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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

11 LEONARD FYOCK, SCOTT)
12 HOCHSTETLER, WILLIAM DOUGLAS,)
DAVID PEARSON, BRAD SEIFERS, and)
13 ROD SWANSON,)

14 Plaintiffs)

15 vs.)

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

20 Defendants.)

CASE NO: CV13-05807 RMW

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: February 7, 2014
Time: 9:00 a.m.
Location: San Jose Courthouse
Courtroom 6 - 4th Floor
280 South 1st Street
San Jose, CA 95113

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NOTICE OF MOTION AND MOTION

1
2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: Notice is hereby given
3 that on February 7, 2014, at 9:00 a.m., or as soon thereafter as counsel may be heard by the
4 above-entitled court, located at 280 South 1st Street, San Jose, California, in the courtroom of the
5 Honorable Judge Ronald Whyte, Plaintiffs will and hereby do move for a preliminary injunction
6 pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

7 Plaintiffs will seek an order enjoining Defendants City of Sunnyvale, the Mayor of
8 Sunnyvale, Anthony Spitaleri, and the Chief of the Sunnyvale Department of Public Safety, Frank
9 Grgurina, (“the City”) from enforcing Sunnyvale Municipal Code section 9.44.050, as it violates
10 Plaintiffs’ Second Amendment right to possess protected arms in common use for lawful
11 purposes.

12 This motion shall be based on this notice of motion and motion, the memorandum of
13 points and authorities in support, the declarations and evidence filed concurrently herewith, and
14 upon any further matters the Court deems appropriate.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUE TO BE DECIDED

15
16
17 The Second Amendment guarantees the right of law-abiding adults to use arms that are
18 typically possessed by law-abiding citizens for lawful purposes. Millions of law-abiding
19 Americans possess firearms with magazines holding over ten rounds for defense of “hearth and
20 home” – the Second Amendment interest that is “elevated above all others.” The City enacted an
21 ordinance banning all law-abiding adults from possessing and using these arms in their homes for
22 any purpose. Does the City’s ordinance violate the Second Amendment?

INTRODUCTION

23
24 This case presents a challenge to the City’s ban on the possession and use of magazines
25 capable of holding more than ten rounds of ammunition. Despite the City’s “large-capacity”
26 label, magazines that hold over ten rounds are the standard for millions of handguns and rifles.
27 And they are chosen and currently possessed by millions of law-abiding American citizens for
28 self-defense within their homes.

1 In *Heller v. District Columbia*, the Supreme Court held that the Second Amendment
2 “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms
3 in defense of hearth and home,” 554 U.S. 570, 635 (2008), and that it specifically protects the
4 right to engage in this activity with arms that are commonly used by law-abiding Americans, *id.*
5 at 624-25. Unlike the laws at issue in the majority of post-*Heller* decisions dealing with conduct
6 arguably outside the Second Amendment’s “core,” the City’s ordinance prohibits law-abiding
7 adults from possessing common arms within the sanctity of their homes for use in defending
8 themselves and their families. The law thus affects not just core lawful conduct; it strikes at the
9 Second Amendment’s highest purpose as described by the Supreme Court.

10 While the government might lawfully place some upper limit on ammunition capacity, the
11 City’s ten-round limit is well below that which the American people find suitable for
12 self-defense. This Court need not decide what limit might serve a compelling government interest
13 while still comporting with constitutional protections. It is enough that the City’s ban goes too
14 far.

15 As is the case with other fundamental rights, the City cannot deny responsible citizens the
16 right to keep and use protected items because some members of society might use them for
17 nefarious purposes. But that is exactly what the City has done. To prevent criminals from
18 unlawfully using firearms with magazines that hold over ten rounds, the City has decided to pull
19 these magazines from the homes of law-abiding residents. The forced removal from residents’
20 homes will occur just twenty-seven days from the scheduled hearing on this motion.

21 By flatly banning the possession and use of protected arms, the City’s ordinance lies at the
22 extreme end of the gun control continuum. Its approach cannot be reconciled with the protections
23 afforded by the Second Amendment, and it is necessarily unconstitutional under any test the court
24 may apply.

25 The harm resulting from the ongoing deprivation of Plaintiffs’ fundamental rights, as well
26 as the harm invited upon those residents who will be forced to dispose of their lawfully acquired
27
28

1 property with no way to replace it under state law is irreparable.¹ As this case raises serious
 2 questions concerning the core exercise of a fundamental right, the Court should issue preliminary
 3 relief to preserve the status quo, thus preventing the removal of lawfully acquired items from the
 4 homes of law-abiding citizens while the case is decided on the merits.

5 STATEMENT OF FACTS

6 I. SUNNYVALE MUNICIPAL CODE SECTION 9.44.050: MAGAZINE POSSESSION BAN

7 The City of Sunnyvale recently enacted Municipal Code section 9.44.050 (“the
 8 Ordinance”), which bans the possession of ammunition feeding devices or “magazines” with the
 9 capacity to accept more than ten rounds.² All persons in possession of these magazines have just
 10 ninety days to remove them from the City, surrender them to the Sunnyvale Department of Public
 11 Safety for destruction, or sell or transfer them to a properly licensed vendor in accordance with
 12 state law. Sunnyvale, Cal., Muni. Code § 9.44.050(b).³ The ban even requires that active-duty
 13 officers discontinue possession of their non-duty magazines capable of holding more than ten
 14 rounds. Anyone who fails to comply with the City’s mandate is subject to criminal penalties,
 15 including incarceration. Sunnyvale., Cal., Muni. Code § 706.

16 The individual plaintiffs, Leonard Fyock, William Douglas, David Pearsons, Brad Seifers,
 17 and Rod Swanson, are responsible and law-abiding residents of Sunnyvale who are not prohibited
 18 from owning or possessing firearms. Fyock Decl. ¶¶ 2-3; Douglas Decl. ¶¶ 2-3; Pearsons Decl. ¶¶
 19 2-3, Seifers Decl. ¶¶ 2-3; Swanson Decl. ¶¶ 2-3. They each currently own lawfully acquired
 20 magazines capable of holding more than ten rounds of ammunition, but section 9.44.050 prohibits
 21

22 ¹ Effective January 1, 2000, California state law prohibits the manufacture, importation,
 23 sale, gift, or loan of magazines capable of holding more than ten rounds. Cal. Penal Code §§
 32310, 32400-50.

24 ² The ordinance exempts from its definition of “large-capacity magazines” any: (1)
 25 feeding device that has been permanently altered so that it cannot accommodate more than ten
 26 rounds; (2) .22 caliber tube ammunition feeding device; or (3) tubular magazine contained in a
 lever-action firearm.

27 ³ The Ordinance took effect on December 6, 2013, requiring all persons to dispose of
 28 their magazines by March 6, 2014.

1 them from continuing to possess those magazines within the City. Fyock Decl. ¶¶ 4-5, 12;
 2 Douglas Decl. ¶¶ 4-5, 10; Pearsons Decl. ¶¶ 4-5, 10; Seifers Decl. ¶¶ 4-5, 12; Swanson Decl. ¶¶
 3 4-5, 11. While each individual plaintiff intends to comply with section 9.44.050 to avoid
 4 prosecution, they would each immediately possess these magazines within the City for self-
 5 defense and other lawful purposes should the Court enjoin enforcement of the law. Fyock Decl.
 6 ¶¶ 13-14; Douglas Decl. ¶¶ 11-12; Pearsons Decl. ¶¶ 11-12; Seifers Decl. ¶¶ 13-14; Swanson
 7 Decl. ¶¶ 12-13.

8 **II. THE BANNED MAGAZINES ARE STANDARD EQUIPMENT FOR COMMON FIREARMS**
 9 **OWNED BY MILLIONS OF LAW-ABIDING CITIZENS**

10 **A. Prevalence of the Prohibited Magazines Among Law-Abiding Citizens**

11 Magazines capable of holding more than ten rounds are standard equipment for many
 12 common pistols and rifles purchased by the American public for both self-defense and sport.
 13 Helsley Decl. ¶ 3; Monfort Decl. ¶ 5; Ex. B at 455-64 (attached to Monfort Decl.); Ex. C
 14 (attached to Monfort Decl.). Conservative estimates set the number of these standard magazines
 15 possessed by law-abiding citizens throughout the country in the tens of millions. Curcuruto Decl.
 16 ¶ 13. Although exact numbers are difficult to calculate, a large percentage – perhaps a majority –
 17 of rifles and pistols manufactured and sold in the United States today have capacities greater than
 18 ten rounds. Curcuruto Decl. ¶ 6; NSSF Magazine Report (attached to Curcuruto Decl. as “Exhibit
 19 A”); Helsley Decl. ¶ 10; Ex. B. Many of the most popular and predominant models of handguns –
 20 the “quintessential” self-defense firearm – typically have capacities ranging from eleven to
 21 twenty rounds, with many holding between fifteen and seventeen. Helsley Decl. ¶ 3; Monfort
 22 Decl. ¶ 5; Ex. B at 455-64, 497-99; Ex. C.

23 Firearms with magazine capacities greater than ten rounds are highly effective for in-
 24 home self-defense. Ayoob Decl. ¶¶ 11,14, 25, 27. Due to their suitability for this purpose, they
 25 are the preferred firearm of choice for millions of law-abiding Americans.⁴

26
 27
 28 ⁴ As Second Amendment protections turn on common usage, the evidence supporting
 these points are discussed in greater detail in Part I.B.1.

1 **I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THEIR CLAIM THAT THE ORDINANCE**
2 **VIOLATES THE SECOND AMENDMENT**

3 The Supreme Court has described “the right of law-abiding, responsible citizens to use
4 arms in defense of hearth and home” as the Second Amendment interest “surely elevate[d] above
5 all other[s].” *Heller*, 554 U.S. at 635. Because the Ordinance prohibits law-abiding citizens from
6 using commonly possessed arms within the sanctity of their homes, for the core, lawful purpose
7 of self-defense, it is unconstitutional under any test the Court might apply.

8 **A. The Second Amendment Protects Arms “Typically Possessed By**
9 **Law-Abiding Citizens for Lawful Purposes”**

10 The Supreme Court recently confirmed that the Second Amendment protects a
11 fundamental, individual right to keep and bear arms that, by virtue of the Fourteenth Amendment,
12 state and local governments are bound to respect. *Id.* at 581; *McDonald v. City of Chicago*, 130 S.
13 Ct. 3020, 3026, 3036 (2010). It follows that there are certain “instruments that constitute bearable
14 arms,” *Heller*, 554 U.S. at 582, that law-abiding citizens have an inviolable right to possess and
15 use. Indeed, as *Heller* made clear, the constitution protects arms “of the kind in common use . . .
16 for lawful purposes like self-defense.” *Id.* at 624. Conversely, it “does not protect those weapons
17 not typically possessed by law-abiding citizens for lawful purposes.” *Id.* at 625. Put another way,
18 the Second Amendment does not protect arms “that are highly unusual in society at large,” *id.*,
19 but it definitively protects those in common use for lawful purposes, *id.* at 624. This distinction is
20 fairly supported by the historical prohibition on carrying “dangerous *and* unusual weapons.” *Id.* at
21 627 (emphasis added).

22 In accord with *Heller*, various circuit courts considering which arms enjoy Second
23 Amendment protection have examined whether types of firearms, ammunition, and firearm
24 accessories are in “common use for lawful purposes.” The Fourth and D.C. Circuits have applied
25 this “common use” test in challenges to laws regulating not just firearms, but also necessary
26 components of functional firearms, including ammunition and ammunition feeding devices.
27 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (magazines
28 holding over ten rounds); *Kodak v. Holder*, 342 F. App’x 907, 908-09 (4th Cir. 2009) (armor-

1 piercing ammunition). And the Ninth Circuit has also applied this analysis to non-essential
2 firearm accessories. *United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009) (finding no
3 Second Amendment right implicated because silencers are not “typically possessed for lawful
4 purposes”).

5 *Heller* and its progeny thus instruct that the Second Amendment protects firearms with
6 capacities of more than ten rounds if they are typically possessed or commonly chosen for lawful
7 purposes in American society. If the Court establishes this class of arms is “in common use for
8 lawful purposes,” as it should, these arms enjoy constitutional protection and the Court’s work is
9 done. Because common usage “for lawful purposes” is the decisive issue under *Heller*, further
10 inquiry into the “necessity” of such arms or the availability of other sufficient arms is improper.
11 *Heller*, 554 U.S. at 624-25, 627.

12 *Heller* categorically invalidated D.C.’s handgun ban without requiring any such showing.
13 The District and its amici specifically argued that handguns may be banned because individuals
14 can defend themselves with rifles and shotguns – items they considered to be superior defensive
15 tools. The *Heller* Court responded unequivocally:

16 It is no answer to say, as [the District does], that it is permissible to ban the
17 possession of handguns so long as the possession of other firearms (i.e., long guns)
18 is allowed. It is enough to note, as we have observed, that the American people
19 have considered the handgun to be the quintessential self-defense weapon.

20 554 U.S. at 630. Simply put, handguns are protected regardless of whether they are “necessary”
21 for self-defense because the American people commonly choose them for that lawful purpose.

22 In direct conflict with this clear instruction from the Supreme Court, a panel of the D.C.
23 Circuit upheld a ban on magazines capable of holding more than ten rounds. *Heller II*, 670 F.3d at
24 1264. To justify application of lesser scrutiny, the court required not only that the banned items
25 be in common use, but *also* that they be “well-suited to or preferred” for self-defense and sporting
26 purposes. *Id.* at 1261. Controlling Supreme Court precedent provides no support for such a test.

27 Here, any argument that magazines capable of holding more than ten rounds are not
28 *necessary* for individuals to vindicate their right to self-defense is simply irrelevant to whether the
law abiding have a right to possess and use them. Even if this argument were rooted in fact, the

1 *American public* dictates what is necessary and suitable for self-defense – not the City. In striking
2 down D.C.’s handgun ban, the *Heller* Court made clear that the Second Amendment protects arms
3 chosen *by the American people* for self-defense. 554 US at 628. It was not for the government to
4 say the banned items are not well-suited to that purpose.

5 Nor may it be suggested that the chances are low that one would ever “need” firearms
6 loaded with more than ten rounds for self-defense. Plaintiffs may never “need” to discharge a
7 firearm for protection at all, but that does not extinguish their right to do so. The City’s belief that
8 firearms holding fewer rounds are sufficient for self-defense in most cases, no matter how sincere,
9 is *not* decisive. Second Amendment protection depends on the purposes for which types of arms
10 are possessed by the law abiding, and it does not evaporate simply because other arms sufficient
11 for those purposes might exist.

12 The City’s ordinance effectively bans firearms with magazine capacities over ten rounds.
13 These arms are routinely, and on a massive scale, chosen and preferred by Americans for self-
14 defense. Their Second Amendment protection cannot be credibly disputed.

15 **B. The Ordinance Prohibits Law-Abiding Citizens From Possessing Arms in**
16 **Common Use for Lawful Purposes – It Is Thus Categorically Invalid**

17 Millions of law-abiding Americans possess firearms with magazine capacities over ten
18 rounds for lawful purposes, including the core lawful purpose of self-defense. Protection for these
19 arms under the Second Amendment is thus secure. Rather than regulate these protected arms, the
20 City has flatly banned all law-abiding citizens from possessing them in their homes. The City’s
21 ordinance is irreconcilable with Second Amendment protections under any test, and the Court
22 need not select a level of scrutiny in declaring it invalid.

23 **1. Firearms Equipped With the Prohibited Magazines Are in Common**
24 **Use for Lawful Purposes**

25 Firearms equipped with magazines prohibited by the Ordinance are “typically possessed
26 by law-abiding citizens for lawful purposes,” including self-defense and sporting purposes. *See*
27 *Heller*, 554 U.S. at 625. In fact, such magazines are *standard equipment* for many popular pistols
28 and the predominant brands of semiautomatic rifles used for both self-defense and recreational

1 purposes. Curcuruto Decl. ¶ 6; Helsley Decl. ¶¶ 3, 10; Monfort Decl. ¶ 5; Ex. B; Ex. C. Standard-
2 issue magazines for very common semiautomatic pistols have capacities ranging from eleven to
3 twenty rounds, with many between fifteen and seventeen. Helsley Decl. ¶¶ 3, 5-9; *see also* Ex. D
4 (attached to Monfort Decl.). Examples of these common handguns include the Browning High
5 Power (13 rounds) c.1954, MAB PA-15 (15 rounds) c.1966, Beretta Models 81/84 (12/13 rounds)
6 c.1977, S&W Model 59 (14 rounds) c.1971, L.E.S P-18 (18 rounds) c.1980 aka Steyr GB, Beretta
7 Model 92 (15 rounds) c.1980s, and Glock 17 (17 rounds) c.1986. Helsley Decl. ¶ 3. And the
8 magazines for tens of millions of rifles are also over ten rounds. Curcuruto Decl. ¶ 8; Ex. A.
9 These are the “standard capacities” for many of the most popular firearms in American society.

10 Approximately one-third of the semiautomatic handgun models listed in *Gun Digest*, a
11 reference work that includes the specifications of currently available firearms, are normally sold
12 with magazines that hold more than ten rounds of ammunition. Helsley Decl. ¶ 1; Ex. B at 407-
13 39. And approximately two-thirds of the distinct models of semiautomatic, centerfire rifles listed
14 are regularly sold with detachable magazines that hold more than ten rounds. Ex. B at 455-64,
15 497-99. In both cases, but especially for handguns, these figures underestimate the market share
16 of magazines capable of holding more than ten rounds of ammunition, because they include many
17 of the rarer lower-capacity firearms offered by low-volume manufacturers.

18 A large percentage of pistols, perhaps a majority, are manufactured with magazines
19 holding more than ten rounds. Helsley ¶¶ 3, 9-11; Ex. A; *see also* Massad Ayoob, *The Complete*
20 *Book of Handguns* 87, 89-90 (2013). And millions of rifles equipped with such magazines are
21 privately owned throughout the United States. Curcuruto Decl. ¶¶ 8, 11-13; Ex. A.

22 At minimum, there are tens of millions of magazines capable of holding more than ten
23 rounds in the hands of the American public. Curcuruto Decl. ¶ 13. A 2004 report funded by the
24 Department of Justice estimated the number of such magazines to be 72 million – a figure that
25 does not include the millions that have been imported or manufactured in the ten years since the
26
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28

1 federal ban expired in 2004.⁵

2 Far from being “highly unusual in society at large,” the evidence establishes that
3 magazines holding more than ten rounds are exceedingly common throughout the nation. The
4 overwhelming majority of states place no restrictions on standard-capacity magazines, let alone
5 force law-abiding citizens to surrender them or face criminal prosecution. It is the City’s ban, not
6 these magazines, that is “highly unusual.”

7 In considering a challenge to a similar magazine ban, the D.C. Circuit acknowledged the
8 commonality of the banned items: “We think it clear enough in the record that . . . magazines
9 holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs contend.” *Heller II*,
10 670 F.3d at 1261. Despite this finding, the *Heller II* court improperly proceeded to further require
11 that such magazines be “well-suited to or preferred for the purpose of self-defense or sport,” a test
12 unsupported by *Heller*. See Part I.A., *supra*.

13 In any event, firearms with magazines capable of holding more than ten rounds are both
14 well-suited and preferred for self-defense in the home and for sport. This fact is self evident. The
15 availability of more ammunition in a firearm increases the likelihood of surviving a criminal
16 attack, while limiting the number of rounds available decreases one’s chances of survival. A
17 firearm’s ammunition capacity is thus directly related to its suitability for self-defense.

18 Evidence of this point is overwhelming. Massad Ayoob, renowned use-of-force expert and
19 a preferred defensive-gun-use trainer among law enforcement, describes the suitability of firearms
20 with increased ammunition capacities for self-defense:

21 [L]imits on magazine capacity are likely to impair the ability of citizens to engage
22 in lawful self-defense in those crime incidents necessitating that the victim fire
many rounds in order to stop the aggressive actions of offenders.

23 Ayoob Decl. ¶ 4; see also Ayoob Decl. at ¶¶ 4-16 (recounting, as examples, some of the many
24 instances where crime victims required more than ten rounds to fight off his or her attacker(s));

25
26 ⁵ Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons*
27 *Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, Rep. to the Nat'l Inst. of Justice,
28 U. S. Dept. of Justice at 65 (2004) (hereafter, “2004 Koper Report”) (reporting industry
estimates that 25 million such magazines were available as of 1995, nearly 4.8 million were
imported for sale from 1994-2000, and an additional 42 million may have arrived after 2000).

1 Kleck Decl. ¶ 20.

2 The reasons a potential victim benefits from having more than ten rounds immediately
3 available in a self-defense emergency are many. 554 U.S. at 624-25, 627. For instance, the
4 presence of multiple attackers often requires far more defensive discharges to eliminate the
5 threat.⁶ Ayoob Decl. ¶¶ 4-16; Kleck Decl. ¶ 21. Second, the stress of a criminal attack greatly
6 reduces the likelihood that shots fired will actually hit a violent intruder.⁷ Kleck Decl. ¶¶ 21-23;
7 *see also* Ayoob Decl. ¶ 27. And it is rare that those hits will incapacitate the criminal intruder
8 before he can complete his attack. Ayoob Decl. ¶¶ 5-9, 11-14; Helsley Decl. ¶¶ 12-15 (debunking
9 the myth that a person, once shot, is generally immediately incapacitated).⁸

10 Given that criminal attacks occur at a moment's notice, taking the victim by surprise,
11 usually at night and in confined spaces, victims rarely have multiple magazines or extra
12 ammunition readily available for reloading. Ayoob Decl. ¶¶ 17-18; Kleck Decl. ¶ 20. Regardless,
13 the victim likely cannot hold a spare magazine as he or she scrambles for cover. Often both hands
14 will be on the firearm. If they are not, one hand is likely holding the phone to call the police.
15 Ayoob Decl. ¶ 17. And certainly most people do not sleep with back-up magazines or firearms
16 strapped to their bodies. Ayoob Decl. ¶ 17. Victims will typically have to make do with a single

17
18 ⁶ Far from a rare occurrence, the 2008 National Crime Victimization survey indicates
19 that 17.4% of violent crimes in the U.S. involved two or more offenders. That year, victims of
20 nearly 800,000 violent crimes faced multiple offenders. Kleck Decl. ¶ 22; *see also* U.S. Dept.
21 of Justice, Bureau of Justice Statistics, National Crime Victimization Survey, *Criminal
Victimization in the United States, 2008 Statistical Tables*, Table 37 (Mar. 2009), available at
22 bjs.gov/content/pub/pdf/cvus08.pdf.

23 ⁷ The low hit-rate among trained law enforcement officers underscores this point. Even
24 at close range, officers miss their target far more often than they hit it. Kleck Decl. ¶¶ 22-23.
25 Considering that even law enforcement often struggle to hit a target under stress at close range,
26 it is no surprise that law-abiding citizens overwhelmingly choose standard-capacity magazines
27 holding more than ten rounds for in-home self-defense. This is especially true since civilians
28 rarely have the benefit of a bullet proof vest, a secondary weapon, extra magazines, or a partner
for backup. Ayoob Decl. ¶¶ 25-26.

⁸ Even assuming a generous 37 percent "hit rate," Kleck Decl. ¶ 23, for a civilian
facing three attackers and the ability to incapacitate each aggressor with just two bullets, the
victim, limited to ten rounds, would be about seven bullets short – and left defenseless to ward
off any remaining attackers while reloading.

1 available gun and its ammunition capacity. Ayooob Decl. ¶¶ 17, 23; Kleck Decl. ¶ 20. Limited to
2 just ten rounds by the City's law, victims will be left defenseless against their attackers should
3 they be unable to neutralize their attackers with just ten bullets.

4 Even if additional magazines are available, it is extremely difficult – and potentially
5 deadly – to stop to change magazines under the stress of a criminal attack. As Mr. Ayooob
6 explains:

7 A highly skilled police officer or competitive shooter may be able to accomplish a
8 reload in two seconds. Most people take considerably longer; especially someone
9 who is under the mental duress typically experienced during an attack. **Changing
10 a magazine is a fine motor skill, the type of skill which degrades severely in
human beings under stress** due to vasoconstriction (loss of blood flow to the
extremities) and also due to tremors induced by internally-generated adrenaline
(epinephrine).

11 Ayooob Decl. ¶ 27 (emphasis added); *see also* Kleck Decl. ¶ 27. In sum, forcing law-abiding
12 citizens to change magazines while attempting to defend against a criminal attack could cost them
13 their lives, particularly if they are facing multiple armed assailants.

14 It is undeniable that magazines capable of accepting more than ten rounds are well-suited
15 to and effective for self-defense in the home and elsewhere.⁹ Firearms with capacities of more
16 than ten rounds were developed for that very reason. Helsley Decl. ¶¶ 4-11. Manufacturers
17 specifically market them for self-defense. Monfort Decl. ¶ 5; Ex. C. And, as evidenced by the fact
18 that U.S. consumers acquire these firearms specifically developed and marketed for personal
19 defense on a massive scale, Curcuruto Decl. ¶¶ 8, 11-13; Ex. A, they are preferred by millions of
20 Americans for that reason. The entire consumer firearm market has transitioned from revolvers to
21 pistols in large part because semiautomatic pistols allow for more rounds to be immediately
22 available in a self-defense emergency. Helsley Decl. ¶¶ 9-11.

23
24 ⁹ The banned magazines are also essential in the most popular competitive shooting
25 sports in America. Standard ammunition capacities are required when proceeding through
26 multi-target stages of competitions sponsored by the highly popular International Practical
27 Shooting Confederation (which has tens of thousands of members). *See* International Practical
28 Shooting Federation, <http://www.ipsc.org>. They are also required for the famed “3-Gun
Competition,” the fastest-growing shooting sport in America, where participants use standard-
capacity magazines while testing their marksmanship skills using rifles, shotguns, and
handguns. *See* Chad Adams, *Complete Guide to 3-Gun Competition* 89 (2012).

1 Civilians overwhelmingly prefer these firearms for the same reason active-duty officers do
 2 – to increase their chances of staying alive. Ayooob Decl. ¶ 24; Helsley Decl. ¶ 11; Fyock Decl. ¶¶
 3 6-11; Douglas Decl. ¶¶ 6-9; Pearsons Decl. ¶¶ 6-9; Seifers Decl. ¶¶ 6-11; Swanson Decl. ¶¶ 7-10.
 4 American citizens have thus historically modeled their choice of firearms on what police carry.
 5 Ayooob Decl. ¶ 24; Helsley Decl. ¶¶ 9-10. For example, Glock pistols, the most popular handguns
 6 among American law enforcement, are “hugely popular” for home and personal defense. Ayooob,
 7 *The Complete Book of Handguns* at 90. They come standard with fifteen- to seventeen-round
 8 magazines. *Id.*

9 In short, firearms with magazine capacities over ten rounds are among “the most preferred
 10 firearm[s] in the nation to ‘keep’ and use for protection of one’s home and family,” *Heller*, 554
 11 U.S. at 628-29; individuals are thus guaranteed the right to possess and use them for those
 12 purposes.

13 **2. Bans on Arms in Common Use for Lawful Purposes Are Categorically** 14 **Invalid Without Resort to Means-End Scrutiny**

15 The Ordinance is necessarily invalid because it imposes an outright ban on the possession
 16 and use of arms protected by the Second Amendment. It is a fundamental principle of both law
 17 and logic that, where the constitution protects the possession or use of an item, a total ban on such
 18 possession or use will be an unconstitutional infringement of that right, regardless of the level of
 19 judicial scrutiny applied. To this end, the courts may forego adoption of any particular standard of
 20 review when striking flat prohibitions on constitutionally protected conduct and items.

21 This was precisely the approach taken by the Supreme Court in *Heller*. There, the
 22 Supreme Court found a ban on handguns, arms the Court found to be in common use for self-
 23 defense, necessarily violates the Second Amendment. 554 U.S. at 635. While *Heller* stated the
 24 ban would fail “any of the standards of scrutiny that [the courts have] applied to enumerated
 25 constitutional rights,” *id.* at 628, the Court made a point of *not* applying any of those standards.
 26 Instead, *Heller* categorically invalidated the handgun ban because it prohibited a class of arms
 27 “overwhelmingly chosen by American society for [the] lawful purpose” of self-defense. 554 U.S.
 28 at 628-29. That the Court did so without selecting a level of scrutiny is unsurprising. For the

1 Second Amendment would mean little if the application of a particular test would permit the
2 government to ban the very arms the Second Amendment protects.

3 A categorical approach to bans on protected arms is also consistent with the framework
4 adopted by the Ninth Circuit in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). In
5 deciding whether arms restrictions for convicted domestic violence misdemeanants violates the
6 Second Amendment, the *Chovan* panel applied a two-step test for Second Amendment
7 challenges. *Id.* at 1136. The approach asks first whether the challenged law burdens protected
8 conduct. *Id.* If it does, the appropriate level of heightened scrutiny is selected based on “how
9 close the law comes to core of the Second Amendment” and “the severity of the law’s burden on
10 the right.” *Id.* at 1138. *Chovan* does not foreclose the application of *Heller*’s categorical approach
11 to striking down as unconstitutional a law that flatly bans the possession of protected arms by
12 law-abiding citizens. As *Heller* made clear, such a law is necessarily unconstitutional regardless
13 of the level of scrutiny applied. 554 U.S. at 628-29. In short, there is no need to struggle with
14 selecting a level of scrutiny under *Chovan* when the Supreme Court has already instructed what
15 the outcome will be under any test.

16 Other circuits have acknowledged this principle. For example, the Seventh Circuit, in
17 striking down the State of Illinois’ flat ban on the protected activity of carrying firearms outside
18 the home, eschewed the levels of scrutiny analysis it had applied in other Second Amendment
19 contexts. *Moore v. Madigan*, 702 F.3d 933, 940, 941 (7th Cir. 2012). The Second Circuit
20 similarly recognized, “where a state regulation is entirely inconsistent with the protections
21 afforded by an enumerated right – it is an exercise in futility to apply means-end scrutiny.”
22 *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 n.9 (2d Cir. 2012).

23 This is also consistent with the Supreme Court’s approach in other rights contexts, where
24 it has repeatedly found bans on protected activity to be unconstitutional without resort to any
25 level of scrutiny. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that a ban on the
26 private possession of obscene material violated the First and Fourteenth Amendments); *Griswold*
27 *v. Connecticut*, 381 U.S. 479, 485 (1965) (declaring a ban on contraceptives unconstitutional);
28 *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301 (1965) (holding that a ban on access to

1 materials deemed “communist political propaganda” violated the First Amendment).¹⁰

2 Here, the City’s magazine ban is inimical to the Second Amendment’s protections for
 3 standard-capacity firearms and should be stricken without resort to any level of scrutiny. Like the
 4 handguns at issue in *Heller*, firearms with magazines holding more than ten rounds are
 5 overwhelmingly chosen by law-abiding citizens for the core lawful purpose of self-defense. And
 6 like the District of Columbia, Sunnyvale flatly bans these protected arms, going so far as to force
 7 law-abiding citizens, including active-duty law enforcement, to remove their standard magazines
 8 from the City or face criminal prosecution.

9 Under *Heller*, the Ordinance is necessarily unconstitutional. The Court need not go any
 10 further because the City’s ban on protected arms would fail “any of the standards of scrutiny that
 11 [the courts have] applied to enumerated constitutional rights.” The City’s outright ban on the use
 12 of standard-capacity firearms that are possessed by millions of law-abiding Americans for in-
 13 home self-defense is plainly inconsistent with the Second Amendments’s protections for these
 14 arms – making the application of means-end scrutiny a futile endeavor.

15 **C. If the Court Selects a Level of Means-End Review, Strict Scrutiny Must**
 16 **Apply**

17 When a law interferes with “fundamental constitutional rights,” it generally is subject to
 18 “strict judicial scrutiny.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); *see*
 19 *also, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988). And “a law is subject to strict scrutiny . . .
 20 when that law *impacts* a fundamental right, not when it *infringes* it.” *Tucson Woman’s Clinic v.*
 21 *Eden*, 379 F.3d 531, 544 (9th Cir. 2004). In *McDonald*, the Supreme Court confirmed the right to

22 ¹⁰ *See also Lawrence v. Texas*, 539 U.S. 558 (2003) (ban on consensual, intimate
 23 conduct in the home); *Butler v. State of Michigan*, 352 U.S. 380, 382-84 (1957) (ban on
 24 material “tending to the corruption of the morals of youth”); *Reliable Consultants, Inc. v.*
 25 *Earle*, 517 F.3d 738, 741, 747 (5th Cir. 2008) (ban on sale of sex toys). When courts have
 26 applied a standard of review to laws directly contradicting or foreclosing the exercise of a
 27 protected activity, such restrictions have been struck down regardless of the test applied. *See,*
 28 *e.g., Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2738-39 (2011) (ban on sale or rental
 of “violent video games”); *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992) (spousal
 notice requirements to obtain abortion); *Carey v. Population Servs., Int’l.*, 431 U.S. 678, 689-
 91 (1977) (ban on contraceptive sales); *Vincenty v. Bloomberg*, 476 F.3d 74, 85 (2d Cir. 2007)
 (ban on spray paint sales).

1 keep and bear arms is fundamental and silenced any argument that it should not be afforded the
2 same status as other fundamental rights. *McDonald*, 130 S. Ct. at 3043. In short, strict scrutiny is
3 the “default” standard for fundamental rights – and the right to arms is no exception.

4 Under the *Chovan* analysis described above, the result is no different. Again, *Chovan*
5 directs courts to select a level of heightened scrutiny according to the law’s proximity “to the core
6 of the Second Amendment right” and “the severity of the law’s burden on the right.” 735 F.3d at
7 1138. *Chovan*’s claims were held to be outside the Second Amendment’s core because his
8 conviction excluded him from the “law abiding.” *Id.* And although the ban imposed a “quite
9 substantial” burden, the law’s many exceptions “lightened” that burden. *Id.*

10 In contrast, the conduct burdened here – the possession of protected arms by the law
11 abiding for in-home self-defense – is at the *very center* of the Second Amendment’s core. *Id.* at
12 1133, 1138 (quoting *Heller*, 554 U.S. at 635) (repeatedly referencing the core of the Second
13 Amendment as “the right of law-abiding, responsible citizens to use arms in defense of hearth and
14 home”). By banning the possession and use of arms widely chosen for in-home self-defense, and
15 by restricting the amount of ammunition residents may load into their firearms well below
16 national norms, the City’s ordinance directly restricts conduct at the Second Amendment’s core.
17 *See id.* at 1133, 1138; *see also Heller*, 554 U.S. at 635.

18 Further, the burden imposed is particularly severe. The law does not simply regulate “the
19 manner in which” Plaintiffs’ rights may be exercised, *Chovan*, 735 F.3d at 1138, but rather
20 directly bans the possession and use of constitutionally protected items. It forces law-abiding
21 residents to remove commonly possessed magazines from their homes. And it does so without
22 qualification.¹¹ The fact that the prohibition extends to the home where the need for self-defense
23 is “most acute” exacerbates the problem. *Heller*, 554 U.S. at 628; *see also Kachalsky*, 701 F.3d at

24
25 ¹¹ It is no answer to say the laws do not impose a severe burden simply because other
26 arms are sufficient for self-defense. Under that logic, a flat ban on virtually any protected arms
27 could avoid strict scrutiny, so long as the government imposed its ban in small enough
28 increments. This would certainly defy the Supreme Court’s instructions as to the protections
the Second Amendment affords. *Heller*, 554 U.S. at 624-25, 630; *McDonald*, 130 S. Ct. at
3037.

1 89 (“Second Amendment guarantees are at their zenith within the home.”).¹²

2 But even if a blanket ban on the use of protected arms in the home is itself not sufficiently
3 severe to warrant strict review, the impact of the law certainly is. While millions of Americans
4 routinely select firearms capable of accepting more than ten rounds for self-defense, the City
5 dictates that its residents must load significantly less ammunition into their firearms. If such a
6 government-imposed reduction on the ammunition capacity of citizens’ commonly used firearms
7 – with potentially deadly consequences in the event of a self-defense emergency – isn’t a severe
8 burden triggering strict scrutiny, it is difficult to imagine what is.

9 Application of strict scrutiny here also comports with a number of decisions from other
10 circuits. Just as “any law regulating the content of speech is subject to strict scrutiny, . . . any law
11 that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding
12 citizen would be subject to strict scrutiny.” *United States v. Masciandaro*, 638 F.3d 458, 470 (4th
13 Cir. 2011). While many courts have evaluated Second Amendment claims under intermediate
14 scrutiny, they have routinely done so where the interest asserted does *not* involve core Second
15 Amendment conduct. As described above, such is not the case here. The City’s flat ban on law-
16 abiding citizens’ possession of arms overwhelmingly chosen by American society for self-defense
17 lies at the very heart of the Second Amendment, and strict scrutiny must apply.

18 The lone circuit court opinion to apply intermediate scrutiny to a ban on the possession of
19 common arms by law-abiding citizens itself suggests that strict scrutiny is appropriate here. As
20 noted above, the D.C. Circuit selected intermediate scrutiny to evaluate a ban on standard-
21 capacity magazines after finding there was little evidence they are “well-suited to or preferred for
22 self-defense or sport.” *Heller II*, 670F.3d at 1262. Here, given the abundance of evidence
23 presented that firearms equipped with the prohibited magazines are both highly effective and

24
25 ¹² To comport with fundamental rights jurisprudence requiring the application of strict
26 scrutiny to laws burdening core protected conduct, *see, e.g., Citizens United v. Fed. Election*
27 *Comm’n*, 558 U.S. 310, 340 (2010), consideration of both the “proximity” and “severity”
28 prongs of *Chovan* should be done so that burdens on conduct closer to the core trigger strict
scrutiny even if the burden is less severe. Thus, even if the Court were to somehow find the
burden less “severe,” it should apply strict scrutiny because the law strikes at the very center of
the Second Amendment’s core.

1 hugely popular for self-defense and sport, strict scrutiny is appropriate even under the novel
2 requirement imposed by the *Heller II* panel. Part I.B.1, *supra*.

3 While bans on the possession of protected arms are categorically invalid under *Heller*, if
4 the Court opts to apply a level of scrutiny, it should keep Kipling’s six honest serving-men in
5 mind.¹³ Here, they each point directly to strict scrutiny. For, at all times (“when”), the law flatly
6 bans (“how”) the exercise of the core right of law-abiding citizens (“who”) to possess and use
7 protected arms (“what”) for the purpose of self-defense (“why”) in the sanctity of their homes
8 (“where”) – the Second Amendment interest that is “surely elevate[d] above all other[s].” *Heller*,
9 554 U.S. at 635.

10 **D. The Ordinance Is Unconstitutional Under Any Heightened Level of Review**

11 Under heightened scrutiny, whether intermediate or strict, a challenged law is *presumed*
12 unconstitutional, and the government bears the burden of justifying it. *See R.A.V. v. City of St.*
13 *Paul*, 505 U.S. 377, 382 (1992) (content-based speech regulations are presumptively invalid); *see*
14 *also United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (“unless the conduct is not
15 protected by the Second Amendment at all, the government bears the burden of justifying the
16 constitutional validity of the law”). Strict scrutiny requires that the City prove that its magazine
17 ban is “narrowly tailored” to serve a “compelling government interest.” *United States v. Playboy*
18 *Entm’t Grp., Inc.*, 529 U.S. 803, 804 (2000). Even under intermediate scrutiny, the City must
19 establish a “reasonable fit” or a “substantial relationship” between the ban and an important
20 government objective. *Chovan*, 735 F.3d at 1139. Such a fit requires that the law is “not more
21 extensive than necessary” to serve its interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 825
22 (9th Cir. 2013) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serve Comm’n of N.Y.*, 447
23 U.S. 557, 566 (1980)). The Ordinance fails under either test.

24 The City seems to have enacted the Ordinance to reduce injuries resulting from the
25 criminal misuse of firearms. Sunnyvale, Ca., Measure C (2013) at 1 (attached to Compl. as
26 _____

27 ¹³ “I keep six honest serving-men (They taught me all I knew); Their names are What
28 and Why and When and How and Where and Who.” Rudyard Kipling, *The Elephant’s Child*, in
Just So Stories 31 (Acra Found. 2013).

1 “Exhibit A”). While the government has a compelling interest in promoting public safety and
 2 preventing crime, *see, e.g., Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994), to
 3 satisfy even intermediate scrutiny the City must demonstrate the law is likely to advance that
 4 interest to some “material degree,” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505
 5 (1996). It cannot.

6 First, the City’s policy has already proven ineffective. The 1994 federal ban on standard-
 7 capacity magazines capable of holding more than ten rounds was so ineffective in reducing
 8 violent crime that it was allowed to expire in 2004. *See* H.R. 3355, 103rd Cong. § 110106. The
 9 Clinton-Reno Department of Justice selected researchers to study the impact of the nationwide
 10 ban.¹⁴ “There was no evidence that lives were saved [and] no evidence that criminals fired fewer
 11 shots during gun fights. . . .” Kopel Testimony, *supra* n. 14, at 11; *see also* Kleck Decl. ¶ 33. It
 12 was thus not surprising that Congress chose not to renew the 1994 ban. Kopel Testimony, *supra*
 13 n. 14, at 11.

14 Since 2004, *millions* of standard-capacity firearms have been purchased throughout the
 15 United States. 2004 Koper Report, n. 5, at 65; *see also* Ex. A. Violent crime has not increased in
 16 that period; in fact, it has steadily and significantly declined.¹⁵ And there is no evidence to suggest
 17 that criminals have fired more shots per incident in the years since the federal ban expired.

18 Empirical evidence demonstrates why restrictions on firearms with magazine capacities
 19 over ten rounds will not further public safety. Such a limit has no bearing on the overwhelming
 20 majority of gun crimes, as criminals rarely fire more than ten shots – and typically they fire fewer
 21 than four. Kleck Decl. ¶¶ 7-8; *see also* 2004 Koper Report, *supra* n. 5, at 90. Moreover, it is
 22

23 ¹⁴ *What Should America Do About Gun Violence?* Full Comm. Hr’g Before U.S. Sen.
 24 Jud. Comm., 113th Cong. at 11 (2013), available at <http://www.judiciary.senate.gov/pdf/1-30-13KopelTestimony.pdf> (hereafter, “Kopel Testimony”); 2004 Koper Report, *supra* n. 5, at 1.
 25

26 ¹⁵ Federal Bureau of Investigation, *Crime in the United States 2012*, Department of
 27 Justice (2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violent-crime>; *id.* at Table 1, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadeoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls.
 28

1 unlikely that a ten-round limit would have any impact even in those rare instances that they do. A
2 study of “mass shootings” from 1984 to 1993 found that for those incidents where both the
3 number of rounds fired and the duration of the shooting were reported, the rate of fire was almost
4 never faster than about one round every two seconds. Kleck Decl. ¶¶ 18-19. And it was usually
5 much slower. Kleck Decl. ¶¶ 18-19, *see also* Kleck Decl. table 1. Thus, none of the mass shooters
6 maintained a sustained rate of fire that could not also have been maintained – even when
7 considering reloading time – with either multiple guns or with an ordinary six-shot revolver and
8 common speedloader. Gary Kleck, *Targeting Guns: Firearms and Their Control* 125 (Aldine De
9 Gruyter 1997).

10 As more recent incidents demonstrate, a mass shooter controlling the circumstances under
11 which he carries out his attack can easily change magazines each time one is spent. Ayooob Decl. ¶
12 28; Kleck Decl. ¶¶ 10-14. For instance, “[a]t Newtown, the murderer changed magazines many
13 times, firing only a portion of the rounds in each magazine.” Kopel Testimony, *supra* n. 14, at 19.
14 And, in the Virginia Tech murders, the perpetrator likewise changed magazines numerous times.
15 Ayooob Decl. ¶ 28. A criminal with multiple guns can avoid the need to reload altogether by
16 simply changing guns when the first runs out of ammunition. Ayooob Decl. ¶¶ 19-22; Kleck Decl.
17 ¶ 10-11. The perpetrators of the majority of mass shootings between 1984 and 1993 carried
18 multiple firearms and did just that. Kleck Decl. ¶11; Kleck, *Targeting Guns* at 125, 144 (table
19 4.2). The same is true of such attacks since that time. Ayooob Decl. ¶ 20; Kleck Decl. ¶¶ 12-14.

20 So, even if we seriously believe that the law would deter a criminal from obtaining the
21 banned magazines, the Ordinance is unlikely to serve the City’s public-safety objectives to any
22 “material degree.”

23 Instead, the City’s ban decreases public safety by restricting the self-defense capabilities
24 of the law abiding – as the time it takes to change magazines is much more likely to negatively
25 affect crime victims than criminal attackers. Ayooob Decl. ¶ 4, 23, 28-29, 31-34; Kleck Decl. ¶ 34.
26 Unlike violent criminals, victims do not choose when or where an attack will take place. Ayooob
27 Decl. ¶ 28. And they will often face multiple armed attackers at a moment’s notice. The burden of
28 changing or reloading a magazine (if extra magazines are even accessible) is far greater for a

1 victim under the emotional and physiological stress of an unannounced attack, especially in the
 2 middle of the night. Ayoob Decl. ¶¶ 27-28, 34; Kleck Decl. ¶¶ 20-21, 27, 29, 34. Compare this
 3 with violent criminals and mass murderers who can plan out their attacks and often carry multiple
 4 firearms and magazines into settings where their victims are unarmed. Ayoob Decl. ¶¶ 28; Kleck
 5 Decl. ¶¶ 10-11, 14, 19-20.

6 In light of these realities, it comes as no surprise that a 2013 poll of 15,000 law
 7 enforcement professionals showed that an overwhelming majority of respondents (95.7%) did not
 8 believe a federal ban on standard-capacity magazines would increase public safety.¹⁶

9 But even if restricting these magazines would promote public safety, the City's chosen
 10 means to accomplish its safety objectives are "substantially broader than necessary." *Fantasyland*
 11 *Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1004 (9th Cir. 2007) (quoting *Ward v. Rock*
 12 *Against Racism*, 491 U.S. 781, 799-800 (1989)). Rather than develop policies to prevent access
 13 by criminals, the City has opted to strip protected arms from the homes of *law-abiding* citizens.
 14 The City attempts to accomplish its objective of reducing injuries from the criminal misuse of
 15 firearms by banning the use of arms by the law abiding – not based on the harm they themselves
 16 may cause, but based on the violence that may come from criminals *who might steal those*
 17 *firearms from gun owners*.

18 But to ban certain arms because criminals might misuse them is to tell law-abiding
 19 citizens that their liberties depend not on their own conduct, but on the conduct of the lawless.
 20 Surely this cannot be. Courts have already rejected the notion that the government may ban
 21 constitutionally protected activity on the grounds that the activity could lead to abuses. *See, e.g.*,

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 25 ¹⁶ *Gun Policy & Law Enforcement: Where Police Stand on America's Hottest Issue*,
 26 PoliceOne.com, http://ddq74coujkl1.cloudfront.net/p1_gunsurveysummary_2013.pdf
 27 (accessed Dec. 19, 2013). With over 1.5 million unique visitors per month and more than
 28 450,000 registered members, PoliceOne is becoming the leading destination for Law
 Enforcement professionals. PoliceOne.com, About Us, <http://www.policeone.com/about/>
 (accessed Dec. 19, 2013).

1 *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 560 (7th Cir. 2009).¹⁷

2 Ultimately, the City’s ban represents a policy choice as to the types of arms it desires its
3 residents to use. But *Heller* is clear that such policy choices are off the table when considering
4 commonly used, constitutionally protected arms. 554 U.S. at 636. There, D.C. sought to ban
5 handguns for the same reasons the City wishes to ban its residents from having standard-capacity
6 firearms and magazines – to decrease criminal misuse and prevent injuries through decreased
7 availability. *Id.* at 682, 694 (Breyer, J., dissenting). Despite these interests, the Supreme Court
8 explicitly stated that D.C.’s handgun ban would “fail constitutional muster” under “any of the
9 standards of scrutiny the Court has applied” to fundamental rights. *Id.* at 628-29.

10 If the D.C. handgun ban could not pass intermediate scrutiny (i.e., it was not “substantially
11 related” to public safety), it follows that the City’s ban on standard-capacity arms cannot survive
12 such scrutiny either.¹⁸ For if stopping law-abiding citizens from possessing protected items were a
13 valid method of reducing criminal access and violent crime, *Heller* would have been decided
14 differently. Certainly, the justifications for a ban on *handguns* are substantially *more* related to
15 the government’s public safety objectives than a ban on firearms with magazines holding over ten
16 rounds. While criminals might sometimes misuse these standard-capacity firearms, misuse of
17 handguns is off the charts. *Id.* at 697-99 (Breyer, J., dissenting) (from 1993 to 1997, a whopping
18 81% of firearm-homicide victims were killed by handguns). Indeed, handguns are
19 overwhelmingly preferred by criminals in nearly all violent gun crimes. But despite the
20 government’s clear interest in keeping concealable firearms out of the hands of criminals and
21

22 ¹⁷ Just as the First Amendment “knows no heckler’s veto,” the Second Amendment
23 cannot tolerate restrictions on law-abiding citizens’ right to keep and bear protected arms based
24 on the threat to public safety posed not by those citizens but by criminals who may obtain such
25 firearms illegally. *See Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

26 ¹⁸ *Heller II*’s holding that D.C.’s magazine ban could survive intermediate scrutiny is in
27 direct conflict with *Heller*’s holding that banning law-abiding citizens from possessing and
28 using protected arms is not a valid means of promoting the government’s interest. *Heller*’s
approach and analysis is controlling – *Heller II*’s, whose analysis was poisoned by the court’s
mistaken assumption that standard-capacity firearms are not well-suited to or preferred for self-
defense or sport, is not.

1 unauthorized users, a ban on the possession of protected arms by the law abiding lacks the
2 required fit under any level of scrutiny. *Id.* at 628-29.

3 Here too, the City’s ban on the possession and use of protected arms is necessarily
4 unconstitutional no matter which test the Court may apply.

5 **II. THE REMAINING PRELIMINARY INJUNCTION FACTORS WARRANT RELIEF**

6 **A. Irreparable Harm Should Be Presumed Because the Ordinance Violates** 7 **Plaintiffs’ Second Amendment Rights**

8 Generally, once a plaintiff shows a likelihood of success on the merits of a constitutional
9 claim, irreparable harm is presumed. 11A Charles Alan Wright et al., *Federal Practice and*
10 *Procedure* § 2948.1 (2d ed. 1995) (“When an alleged deprivation of a constitutional right is
11 involved, most courts hold that no further showing of irreparable injury is necessary.”). The Ninth
12 Circuit has often imported the First Amendment’s “irreparable-if- only-for-a-minute” concept to
13 cases involving other rights and, in doing so, has held a deprivation of these rights constitutes
14 irreparable harm per se. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). The
15 Second Amendment should be treated no differently. *See McDonald*, 130 S. Ct. at 3043, 3044;
16 *Ezell v. Chicago*, 651 F.3d 684, 700 (7th Cir. 2011) (a deprivation of the right to arms is
17 “irreparable and having no adequate remedy at law”).

18 Here, because Plaintiffs are likely to succeed on the merits of their Second Amendment
19 claim, irreparable harm is presumed. The harm is the denial of the exercise of Plaintiffs’
20 constitutional rights – namely, the right to use and possess protected arms for lawful purposes,
21 including self-defense within their homes, and the potentially *deadly* consequences that can arise
22 when one’s ability to use such arms in self-defense is restricted.

23 Plaintiffs have established a likelihood of success on the merits of their constitutional
24 claim; they have necessarily established irreparable harm warranting preliminary relief.

25 **B. Harms to Plaintiffs and to the Public Far Outweigh Any Harm to the City**

26 When plaintiffs challenge government action that affects the exercise of constitutional
27 rights, “[t]he balance of equities and the public interest . . . tip *sharply* in favor of enjoining the
28 ordinance.” *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (emphasis added).

1 And, the City “cannot reasonably assert that [it] is harmed in any legally cognizable sense by
2 being enjoined from constitutional violations.” *Haynes v. Office of the Att’y Gen. Phill Kline*, 298
3 F. Supp. 2d 1154, 1160 (D. Kan. Oct. 26, 2004) (citing *Zepeda v. U.S. Immigration.*, 753 F.2d
4 719, 727 (9th Cir. 1983)).

5 Here, Plaintiffs seek to vindicate their fundamental Second Amendment rights. As the
6 Ninth Circuit has made clear, “all citizens have a stake in upholding the Constitution” and have
7 “concerns [that] are implicated when a constitutional right has been violated.” *Preminger v.*
8 *Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Accordingly, not only Plaintiffs’ rights are at stake,
9 but so are the rights of all residents seeking to engage in Second Amendment conduct that is
10 prohibited by the City’s law. This is especially true for those residents unable to store their
11 magazines outside of the City. These residents will be dispossessed of their magazines with no
12 way to replace them because state law prohibits the purchase and sale of these magazines. Cal.
13 Penal Code §§ 32310, 32400-50. The balance of equities and the public interest thus tip *sharply* in
14 Plaintiffs’ favor. *See Klein*, 584 F.3d at 1208.

15 Even absent the constitutional dimension of this lawsuit, the balance of harms tips in
16 Plaintiffs’ favor. The City can establish no harm to its interests as the law does not actually serve
17 the public interest or increase public safety. *See Part I.D., supra*. To the contrary, the City’s laws
18 make the public *less* secure. The Ordinance prevents residents from possessing and using
19 standard-capacity firearms, putting residents at *greater* risk when faced with a self-defense
20 emergency. The Ordinance limits residents to using roughly half the ammunition that law-abiding
21 Americans typically prefer to have in their self-defense firearms.

22 Granting the injunction will maintain the status quo while the case is decided on the
23 merits. The sale of standard-capacity magazines is already unlawful in California, so the City will
24 not be flooded with additional standard-capacity firearms if an injunction is granted. On the other
25 hand, granting an injunction will end the ongoing violation of Plaintiffs’ rights, allowing them the
26 freedom to exercise them without fear of prosecution and allowing residents to continue
27 possessing their lawfully acquired, common magazines in their homes.

1 **CONCLUSION**

2 The Second Amendment extends protections to arms commonly used by responsible
3 citizens. Magazines that hold over ten rounds are the standard for many firearms commonly
4 owned in modern American society. Accounting for millions of annual firearm purchases by the
5 law abiding, their Second Amendment protection is hardly debatable.

6 Fearing that certain members of society may misuse these arms, the City has prohibited all
7 law-abiding citizens from possessing or using them for self-defense in their homes. The courts
8 have often described the impropriety of this approach with the phrase *abusus non tollit usum* – as
9 abuse is not a valid argument against proper use.

10 Just as the government may not strip “smart phones” from the law abiding on the basis that
11 drug dealers frequently use them to move their product or that terrorists can use them to detonate
12 explosives in a mass killing, the City cannot deny law-abiding citizens the right to keep and use
13 protected arms simply because they might be misused by some. While the Supreme Court has not
14 yet ruled that the constitution guarantees protections for common tools of communication, like
15 smart phones, it is self evident that the First Amendment would not tolerate such government
16 action. In the Second Amendment context, it is even more clear, as the Court *has expressly*
17 *announced* protection for common arms.

18 The Court should grant Plaintiffs’ motion to preserve the status quo and prevent the
19 removal of these protected arms from the homes of Sunnyvale residents while the Court considers
20 the merits of this case.

21 Dated: December 23, 2013

MICHEL & ASSOCIATES, P.C.

22
23 /s/ C. D. Michel
24 C.D. Michel
25 Attorney for Plaintiffs
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