2	55233	19032	34.5%		12404	6235
Supervisory District 3	25338	7599	30.0%		4899	2528
Supervisory District 5	29895	11433	38.2%		7505	3707
City of Sunnyvale	55233	19032	34.5%		12404	6235

10	City of Sunnyvale Measure C - City of Sunnyvale - Gun Safety
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VBM Totals - Page 9

	REGISTRATION	BALLOTS CAST	TURNOUT (%)		Measure C - City of Sunnyvale - Gun Safety YES	NO
Santa Clara County	55233	15060	27.3%		10182	4565
US Representative, District 17	55233	15060	27.3%		10182	4565
State Senate, District 10	22	6	27.3%		4	1
State Senate, District 13	55211	15054	27.3%		10188	4564
Assembly District 24	55211	15054	27.3%		10188	4564
Assembly District 25	22	6	27.3%		4	1
State Board of Equal. District 2	55233	15060	27.3%		10192	4565
Supervisory District 3	25338	5955	23.5%		3998	1833
Supervisory District 5	29895	9105	30.5%		6194	2732
City of Sunnyvale	55233	15060	27.3%		10192	4565



10	City of Sunnyvale Measure C - City of Sunnyvale - Gun Safety
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PCT. Totals - Page 9

	REGISTRATION	BALLOTS CAST	TURNOUT (%)		Measure C - City of Sunnyvale - Gun Safety YES	NO
Santa Clara County	55233	3972	7.2%		2212	1670
US Representative, District 17	55233	3972	7.2%		2212	1670
State Senate, District 10	22	0	0.0%		0	0
State Senate, District 13	55211	3972	7.2%		2212	1670
Assembly District 24	55211	3972	7.2%		2212	1670
Assembly District 25	22	0	0.0%		0	0
State Board of Equal, District 2	55233	3972	7.2%		2212	1670
Supervisory District 3	25338	1644	6.5%		901	695
Supervisory District 5	29895	2328	7.8%		1311	975
City of Sunnyvale	55233	3972	7.2%		2212	1670

EXHIBIT A

November 5, 2013. Santa Clara County Consolidated Election.

9	City of Sunnyvale Measure C - City of Sunnyvale - Gun Safety
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure C - City of Sunnyvale - Gun Safety	
					YES	NO
PCT 4001	PCT	794	60	7.6%	35	23
	VBM	794	212	26.7%	144	63
PCT 4002	PCT	1349	92	6.8%	42	42
	VBM	1349	331	24.5%	217	105
PCT 4004	PCT	639	68	10.6%	37	31
	VBM	639	143	22.4%	104	37
PCT MAIL 4005	PCT	41	0	0.0%	0	0
	VBM	41	16	39.0%	10	6
PCT 4006	PCT	970	50	5.2%	27	22
	VBM	970	220	22.7%	142	78
PCT 4007	PCT	1190	62	5.2%	34	27
	VBM	1190	320	26.9%	192	122
PCT MAIL 4008	PCT	22	0	0.0%	0	0
	VBM	22	6	27.3%	4	1
PCT 4010	PCT	1229	74	6.0%	30	43
	VBM	1229	378	30.8%	275	92
PCT 4011	PCT	1340	85	6.3%	43	39
	VBM	1340	288	21.5%	174	108
PCT MAIL 4012	PCT	16	0	0.0%	0	0
PCT MAIL 4012	VBM	16	0	0.0%	0	0
PCT 4013	PCT	907	74	8.2%	40	30
	VBM	907	215	23.7%	131	80
PCT 4016	PCT	1252	59	4.7%	29	30
	VBM	1252	321	25.6%	239	76
PCT 4017	PCT	905	42	4.6%	26	15
	VBM	905	204	22.5%	159	40
PCT 4019	PCT	960	98	10.2%	51	39
	VBM	960	244	25.4%	162	72
PCT 4022	PCT	1188	115	9.7%	61	30
	VBM	1188	272	22.9%	189	78
PCT 4023	PCT	1133	118	10.4%	69	47
	VBM	1133	346	30.5%	213	129
PCT 4026	PCT	1157	81	7.0%	45	35
	VBM	1157	263	22.7%	167	92
PCT 4034	PCT	1169	117	10.0%	69	48
	VBM	1169	421	36.0%	267	146
PCT 4035	PCT	1129	89	7.9%	49	37
	VBM	1129	297	26.3%	203	89
PCT 4036	PCT	876	61	7.0%	27	32
	VBM	876	254	29.0%	167	84
PCT 4038	PCT	1151	109	9.5%	48	58
PCT 4038	VBM	1151	322	28.0%	205	113
PCT 4039	PCT	995	88	8.8%	58	30
	VBM	995	370	37.2%	251	106
PCT 4041	PCT	1336	110	8.2%	59	48
	VBM	1336	515	38.6%	346	161

9	City of Sunnyvale Measure C - City of Sunnyvale - Gun Safety
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure C - City of Sunnyvale - Gun Safety	
					YES	NO
PCT 4043	PCT	780	60	7.7%	36	23
	VBM	780	250	32.1%	161	81
PCT 4045	PCT	1223	81	6.6%	45	36
	VBM	1223	285	23.3%	184	95
PCT 4048	PCT	1404	99	7.1%	47	51
	VBM	1404	241	17.2%	167	69
PCT 4050	PCT	1255	51	4.1%	28	21
	VBM	1255	219	17.5%	153	61
PCT 4051	PCT	1341	64	4.8%	33	31
	VBM	1341	424	31.6%	297	121
PCT 4052	PCT	1313	96	7.3%	55	39
	VBM	1313	407	31.0%	276	124
PCT 4053	PCT	1371	154	11.2%	78	75
	VBM	1371	451	32.9%	297	145
PCT 4058	PCT	1148	62	5.4%	36	23
	VBM	1148	217	18.9%	132	84
PCT 4059	PCT	1400	84	6.0%	47	37
	VBM	1400	350	25.0%	229	118
PCT 4063	PCT	1455	68	4.7%	34	33
	VBM	1455	310	21.3%	200	107
PCT 4070	PCT	1321	88	6.7%	51	36
	VBM	1321	479	36.3%	331	138
PCT 4071	PCT	1313	130	9.9%	69	60
	VBM	1313	422	32.1%	252	156
PCT 4076	PCT	1073	87	8.1%	52	32
	VBM	1073	329	30.7%	222	103
PCT 4085	PCT	927	82	8.9%	53	29
	VBM	927	356	38.4%	251	101
PCT 4086	PCT	1179	90	7.6%	48	40
	VBM	1179	433	36.7%	302	120
PCT 4087	PCT	915	30	3.3%	16	13
	VBM	915	147	16.1%	112	23
PCT MAIL 4089	PCT	154	0	0.0%	0	0
	VBM	154	36	23.4%	30	3
PCT 4099	PCT	655	36	5.5%	17	18
	VBM	655	144	22.0%	104	34
PCT 4101	PCT	662	48	7.3%	17	29
	VBM	662	148	22.4%	110	37
PCT 4103	PCT	1307	114	8.7%	68	42
	VBM	1307	309	23.6%	208	95
PCT 4113	PCT	937	88	9.4%	59	26
	VBM	937	391	41.7%	282	105
PCT 4117	PCT	785	49	6.2%	33	16
	VBM	785	175	22.3%	130	38
PCT 4118	PCT	942	91	9.7%	59	32
	VBM	942	287	30.5%	198	87

9	City of Sunnyvale Measure C - City of Sunnyvale - Gun Safety
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		REGISTRATION	BALLOTS CAST	TURNOUT (%)	Measure C - City of Sunnyvale - Gun Safety	
					YES	NO
PCT 4119	PCT	1303	79	6.1%	43	32
	VBM	1303	308	23.5%	210	91
PCT 4122	PCT	1046	87	8.3%	49	38
	VBM	1046	314	30.0%	220	91
PCT 4126	PCT	1111	67	6.0%	46	19
	VBM	1111	350	31.5%	251	94
PCT 4128	PCT	870	55	6.3%	32	23
	VBM	870	248	28.5%	171	74
PCT 4129	PCT	1076	71	6.6%	46	25
	VBM	1076	363	33.7%	251	100
PCT 4130	PCT	927	62	6.7%	34	27
	VBM	927	235	25.4%	168	62
PCT 4131	PCT	1151	68	5.7%	38	26
	VBM	1151	182	15.8%	128	46
PCT 4154	PCT	1141	80	7.0%	44	34
PCT 4154	VBM	1141	296	25.9%	204	86
GRAND TOTALS		55,233	19,032	34.5%	12,404	6,235

# **EXHIBIT B**



# **EXHIBIT C**

## Firearms Transaction Record Part I - Over-the-Counter

**WARNING: You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. §§921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.**

Transferor's Transaction  
Serial Number (If any)

**Prepare in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on this form. "PLEASE PRINT."**

### Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name					
Last Name	First Name	Middle Name (If no middle name, state "NMN")			
2. Current Residence Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)					
Number and Street Address	City	County	State	ZIP Code	
3. Place of Birth		4. Height	5. Weight	6. Gender	
U.S. City and State	-OR- Foreign Country	Ft. _____ In. _____	(Lbs.)	<input type="checkbox"/> Male <input type="checkbox"/> Female	
7. Birth Date					
Month		Day		Year	
8. Social Security Number (Optional, but will help prevent misidentification)			9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.)		
10.a. Ethnicity		10.b. Race (Check one or more boxes.)			
<input type="checkbox"/> Hispanic or Latino		<input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Black or African American <input type="checkbox"/> White			
<input type="checkbox"/> Not Hispanic or Latino		<input type="checkbox"/> Asian <input type="checkbox"/> Native Hawaiian or Other Pacific Islander			
11. Answer questions 11.a. (see exceptions) through 11.i. and 12 (if applicable) by checking or marking "yes" or "no" in the boxes to the right of the questions.					
a. Are you the actual transferee/buyer of the firearm(s) listed on this form? <b>Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Instructions for Question 11.a.) Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.</b>				Yes <input type="checkbox"/>	No <input type="checkbox"/>
b. Are you under indictment or information in any court for a <b>felony</b> , or any other crime, for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)				Yes <input type="checkbox"/>	No <input type="checkbox"/>
c. Have you ever been convicted in any court of a <b>felony</b> , or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)				Yes <input type="checkbox"/>	No <input type="checkbox"/>
d. Are you a fugitive from justice?				Yes <input type="checkbox"/>	No <input type="checkbox"/>
e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?				Yes <input type="checkbox"/>	No <input type="checkbox"/>
f. Have you ever been adjudicated mentally defective (which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs) <b>OR</b> have you ever been committed to a mental institution? (See Instructions for Question 11.f.)				Yes <input type="checkbox"/>	No <input type="checkbox"/>
g. Have you been discharged from the Armed Forces under <b>dishonorable</b> conditions?				Yes <input type="checkbox"/>	No <input type="checkbox"/>
h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)				Yes <input type="checkbox"/>	No <input type="checkbox"/>
i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)				Yes <input type="checkbox"/>	No <input type="checkbox"/>
j. Have you ever renounced your United States citizenship?				Yes <input type="checkbox"/>	No <input type="checkbox"/>
k. Are you an alien <b>illegally</b> in the United States?				Yes <input type="checkbox"/>	No <input type="checkbox"/>
l. Are you an alien admitted to the United States under a nonimmigrant visa? (See Instructions for Question 11.l.) If you answered "no" to this question, do <b>NOT</b> respond to question 12 and proceed to question 13.				Yes <input type="checkbox"/>	No <input type="checkbox"/>
12. If you are an alien admitted to the United States under a nonimmigrant visa, do you fall within any of the exceptions set forth in the instructions? (If "yes," the licensee must complete question 20c.) (See Instructions for Question 12.) If question 11.l. is answered with a "no" response, then do <b>NOT</b> respond to question 12 and proceed to question 13.				Yes <input type="checkbox"/>	No <input type="checkbox"/>
13. What is your State of residence (if any)? (See Instructions for Question 13.)		14. What is your country of citizenship? (List/check more than one, if applicable. If you are a citizen of the United States, proceed to question 16.) <input type="checkbox"/> United States of America		15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number?	
		<input type="checkbox"/> Other (Specify) _____			





**Section D - Must Be Completed By Transferor (Seller)**

26. Manufacturer and/or Importer (If the manufacturer and importer are different, the FFL should include both.)	27. Model	28. Serial Number	29. Type (pistol, revolver, rifle, shotgun, receiver, frame, etc.) (See instructions for question 29)	30. Caliber or Gauge

30a. Total Number of Firearms (Please *handwrite* by printing e.g., one, two, three, etc. **Do not use numerals.**)

30b. Is any part of this transaction a Pawn Redemption?  Yes  No

30c. For Use by FFL (See Instructions for Question 30c.)

**Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days**

31. Trade/corporate name and address of transferor (seller) (Hand stamp may be used.)	32. Federal Firearms License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)
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**The Person Transferring The Firearm(s) Must Complete Questions 33-36. For Denied/Cancelled Transactions, The Person Who Completed Section B Must Complete Questions 33-35.**

**I certify that my answers in Sections B and D are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. On the basis of: (1) the statements in Section A (and Section C if the transfer does not occur on the day Section A was completed); (2) my verification of the identification noted in question 20a (and my reverification at the time of transfer if the transfer does not occur on the day Section A was completed); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.**

33. Transferor's/Seller's Name (Please print)	34. Transferor's/Seller's Signature	35. Transferor's/Seller's Title	36. Date Transferred
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**NOTICES, INSTRUCTIONS AND DEFINITIONS**

**Purpose of the Form:** The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he or she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. This form should only be used for sales or transfers where the seller is licensed under 18 U.S.C. § 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. In determining the lawfulness of the sale or delivery of a long gun (rifle or shotgun) to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State.

After the seller has completed the firearms transaction, he or she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his or her permanent records. Such Forms 4473 must be retained for at least 20 years. Filing may be chronological (by date), alphabetical (by name), or numerical (by transaction serial number), as long as all of the seller's completed Forms 4473 are filed in the same manner. **FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED:** If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not complete after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his or her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name) or chronological (by date of transferee's certification) order.

If you or the buyer discover that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and you or the buyer wish to make a record of your discovery, then photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. You only should make changes to Sections B and D. The buyer should only make changes to Sections A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of your permanent records.

**Over-the-Counter Transaction:** The sale or other disposition of a firearm by a seller to a buyer, at the seller's licensed premises. This includes the sale or other disposition of a rifle or shotgun to a nonresident buyer on such premises.

**State Laws and Published Ordinances:** The publication (ATF P 5300.5) of State firearms laws and local ordinances ATF distributes to licensees.

**Exportation of Firearms:** The State or Commerce Departments may require you to obtain a license prior to export.

**Section A**

**Question 1. Transferee's Full Name:** The buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the seller. Two persons (other than the seller) must then sign as witnesses to the buyer's answers and signature.

When the buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the

business must complete Section A of the form with his or her personal information, sign Section A, and attach a written statement, executed under penalties of perjury, stating: (A) the firearm is being acquired for the use of and will be the property of that business entity and (B) the name and address of that business entity. If the buyer's name in question 1. is illegible, the seller must print the buyer's name above the name written by the buyer.

**Question 2. Current Residence Address:** U.S. Postal abbreviations are acceptable. (*e.g., St., Rd., Dr., PA, NC, etc.*). Address cannot be a post office box. County and Parish are one and the same.

If the buyer is a member of the Armed Forces on active duty acquiring a firearm in the State where his or her permanent duty station is located, but does not reside at his or her permanent duty station, the buyer must list both his or her permanent duty station address and his or her residence address in response to question 2. If you are a U.S. citizen with two States of residence, you should list your current residence address in response to question 2 (*e.g., if you are buying a firearm while staying at your weekend home in State X, you should list your address in State X in response to question 2*).

**Question 9. Unique Personal Identification Number (UPIN):** For purchasers approved to have information maintained about them in the FBI NICS Voluntary Appeal File, NICS will provide them with a Unique Personal Identification Number, which the buyer should record in question 9. The licensee may be asked to provide the UPIN to NICS or the State.

**Question 11.a. Actual Transferee/Buyer:** For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself (*e.g., redeeming the firearm from pawn/retrieving it from consignment, firearm raffle winner*). You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party. **ACTUAL TRANSFEREE/BUYER EXAMPLES:** Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer "NO" to question 11.a. The licensee may not transfer the firearm to Mr. Jones. However, if Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual transferee/buyer of the firearm and should answer "YES" to question 11.a. However, you may not transfer a firearm to any person you know or have reasonable cause to believe is prohibited under 18 U.S.C. § 922(g), (n), or (x). **Please note: EXCEPTION:** If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.

**Question 11.b. - 11.i. Definition of Prohibited Person:** Generally, 18 U.S.C. § 922 prohibits the shipment, transportation, receipt, or possession in or affecting interstate commerce of a firearm by one who: has been convicted of a misdemeanor crime of domestic violence; has been convicted of a felony, or any other crime, punishable by imprisonment for a term exceeding one year (*this does not include State misdemeanors punishable by imprisonment of two years or less*); is a fugitive from justice; is an unlawful user of, or addicted to, marijuana or any depressant, stimulant, or narcotic drug, or any other controlled substance; has been adjudicated mentally defective or has been committed to a mental institution; has been discharged from the Armed Forces under dishonorable conditions; has renounced his or her U.S. citizenship; is an alien illegally in the United States or an alien admitted to the United States under a nonimmigrant visa; or is subject to certain restraining orders. Furthermore, section 922 prohibits the shipment, transportation, or receipt in or affecting interstate commerce of a firearm by one who is under indictment or information for a felony, or any other crime, punishable by imprisonment for a term exceeding one year.

**Question 11.b. Under Indictment or Information or Convicted in any Court:** An indictment, information, or conviction in any Federal, State, or local court. An information is a formal accusation of a crime verified by a prosecutor.

**EXCEPTION to 11.c. and 11.i.:** A person who has been convicted of a felony, or any other crime, for which the judge could have imprisoned the person for more than one year, or who has been convicted of a misdemeanor crime of domestic violence, is not prohibited from purchasing, receiving, or possessing a firearm if: (1) under the law of

the jurisdiction where the conviction occurred, the person has been pardoned, the conviction has been expunged or set aside, or the person has had their civil rights (*the right to vote, sit on a jury, and hold public office*) taken away and later restored AND (2) the person is not prohibited by the law of the jurisdiction where the conviction occurred from receiving or possessing firearms. Persons subject to this exception should answer "no" to 11.c. or 11.i., as applicable.

**Question 11.f. Adjudicated Mentally Defective:** A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) is a danger to himself or to others; or (2) lacks the mental capacity to contract or manage his own affairs. This term shall include: (1) a finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility.

**Committed to a Mental Institution:** A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution. Please also refer to Question 11.c. for the definition of a prohibited person.

**EXCEPTION to 11. f. NICS Improvement Amendments Act of 2007:** A person who has been adjudicated as a mental defective or committed to a mental institution is not prohibited if: (1) the person was adjudicated or committed by a **department or agency of the Federal Government**, such as the United States Department of Veteran's Affairs ("VA") (as opposed to a State court, State board, or other lawful State authority); **and** (2) either: (a) the person's adjudication or commitment for mental incompetency was set-aside or expunged by the adjudicating/committing agency; (b) the person has been fully released or discharged from all mandatory treatment, supervision, or monitoring by the agency; or (c) the person was found by the agency to no longer suffer from the mental health condition that served as the basis of the initial adjudication.

**Persons who fit this exception should answer "no" to Item 11.f.** This exception does not apply to any person who was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice.

**Question 11.h. Definition of Restraining Order:** Under 18 U.S.C. § 922, firearms may not be sold to or received by persons subject to a court order that: (A) was issued after a hearing which the person received actual notice of and had an opportunity to participate in; (B) restrains such person from harassing, stalking, or threatening an intimate partner or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. An "intimate partner" of a person is: the spouse or former spouse of the person, the parent of a child of the person, or an individual who cohabitates or cohabitating with the person.

**Question 11.i. Definition of Misdemeanor Crime of Domestic Violence:** A Federal, State, local, or tribal offense that is a misdemeanor under Federal, State, or tribal law and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with, or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. The term includes all misdemeanors that have as an element the use or attempted use of physical force or the threatened use of a deadly weapon (*e.g., assault and battery*), if the offense is committed by one of the defined parties. (*See Exception to 11.c. and 11.i.*) A person who has been convicted of a misdemeanor crime of domestic violence also is not prohibited unless: (1) the person was represented by a lawyer or gave up the right to a lawyer; or (2) if the person was entitled to a jury, was tried by a jury, or gave up the right to a jury trial. Persons subject to this exception should answer "no" to 11.i.

**Question 11.I.** An alien admitted to the United States under a nonimmigrant visa includes, among others, persons visiting the United States temporarily for business or pleasure, persons studying in the United States who maintain a residence abroad, and certain temporary foreign workers. The definition does NOT include permanent resident aliens nor does it apply to nonimmigrant aliens admitted to the United States pursuant to either the Visa Waiver Program or to regulations otherwise exempting them from visa requirements.

An alien admitted to the United States under a nonimmigrant visa who responds "yes" to question 11.I. must provide a response to question 12 indicating whether he/she qualifies under an exception.

**Question 12. Exceptions to the Nonimmigrant Alien Response:** An alien admitted to the United States under a nonimmigrant visa is not prohibited from purchasing, receiving, or possessing a firearm if the alien: (1) is in possession of a hunting license or permit lawfully issued by the Federal Government, a State, or local government, or an Indian tribe federally recognized by the Bureau of Indian Affairs, which is valid and unexpired; (2) was admitted to the United States for lawful hunting or sporting purposes; (3) has received a waiver from the prohibition from the Attorney General of the United States; (4) is an official representative of a foreign government who is accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; (5) is en route to or from another country to which that alien is accredited; (6) is an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or (7) is a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

Persons subject to one of these exceptions should answer "yes" to questions 11.I. and 12 and provide documentation such as a copy of the hunting license or letter granting the waiver, which must be recorded in 20.c. If the transferee (buyer) answered "yes" to this question, the licensee must complete 20.c.

The seller should verify supporting documentation provided by the purchaser and must attach a copy of the provided documentation to this ATF Form 4473, Firearms Transaction Record.

**Question 13. State of Residence:** The State in which an individual resides. An individual resides in a State if he or she is present in a State with the intention of making a home in that State. If an individual is a member of the Armed Forces on active duty, his or her State of residence also is the State in which his or her permanent duty station is located.

If you are a U.S. citizen with two States of residence, you should list your current residence address in response to question 2 (e.g., *if you are buying a firearm while staying at your weekend home in State X, you should list your address in State X in response to question 2.*)

**Question 16. Certification Definition of Engaged in the Business:** Under 18 U.S.C. § 922 (a)(1), it is unlawful for a person to engage in the business of dealing in firearms without a license. A person is engaged in the business of dealing in firearms if he or she devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms. A license is not required of a person who only makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his or her personal collection of firearms.

## Section B

**Question 18. Type of Firearm(s):** Check all boxes that apply. "Other" refers to frames, receivers and other firearms that are not either handgun or long guns (rifles or shotguns), such as firearms having a pistol grip that expel a shotgun shell, or National Firearms Act (NFA) firearms.

If a frame or receiver can only be made into a long gun (*rifle or shotgun*), it is still a frame or receiver not a handgun or long gun. However, they still are "firearms" by definition, and subject to the same

GCA limitations as any other firearms. See Section 921(a)(3)(b). 18 U.S.C. Section 922(b)(1) makes it unlawful for a licensee to sell any firearm other than a shotgun or rifle to any person under the age of 21. Since a frame or receiver for a firearm, to include one that can only be made into a long gun, is a "firearm other than a shotgun or rifle," it cannot be transferred to anyone under the age of 21. Also, note that multiple sales forms are not required for frames or receivers of any firearms, or pistol grip shotguns, since they are not "pistols or revolvers" under Section 923(g)(3)(a).

**Question 19. Gun Shows:** If sale at gun show or other qualifying event sponsored by any national, State, or local organization, as authorized by 27 CFR § 478.100, the seller must record the name of event and the location (*city and State*) of the sale in question 19.

**Question 20a. Identification:** List issuing authority (e.g., *State, County or Municipality*) and type of identification presented (e.g., *Virginia driver's license (VA DL), or other valid government-issued identification*).

**Know Your Customer:** Before a licensee may sell or deliver a firearm to a nonlicensee, the licensee must establish the identity, place of residence, and age of the buyer. The buyer **must** provide a valid government-issued photo identification to the seller that contains the buyer's name, residence address, and date of birth. The licensee must record the type, identification number, and expiration date (*if any*) of the identification in question 20.a. A driver's license or an identification card issued by a State in place of a license is acceptable. Social Security cards are not acceptable because no address, date of birth, or photograph is shown on the cards. A combination of government-issued documents may be provided. For example, if a U.S. citizen has two States of residence and is trying to buy a handgun in State X, he may provide a driver's license (*showing his name, date of birth, and photograph*) issued by State Y and another government-issued document (*such as a tax document*) from State X showing his residence address. If the buyer is a member of the Armed Forces on active duty acquiring a firearm in the State where his or her permanent duty station is located, but he or she has a driver's license from another State, you should list the buyer's military identification card and official orders showing where his or her permanent duty station is located in response to question 20.a.

**Question 20.b. Alternate Documentation:** Licensees may accept a combination of valid government-issued documents to satisfy the identification document requirements of the law. The required valid government-issued photo identification document bearing the name, photograph, and date of birth of transferee may be supplemented by another valid, government-issued document showing the transferee's residence address. This alternate documentation should be recorded in question 20.b., with issuing authority and type of identification presented. A combination of government-issued documents may be provided. For example, if a U.S. citizen has two States of residence and is trying to buy a handgun in State X, he may provide a driver's license (*showing his name, date of birth, and photograph*) issued by State Y and another government-issued document (*such as a tax document*) from State X showing his residence address.

**Question 20c. Documentation for Aliens Admitted to the United States Under a Nonimmigrant Visa:** See instructions for Question 11.I. Types of acceptable documents would include a valid hunting license lawfully issued in the United States or a letter from the U.S. Attorney General granting a waiver.

**Question(s) 21, 22, 23, NICS BACKGROUND CHECKS:** 18 U.S.C. § 922(t) requires that prior to transferring any firearm to an unlicensed person, a licensed importer, manufacturer, or dealer must first contact the National Instant Criminal Background Check System (NICS). NICS will advise the licensee whether the system finds any information that the purchaser is prohibited by law from possessing or receiving a firearm. For purposes of this form, contacts to NICS include contacts to State agencies designated to conduct NICS checks for the Federal Government. **WARNING:** Any seller who transfers a firearm to any person they know or have reasonable cause to believe is prohibited from receiving or possessing a firearm violates the law, even if the seller has complied with the background check requirements of the Brady law.

After the buyer has completed Section A of the form and the licensee has completed questions 18-20, and before transferring the firearm, the licensee must contact NICS (*read below for NICS check exceptions.*) However, the licensee should NOT contact NICS and should stop the transaction if: the

buyer answers "no" to question 11.a.; the buyer answers "yes" to any question in 11.b.-11.l., unless the buyer only has answered "yes" to question 11.l. and also answers "yes" to question 12; or the buyer is unable to provide the documentation required by question 20.a, b, or c.

At the time that NICS is contacted, the licensee must record in question 21.a-c: the date of contact, the NICS (or State) transaction number, and the initial response provided by NICS or the State. The licensee may record the Missing Disposition Information (MDI) date in 21.c. that NICS provides for delayed transactions (States do not provide this number). If the licensee receives a "delayed" response, before transferring the firearm, the licensee must record in question 21.d. any response later provided by NICS or the State or that no resolution was provided within 3 business days. If the licensee receives a response from NICS or the State after the firearm has been transferred, he or she must record this information in question 21.e. **Note:** States acting as points of contact for NICS checks may use terms other than "proceed," "delayed," "cancelled," or "denied." In such cases, the licensee should check the box that corresponds to the State's response. Some States may not provide a transaction number for denials. However, if a firearm is transferred within the three business day period, a transaction number is required.

**NICS Responses:** If NICS provides a "proceed" response, the transaction may proceed. If NICS provides a "cancelled" response, the seller is prohibited from transferring the firearm to the buyer. If NICS provides a "denied" response, the seller is prohibited from transferring the firearm to the buyer. If NICS provides a "delayed" response, the seller is prohibited from transferring the firearm unless 3 business days have elapsed and, before the transfer, NICS or the State has not advised the seller that the buyer's receipt or possession of the firearm would be in violation of law. (See 27 CFR § 478.102(a) for an example of how to calculate 3 business days.) If NICS provides a "delayed" response, NICS also will provide a Missing Disposition Information (MDI) date that calculates the 3 business days and reflects when the firearm(s) can be transferred under Federal law. States may not provide an MDI date. *Please note State law may impose a waiting period on transferring firearms.*

**EXCEPTIONS TO NICS CHECK:** A NICS check is not required if the transfer qualifies for any of the exceptions in 27 CFR § 478.102(d). Generally these include: (a) transfers where the buyer has presented the licensee with a permit or license that allows the buyer to possess, acquire, or carry a firearm, and the permit has been recognized by ATF as a valid alternative to the NICS check requirement; (b) transfers of National Firearms Act weapons approved by ATF; or (c) transfers certified by ATF as exempt because compliance with the NICS check requirements is impracticable. See 27 CFR § 478.102(d) for a detailed explanation. If the transfer qualifies for one of these exceptions, the licensee must obtain the documentation required by 27 CFR § 478.131. A firearm must **not** be transferred to any buyer who fails to provide such documentation.

### Section C

**Question 24 and 25. Transfer on a Different Day and Recertification:** If the transfer takes place on a different day from the date that the buyer signed Section A, the licensee must again check the photo identification of the buyer at the time of transfer, and the buyer must complete the recertification in Section C at the time of transfer.

### Section D

Immediately prior to transferring the firearm, the seller must complete all of the questions in Section D. In addition to completing this form, the seller must report any multiple sale or other disposition of pistols or revolver on ATF Form 3310.4 (see 27 CFR § 478.126a).

**Question(s) 26, 27, 28, 29 and 30, Firearm(s) Description:** These blocks should be completed with the firearm(s) information. Firearms manufactured after 1968 should all be marked with a serial number. Should you acquire a firearm that is not marked with a serial number; you may answer question 28 with "NSN" (No Serial Number), "N/A" or "None."

If more than five firearms are involved in a transaction, the information required by Section D, questions 26-30, must be provided for the additional firearms on a separate sheet of paper, which must be attached to the ATF Form 4473 covering the transaction.

**Types of firearms include:** pistol, revolver, rifle, shotgun, receiver, frame and other firearms that are not either handguns or long guns (rifles or shotguns), such as firearms having a pistol grip that expel a shotgun shell or National Firearms Act (NFA) firearms.

Additional firearms purchases by the same buyer may not be added to the form after the seller has signed and dated it. A buyer who wishes to purchase additional firearms after the seller has signed and dated the form must complete a new ATF Form 4473. The seller must conduct a new NICS check.

**Question 30c.** This box is for the FFL's use in recording any information he or she finds necessary to conduct business.

**Question 32 Federal Firearms License Number:** Must contain at least the first three and last five digits of the FFL number, for instance X-XX-XXXXX.

**Question 33-35 Transferor/Sellers Information:** For "denied" and "cancelled" NICS transactions, the person who completed Section B must complete Section D, questions 33-35.

### Privacy Act Information

Solicitation of this information is authorized under 18 U.S.C. § 923(g). Disclosure of the individual's Social Security number is voluntary. The number may be used to verify the buyer's identity.

### Paperwork Reduction Act Notice

The information required on this form is in accordance with the Paperwork Reduction Act of 1995. The purpose of the information is to determine the eligibility of the transferee to receive firearms under Federal law. The information is subject to inspection by ATF officers and is required by 18 U.S.C. §§ 922 and 923.

The estimated average burden associated with this collection is 30 minutes per respondent or recordkeeper, depending on individual circumstances. Comments about the accuracy of this burden estimate and suggestions for reducing it should be directed to Reports Management Officer, Document Services Section, Bureau of Alcohol, Tobacco, Firearms and Explosives, Washington, DC 20226.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Confidentiality is not assured.

# **EXHIBIT D**

# **EXHIBIT E**

# **EXHIBIT F**



# THE LIMITS OF FOURTH AMENDMENT INJUNCTIONS

ORIN S. KERR\*

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## INTRODUCTION

On July 21, 2006, a District Court Judge in Ohio entered a remarkable injunction in a civil case called *Warshak v. United States*.<sup>1</sup> Stephen Warshak ran a massive fraud scheme selling a “male enhancement” pill named Enzyte that was widely advertised online.<sup>2</sup> During the criminal investigation of his company, federal agents obtained Warshak’s personal e-mail from his Internet service provider with a court order obtained under 18 U.S.C. § 2703(d), a provision of the Stored Communications Act that permits orders to be issued with less than probable cause. Warshak responded with a civil suit seeking both damages and injunctive relief on the ground that obtaining his e-mails with less process than a warrant violated his Fourth Amendment rights. District Judge Susan Dlott granted Warshak’s request for injunctive relief with the following order:

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1. *See Warshak v. United States*, No. 1:06-CV-357, 2006 WL 5230332, at \*1 (S.D. Ohio July 21, 2006).

2. Warshak has since been convicted and sentenced. Conrad de Aenlle, *Heading to Prison*, N.Y. TIMES, Aug. 31, 2008, at BU2.

The United States is accordingly ENJOINED, pending final judgment on the merits of Plaintiffs' claims, from seizing, pursuant to court order under 18 U.S.C. § 2703(d), the contents of any personal email account maintained by an Internet Service Provider in the name of any resident of the Southern District of Ohio without providing the relevant account holder or subscriber prior notice and an opportunity to be heard on any complaint, motion, or other pleading seeking issuance of such an order.<sup>3</sup>

The rationale behind Judge Dlott's order was that the injunction was needed to ensure that the government did not obtain the contents of personal e-mail accounts in ways that violated the Fourth Amendment. On appeal, the Sixth Circuit modified the injunction slightly but agreed with the basic approach of the district court.<sup>4</sup> In the Sixth Circuit's view, the court's job was to craft an injunction designed to ensure that procedures used to compel e-mail complied with the Fourth Amendment. It therefore considered all of the ways that the government could obtain e-mail from an account, and then crafted the injunction in a way that satisfied the court that no Fourth Amendment rights could be infringed.<sup>5</sup>

The approach of the district court and circuit panel in *Warshak* did not ultimately stand: The *en banc* court disagreed with the original panel and reversed.<sup>6</sup> At the same time, the district court and panel decision raise interesting questions of Fourth Amendment law that have received surprisingly little scholarly attention. When is injunctive relief appropriate in Fourth Amendment cases? Should courts feel free to craft injunctive relief to avoid Fourth Amendment defects? Or is there something wrong, either as a matter of doctrine or policy, with crafting injunctions in Fourth Amendment cases?

This essay will provide answers to these questions. The first part argues that as a matter of history and practice, injunctive relief has been quite rare in Fourth Amendment cases. Fourth Amendment injunctions are permitted, but they have always stayed limited to a very specific set of facts. As a practical matter, injunctive relief has been used as an on-off switch for carefully-defined practices: courts ruling on the injunction either allow the specific practice or prohibit it. The most significant doctrinal hook for this limitation is Article III standing: Injunctive relief requires a "real and immediate threat" of future injury to establish a case

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3. See *Warshak*, 2006 WL 5230332 at \*8.

4. *Warshak v. United States*, 490 F.3d 455, 460 (6th Cir. 2007).

5. See *id.*

6. *Warshak v. United States*, 532 F.3d 521, 534 (6th Cir. 2008).

or controversy.<sup>7</sup> The precise meaning of that requirement remains murky, but it arguably means that a plaintiff must show a real and immediate threat of a highly specific set of facts occurring.

My second point is that as a matter of normative policy, any ambiguity in the current state of the law should be resolved against imposing broad Fourth Amendment injunctions. At first blush, it may seem that crafting a broad injunction to avoid Fourth Amendment violations appropriately shapes the remedy to the wrong. However, crafting broad injunctive relief forces courts to assume duties that they are not competent to handle. Fourth Amendment doctrine is tremendously fact-specific: every fact pattern is different, and even the exceptions to the exceptions have their own exceptions. Courts are poorly suited to design broad injunctive relief in this setting: they lack the ability to predict how the government may act and the fact patterns that may arise. Courts should therefore decline to craft Fourth Amendment injunctions involving hypothetical facts. Courts should apply the same Fourth Amendment standards in cases seeking injunctive relief that they apply elsewhere: courts should rule on one set of facts rather than classes of facts.

#### I. THE LAW AND PRACTICE OF FOURTH AMENDMENT INJUNCTIONS

A defining characteristic of Fourth Amendment doctrine is that it develops in a case-by-case fashion.<sup>8</sup> Every decision is based on concrete facts.<sup>9</sup> In the usual context of a motion to suppress, the defendant files a motion to suppress after the search or seizure has occurred, and the government must show that the exact search that occurred satisfied the Constitution. The parties and the judge all look back to a specific moment when a specific law enforcement officer took a specific step that uncovered specific evidence.<sup>10</sup>

When the facts are made clear, either on the papers or in a hearing, the court applies the complex framework of Fourth Amendment doctrine to that specific set of facts. It runs through the usual questions of Fourth Amendment law: Did any searches occur? Any seizures? If so, was a valid warrant obtained? If not, did a specific exception to the warrant

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7. *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983).

8. *Saucier v. Katz*, 533 U.S. 194, 205-06 (2001); *United States v. Brown*, 635 F.2d 1207, 1211 (6th Cir. 1980).

9. *See v. City of Seattle*, 387 U.S. 541, 546 (1967).

10. *See, e.g., Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 448-49 (1990) (noting the "extensive testimony" heard to determine the constitutionality of a highway checkpoint program).

requirement apply, such as exigent circumstances or consent that rendered the warrantless search or seizure reasonable? The court then issues an opinion concluding whether the Fourth Amendment was violated, and in some cases, whether the Fourth Amendment violation should lead to suppression of the evidence.

In civil cases seeking injunctive relief, the remedy is necessarily prospective rather than retrospective. That is, courts prohibit future acts rather than impose liability for past ones. In this environment, injunctive relief is quite rare. Courts have generally limited injunctive relief to ongoing programs such as a drug testing policies or road blocks. Although the injunctive remedy technically is prospective, as a practical matter it acts just like a retrospective remedy. Courts typically limit the relief to the specific established the facts of the ongoing program.

Two roadblock cases provide helpful illustrations of this narrow use of injunctive relief. In *Michigan Dept. of State Police v. Sitz*,<sup>11</sup> a group of Michigan drivers filed a civil action against the Michigan Department of State Police seeking declaratory and injunctive relief from potential subjection to drunk driving checkpoints. The trial court "heard extensive testimony"<sup>12</sup> about Michigan's drunk driving checkpoints, and then held that on balance the program violated the Fourth Amendment and should be prohibited. The U.S. Supreme Court disagreed, holding that the drunk driving checkpoints were constitutionally reasonable and therefore consistent with the Fourth Amendment.<sup>13</sup>

In contrast, in another road block case, *City of Indianapolis v. Edmond*,<sup>14</sup> a class of Indianapolis motorists filed a lawsuit seeking injunctive relief against an Indianapolis check point designed to find drugs. The two sides stipulated to the facts as to exactly how the program worked,<sup>15</sup> and the U.S. Supreme Court ruled that, as stipulated, the program was unconstitutional and should be enjoined.<sup>16</sup> We can see the same approach with cases involving drug testing. A typical example is *Skinner v. Railway Labor Executives' Ass'n*,<sup>17</sup> a labor union of railway employees sued to enjoin detailed regulations that governed drug and alcohol testing of railroad employees. The Court ruled that the specific procedures permitted were reasonable and therefore constitutional.

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11. See generally *id.* at 448.

12. *Id.*

13. *Id.* at 455 ("In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment.")

14. See generally *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

15. *Id.* at 35-36.

16. *Id.* at 48.

17. See generally 489 U.S. 602 (1989).

The basic idea, both in the drug testing and the road block cases, is that the fact-sensitivity of Fourth Amendment law does not prohibit injunctive relief so long as the facts can be either stipulated or found at trial or otherwise established with reasonable detail. The court can take the facts of an existing or proposed program and treat it as a past set of facts rather than a current or future one. It can then rule on whether these sets of facts are within the Fourth Amendment or beyond it.

The constitutional doctrine forcing Fourth Amendment injunctions into this narrow role is the Article III “case or controversy” requirement.<sup>18</sup> The case or controversy requirement limits the power of the federal courts by prohibiting federal courts from acting in the absence of actual injury. The federal courts cannot reach out and decide issues without an actual dispute before them; they cannot act based merely on an “[a]bstract injury.”<sup>19</sup> Under the case or controversy requirement, the federal courts cannot act based on hypothetical facts; they need specific facts (or at least allegations of specific facts<sup>20</sup>) before announcing how the law applies.

Applying the case or controversy to injunctive relief raises a difficult question: How can a plaintiff prove an actual injury based on something that hasn’t happened yet? Injunctions are prospective in nature: the court orders a party not to do something in the future. But it’s hard to predict the future, and it’s therefore often hard to prove that a specific injury will occur. We might know that a type of harm will occur without knowing its precise circumstances. The key question is, how clearly does the plaintiff need to prove a specific set of facts likely in the future to satisfy the case or controversy requirement? Is a likelihood of the general category of harm enough? Or must the plaintiff prove the very specific set of facts?

The case law hasn’t settled this issue definitively. However, the Supreme Court’s cases suggest that the plaintiff must show a likelihood of a *specific set of facts*, rather than a likelihood of a general category of facts. That is, the plaintiff must show that the relevant facts that are needed to assess the constitutionality of the act are likely to occur. For example, in *City of Los Angeles v. Lyons*,<sup>21</sup> Lyons sued the City of Los Angeles after a city police officer had subjected him to a “chokehold” that rendered him unconscious. Lyons sought damages and also

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18. See *Lyons*, 461 U.S. at 95.

19. See *id.* at 101.

20. The federal courts do have the power to act on alleged facts that may or may not prove accurate. For example, if a plaintiff alleges facts in a complaint, the court will take those alleged facts as true for the purposes of a dismissal under FED. R. CIV. P. 12(b)(6).

21. See *Lyons*, 461 U.S. at 95.

injunctive relief; the injunctive relief asked the Court to block the LA police force from using chokeholds "except in situations where the proposed victim of said control reasonably appears to be threatening the immediate use of deadly force."<sup>22</sup> The district court found that the LA police department had authorized its officers to use chokeholds "in situations where no one is threatened by death or grievous bodily harm,"<sup>23</sup> and that the officers were insufficiently trained, and that the chokeholds were very dangerous. The district court then, enjoined the use of chokeholds "under circumstances which do not threaten death or serious bodily injury."<sup>24</sup>

The Supreme Court overturned the injunction on the ground that Lyons had not established a case or controversy. To establish a case or controversy permitting injunctive relief, the Court held, Lyons had to show "a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part."<sup>25</sup> It wasn't enough that Lyons might be stopped, or that he might be subject to a chokehold. Nor was it enough that someone in Los Angeles might be subject to an illegal chokehold. To establish standing, Lyons needed to show a real and immediate threat that he himself would be stopped and would be subject to a chokehold that rendered him unconscious without any provocation or resistance. In other words, Lyons had to show a likelihood of all of the relevant facts that had established the illegality of the first act occurring again to him.

Lyons echoed and relied on an earlier decision, *Rizzo v. Goode*,<sup>26</sup> which offers a less clear holding but provides helpful context to understand Lyons. In *Rizzo*, a district court judge in Philadelphia had entered a broad injunctive order in a class action lawsuit against the mayor, the City Managing Director, and the Police Commissioner designed to reform the conduct of the Philadelphia police.<sup>27</sup> The plaintiffs had alleged widescale lawbreaking by the police, and the district court judge heard 250 witnesses over 21 days of hearings to assess the problem.<sup>28</sup> During the trial, the court documented about 20 specific cases in which individual officers had violated the law.<sup>29</sup> The district court judge concluded that a comprehensive program of equitable relief was necessary to reform police practices among the Philadelphia police.

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22. *Id.* at 98 (quoting the complaint).

23. *Id.*

24. *Id.* at 100.

25. *Id.* at 96.

26. *See* 423 U.S. 362 (1976).

27. *Id.* at 362-63.

28. *Id.* at 367.

29. *Id.* at 373.

When the case came before the Supreme Court, the Court ruled that the district court had no Article III power to enter such an injunction because the claim for a case or controversy was based only on proof of about 20 past incidents in a city with 7,500 policemen and 3 million inhabitants.<sup>30</sup> This evidence did not directly implicate the Mayor, the police chief, or the City Managing director: they were not actually responsible for the wrongdoing. More broadly, the principles of federalism did not permit a federal court to interfere so directly with the internal operations of state law enforcement agencies: "The scope of federal equity power" could not "be extended to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees."<sup>31</sup> Equitable relief, the Court stressed, was "to be used sparingly, and only in a clear and plain case."<sup>32</sup>

*Rizzo* and *Lyons* show that injunctive relief needs to be narrow in police conduct cases, but they do not clearly settle just how specific a plaintiff's claims must be to trigger injunctive relief. I will therefore turn to the policy question: How should courts construe the case and controversy requirement in Fourth Amendment cases? Should they require proof that the very specific set of facts alleged will reoccur, or only that general class of facts?

## II. THE DIFFICULTY WITH BROAD FOURTH AMENDMENT INJUNCTIONS

From a policy standpoint, the fact-specific nature of Fourth Amendment rulemaking counsels strongly against broad Fourth Amendment injunctions. Fourth Amendment rules are almost always fact-specific: most rules have exceptions, and the exceptions have their own exceptions. As a result, it is difficult for a court to pronounce how the Fourth Amendment might apply to a general set of facts. To do so successfully, a court would need to both predict all of the factual scenarios that might arise and answer exactly how the Fourth Amendment would apply to all of them.

Courts are not competent to do this accurately. In litigation, litigants present competing arguments as to how the law applies to a specific set of facts. But courts and litigants are poorly suited to identify the full range of fact patterns that might arise and then apply the law to it. Efforts to do so likely will lead to injunctions that are vastly

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30. *Id.*

31. *Id.* at 378.

32. *Id.* at 378 (citing *Irwin v. Dixon*, 50 U.S. 10, 33 (1850)).

underinclusive, vastly overinclusive, or hopelessly vague. As a district court judge once noted in rejecting a claim for broad injunctive relief under the Fourth Amendment, "the myriad factual situations in which [Fourth Amendment] issues can arise are so varied, and the boundaries in some areas of the law are so nebulous, that any attempt at broad-spectrum injunctive relief should be avoided. Courts are simply not equipped to supervise the day-to-day operations of police officers by injunction."<sup>33</sup>

Perhaps the best way to prove this point is with an example. Imagine Peter Plaintiff's house was raided by the local police without a warrant. Peter believes that the police may do this again, so he brings a Fourth Amendment claim against the police seeking an injunction against the warrantless entry of his home. At first blush, this might seem reasonable: After all, the Fourth Amendment normally requires the police to obtain a warrant before entering a home. Imagine you are a federal district court judge, and you want to make sure the police don't violate Peter Plaintiff's Fourth Amendment rights any more. You decide you will grant the injunction.

But what should the injunction say? For your first draft, you write out the following sentence: "The government is enjoined from entering Plaintiff's home without a valid warrant." But wait, you think, that's too broad. There are several exceptions to the warrant requirement, such as exigent circumstances<sup>34</sup> and consent.<sup>35</sup> These exceptions allow the police to enter the home without a warrant. So a second draft might try to track the Supreme Court's decisions on those exceptions and say the following: "The government is enjoined from entering a home without a valid warrant unless exigent circumstances exist or the police have actual or apparent authority from an individual with common authority to consent."

But that's too broad as well. The Supreme Court has allowed warrantless home inspections for regulatory reasons.<sup>36</sup> Plus, there is no constitutional prohibition on entry into a home when the home is open to the public, and therefore, protected by the Fourth Amendment.<sup>37</sup> The third draft might try to take account of these doctrines and say something like the following: "The government is enjoined from entering a home without a valid warrant unless exigent circumstances

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33. *Hughes v. Rizzo*, 282 F.Supp. 881, 885 (E.D.Pa. 1968).

34. *See, e.g., Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006).

35. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990).

36. *See Camara v. Municipal Court*, 387 U.S. 523 (1967).

37. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (Harlan, J., concurring) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").



exist; or the police have actual or apparent authority from an individual with common authority to consent; or the home is being inspected by housing inspectors in a reasonable way; or the home is open to the public.”

Does that do the job? No, it doesn't. The Supreme Court has allowed warrantless entry into a home to escort an individual who has just been arrested outside the home and needs to obtain materials for jail.<sup>38</sup> Lower courts have also allowed warrantless entry into homes when the resident does not have permission from the property owner to be there, such as the case with a squatter or a person who has stopped paying rent and has been evicted.<sup>39</sup> In addition, courts have allowed warrantless entries into homes when the homeowner invites an undercover officer or confidential informant inside to buy drugs; the undercover sees illegal drugs inside and signals to the officers; and the undercover invites others to enter the home.<sup>40</sup> Any injunction would have to recognize these exceptions, too.

You can see where this is going. If a court wants to draft an injunction that accurately maps how the Fourth Amendment applies to home searches, it needs to answer a seemingly limitless set of hypothetical situations addressing a seemingly limitless set of possible exceptions to whatever default rule the court creates. To reflect the scope of Fourth Amendment protections accurately, the proposed injunction would have to reach a conclusion on the precise scope of every possible exception to the warrant requirement, whether recognized already by the courts or not. For example, consider the plausible argument that the Fourth Amendment does not require a warrant to search a home to conduct foreign intelligence from agents of foreign powers—and if so, what kinds of warrants are permitted.<sup>41</sup> Right now, there are no cases on the question. However, the injunction presumably would need to rule on this issue, as otherwise it might end up blocking warrantless searches that the Fourth Amendment would permit.

Judges are smart people. But not even the smartest judge could craft such rules prospectively in a clear and accurate way. The case-by-case development of Fourth Amendment law normally requires extensive briefing from parties as to how the Fourth Amendment applies to a *single*

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38. See *Washington v. Chrisman*, 455 U.S. 1 (1982).

39. *Zimmerman v. Bishop Estate*, 25 F.3d 784, 787-88 (9th Cir. 1994).

40. See, e.g., *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986). The legality of this technique is currently before the Supreme Court in *Pearson v. Callahan*, 07-751 (cert. granted by 128 S.Ct. 1702), a case in which I represent the petitioners.

41. See, e.g., *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980). But see *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

*set of facts.* But to craft a broad Fourth Amendment injunction, courts would have to devise rules covering an essentially *infinite* set of facts. They would need to identify each of these facts and then apply the Fourth Amendment to them with little if any briefing on even the most obvious doctrinal categories. Further, the court's Fourth Amendment rules would not be merely dicta. Because they would shape the injunction and be binding on the executive, the court's rulings would be holdings that would often become binding on other courts.

The District Court and initial panel opinions in *Warshak v. United States*<sup>42</sup> that I discussed in the introduction to this essay provide a textbook demonstration of these problems. Warshak sought an injunction regulating when and how the federal government could obtain e-mail of residents of the Southern District of Ohio from ISPs.<sup>43</sup> The initial Sixth Circuit panel devised the following set of rules to regulate access to e-mail:<sup>44</sup>

(a) When the government seeks to compel the contents of personal e-mails from an Internet service provider, it may obtain the e-mail from the Internet service provider only in the following circumstances:

(1) Pursuant to a subpoena, if the government can establish, "based on specific facts," "that the ISP or other intermediary clearly established and utilized the right to inspect, monitor, or audit the contents, or otherwise had content revealed to it,"<sup>45</sup> or:

(2) Pursuant to a subpoena, if the government provides prior notice to the e-mail subscriber and permits the subscriber an opportunity to challenge the constitutional reasonableness of the subpoena before the e-mails are disclosed, or:

(3) Pursuant to a search warrant based on probable cause that "target[s] e-mails that could reasonably be believed to have some connection to its specific investigation," if neither the circumstances in subsections (1) or (2) are satisfied.<sup>46</sup>

(b) Subsection (a) shall not apply to computer scanning of e-mail for key words, types of images or "similar indicia of wrongdoing" in a way that does not disclose contents to an

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42. *Warshak v. United States*, 2006 WL 5230332 (S.D. Ohio 2006), *vacated in part*, 490 F.3d 455 (6th Cir. 2007), *rev'd en banc*, 532 F.3d 521 (6th Cir. 2008).

43. *Warshak v. United States*, 2006 WL 5230332 (S.D. Ohio 2006).

44. *Warshak v. United States*, 490 F.3d 455, \*474-76 (6th Cir. 2007). The rules which follow are indented and formatted for clarity; they are not an exact quotation from the case.

45. *Id.* at 475.

46. *Id.* at 476.

actual person.<sup>47</sup>

In crafting these rules, the *Warshak* panel tried to account for some of the major possible distinctions in government and ISP practices. Working without any particular facts, the panel concluded that screening for keywords was different than full content monitoring; prior notice should trigger a different and less protective set of rules; and significant monitoring by an ISP should lead to different rules as well. The panel then devised rules to account for each of these different distinctions.

As I have detailed in depth elsewhere, the *Warshak* panel's rules were highly creative and made several doctrinal category errors.<sup>48</sup> Most of the distinctions were not actually briefed at any length by the parties; the panel essentially invented them. But even on the decision's own terms, notice how much the panel left out. First, there is the question of definitions. First, what is a "personal" e-mail account, and what is a nonpersonal one? What is an "ISP" for Fourth Amendment purposes? Second, notice how many Fourth Amendment questions the panel ignored. For example, what about access pursuant to consent or exigent circumstances? What about access when the server is located outside the United States? What about screening for contraband images of child pornography, which may or may not implicate a reasonable expectation of privacy?<sup>49</sup>

By attempting to resolve every application of how the Fourth Amendment applies to personal e-mail, the *Warshak* panel bit off more than it could chew. The *en banc* panel took the better approach by reversing on the ground of ripeness.<sup>50</sup> Stephen Warshak had not established a real and immediate prospect that his e-mail would be accessed again in the same way it was accessed before. The original panel should not have used his request for injunctive relief as a springboard to devise a new world of Fourth Amendment rules.

## CONCLUSION

Accurate rulemaking benefits from case-by-case attention. As the Supreme Court has stressed, "[a]lthough passing on the validity of a law

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47. *Id.* at 474.

48. See Posting of Orin S. Kerr to Volokh Conspiracy, *The Procedural Errors of Warshak v. United States*, <http://www.volokh.com/posts/1182446445.shtml> (June 21, 2007); Posting of Orin S. Kerr to Volokh Conspiracy, *Warshak and Fourth Amendment Standards for Orders to Compel*, <http://www.volokh.com/posts/1182840096.shtml> (June 26, 2007).

49. See generally Richard P. Salgado, *Fourth Amendment Search And The Power Of The Hash*, 119 HARV. L. REV. F. 38 (2005).

50. See *Warshak v. United States*, 532 F.3d at 526-28 (6th Cir. 2008).

wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.”<sup>51</sup> This difficulty is particularly acute in the Fourth Amendment setting. Fourth Amendment decisions are too fact-sensitive for courts to use injunctive relief to craft broad-ranging injunctions.

The Article III case or controversy requirement should be read to forbid such broad rulemaking. Courts should require a “real and immediate threat” that a very specific set of facts will occur – so specific that the Court does not need to create rules for various possible variations in those facts. When it comes to injunctive relief, courts should apply the same Fourth Amendment standards that they apply elsewhere: they should rule on one set of facts rather than classes of those facts. This limitation will both comply with Article III standing and recognize the institutional limitations of judicial rulemaking in the area of search and seizure law.

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51. *Sabri v. United States*, 541 U.S. 600, 608-09 (2004).