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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO VETERAN POLICE
OFFICERS ASSOCIATION, LARRY BARSETTI,
RAINERIO GRANADOS, ARTHUR RITCHIE,
and RANDALL LOW,

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,
THE MAYOR OF SAN FRANCISCO, EDWIN
LEE in his official capacity, THE CHIEF OF THE
SAN FRANCISCO POLICE DEPARTMENT,
GREG SUHR, in his official capacity, and DOES
1-10,

Defendants.

No. C 13-05351 WHA

**ORDER DENYING
PRELIMINARY
INJUNCTION**

INTRODUCTION

In this action challenging a San Francisco ordinance banning the possession of firearm magazines with the capacity to accept more than ten rounds, plaintiffs move for a preliminary injunction. For the reasons set forth below, the motion is **DENIED**.

STATEMENT

For over a decade, California has restricted firearm magazines holding more than ten bullets, particularly restricting their manufacture, importation and sale, but has not prohibited ownership by individuals. Cal. Penal Code Section 32310. This state law was enacted in 1999 to supplement a then-existing federal law, enacted in 1994, that prohibited the possession or transfer of magazines with the capacity to accept more than ten rounds. The federal law expired by its own terms in 2004. While the California statute generally prohibits the *making* of new magazines with the capacity to accept more than ten rounds and *transfer* of existing ones, it does not prohibit their *possession*. This action does not challenge the constitutionality of this state

1 law. The challenge lies instead against a new local ordinance banning possession of magazines
2 holding more than ten rounds.

3 The background is as follows. On December 14, 2012, a shooter, armed with an
4 assault weapon and several magazines with the capacity to accept more than ten rounds, entered
5 Sandy Hook Elementary School in Newtown, Connecticut. He massacred 27 people, including
6 twenty young children (Van Aken Decl., Exh. 10 at 3, 22–23). Following this horrific tragedy,
7 several state and local governments enacted bans on magazines with the capacity to accept more
8 than ten rounds. As of this date, four courts have ruled on the constitutionality of these bans and
9 all four courts have upheld them. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244,
10 1264 (D.C. Cir. 2011); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 2013 U.S. Dist. LEXIS 182307,
11 at *55–56 (W.D.N.Y. Dec. 31, 2013) (Judge William Skretny); *Shew v. Malloy*, 2014 U.S. Dist.
12 LEXIS 11339, at *39–40 (D. Conn. Jan. 30, 2014) (Judge Alfred Covello); *Tardy v. O’Malley*,
13 No. CCB-13-2861, TRO Hr’g Tr., at 66–71 (D. Md. Oct. 1, 2013) (Judge Catherine Blake).

14 For its part, San Francisco enacted Section 619 of the San Francisco Police Code,
15 challenged herein under the Second Amendment. With certain exceptions, the ordinance
16 prohibits any person, corporation, or other entity in San Francisco from possessing a magazine
17 with the capacity to accept more than ten rounds, whether assembled or disassembled.

18 A magazine with the capacity to accept more than ten rounds is defined as:

19 . . . any detachable ammunition feeding device with the capacity to
20 accept [more than ten rounds], but shall not be construed to include
any of the following:

21 (1) A feeding device that has been permanently
22 altered so that it cannot accommodate [more than ten
rounds];

23 (2) A .22 caliber tube ammunition feeding
24 device, or

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

26 The ordinance, by its own terms, bans magazines with the capacity to accept more than ten
27 rounds because they “significantly increase[] the lethality of the automatic and semiautomatic
28 firearms using them.” In particular, the ordinance explicitly identifies recent high-profile

1 massacres where the shooter used magazines with the capacity to accept more than ten rounds,
2 including the Sandy Hook massacre.

3 The ordinance also explicitly addresses concerns regarding self-defense:

4 [Magazines with the capacity to accept more than ten rounds] are
5 not necessary for individuals to vindicate their right to self-
6 defense. Only in extraordinarily rare circumstances would a
7 person using a firearm in self-defense ever be required to use a
8 large capacity magazine to defend himself or herself effectively.
9 This is particularly true in an urban center like San Francisco,
10 where law enforcement can and does respond quickly to threats
11 and incidents. Conversely, the dangers of [magazines with the
12 capacity to accept more than ten rounds] are heightened in dense
13 urban areas like San Francisco.

14 Any person who, prior to the passage of the ordinance, legally possessed a magazine
15 with the capacity to accept more than ten rounds is now required to store it out of state or
16 relinquish it within ninety days of the ordinance’s enactment, either through sale, transfer, or
17 surrender to the San Francisco Police Department. The parties have stipulated to extend the
18 enforcement date to April 7, 2014 (Dkt. No. 11). The ordinance is tailored to provide for certain
19 exemptions, including:

20 (1) Any government officer, agent, or employee, member
21 of the armed forces of the United States, or peace officer, to the
22 extent that such a person is otherwise authorized to possess a large
23 capacity magazine in connection with his or her official duties;

24 (2) A person licensed pursuant to Penal Code Sections
25 26700 to 26915, inclusive;

26 (3) A gunsmith for the purposes of maintenance, repair, or
27 modification of the large capacity magazine;

28 (4) Any entity that operates an armored vehicle business
pursuant to the laws of the state, and an authorized employee of
such entity, while in the course and scope of his or her
employment for purposes that pertain to the entity’s armored
vehicle business;

(5) Any person, corporation or other entity that
manufactures the large capacity magazine for a person mentioned
in subsection (a) or for export pursuant to applicable federal
regulations;

(6) Any person using the large capacity magazine solely as
a prop for a motion picture, television, or video production, or
entertainment event;

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(7) Any holder of a special weapons permit issued pursuant to Penal Code [Sections] 33300, 32650, 32700, 31000, or 18900;

(8) Any person issued a permit pursuant to Penal Code [Section] 32315 by the California Department of Justice upon a showing of good cause for the possession, transportation, or sale of large capacity magazines between a person licensed pursuant to Penal Code Section 26700 to 26915 and an out-of-state client, when those activities are in accordance with the terms of that permit;

(9) Any federal, state, or local historical society, museum, or institutional collection which is open to the public, provided that the large capacity magazine is properly housed[,] secured from unauthorized handling, and unloaded;

(10) Any person who finds the large capacity magazine, if the person is not prohibited from possessing firearms or ammunition pursuant to federal or state law, and the person possesses the large capacity magazine no longer than it is necessary to deliver or transport the same to a law enforcement agency for that agency’s disposition according to law;

(11) A forensic laboratory or any authorized agent or employee thereof in the course and scope of his or her authorized activities;

(12) Any person in the business of selling or transferring large capacity magazines in accordance with Penal Code [Section] 12020, who is in possession of a large capacity magazine solely for the purpose of doing so; or

(13) Any person lawfully in possession of a firearm that the person obtained prior to January 1, 2000 if no magazine that holds 10 or less rounds of ammunition is compatible with that firearm and the person possesses the large capacity magazine solely for use with that firearm.

Any person who violates the ordinance is guilty of a misdemeanor (Van Aken Decl., Exh. 1 at 2–6).

Plaintiffs Larry Barsetti, Rainerio Granados, Randall Low, and Arthur Ritchie are all residents of San Francisco who own magazines with the capacity to accept more than ten rounds (Barsetti Decl. ¶¶ 2–3; Granados Decl. ¶¶ 2–3; Low Decl. ¶¶ 2–3; Ritchie Decl. ¶¶ 2–3). If San Francisco’s ordinance is not enjoined, each of these plaintiffs will be forced to store their magazines with the capacity to accept more than ten rounds out of state or relinquish them by April 7. Plaintiff San Francisco Veteran Police Officers Association represents veteran San Francisco Police Department members and their interests, including their asserted right to

1 possess magazines with the capacity to accept more than ten rounds. An unspecified number of
 2 members, including plaintiff Barsetti, are residents who own magazines with the capacity
 3 to accept more than ten rounds. These members will also be forced to store their magazines
 4 with the capacity to accept more than ten rounds out of state or relinquish them by April 7 if
 5 the City's ordinance is not enjoined. Other members are non-residents who will be prohibited
 6 from carrying their magazines within San Francisco, as they currently do in accordance with
 7 state law (Vannucci Decl. ¶¶ 1,4, 7, 9). All individual plaintiffs claim that they would continue
 8 to possess magazines with the capacity to accept more than ten rounds but for Section 619 of
 9 the San Francisco Police Code.

10 Plaintiffs now move for a preliminary injunction to suspend Section 619 of the
 11 San Francisco Police Code. This order follows full briefing, oral argument, and supplemental
 12 briefing after argument concerning a recent and subsequent decision by our court of appeals.

13 ANALYSIS

14 To obtain a preliminary injunction, plaintiffs must establish: (1) they are likely to
 15 succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary
 16 relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest.
 17 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted).

18 As an alternative avenue to a preliminary injunction, our court of appeals has held
 19 that "serious questions going to the merits and a hardship balance that tips sharply toward the
 20 plaintiff can [also] support issuance of an injunction, assuming the other two elements of the
 21 *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132
 22 (9th Cir. 2011). "Serious questions" refers to questions "which cannot be resolved one way or
 23 the other at the hearing on the injunction and as to which the court perceives a need to preserve
 24 the status quo lest one side prevent resolution of the questions or execution of any judgment by
 25 altering the status quo." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991).

26 1. THE MERITS.

27 The Second Amendment states: "A well regulated Militia, being necessary to the
 28 security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

1 Plaintiffs argue that they are likely to succeed on the merits, or at least raise serious questions
2 going to the merits, because the ordinance is “categorically” unconstitutional or, at the very least,
3 fails heightened scrutiny.

4 In 2008, the Supreme Court held that the Amendment protected the fundamental
5 “individual right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 622
6 (2008). The “central component” of the right is individual self-defense. *Id.* at 599. This right
7 is incorporated against states and municipalities by way of the Fourteenth Amendment.
8 *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

9 The Supreme Court, however, recognized several important limitations on the Second
10 Amendment’s protection. While the Amendment is not restricted to militia service, the Supreme
11 Court emphasized that the “central component” of the Amendment protects an individual’s right
12 to own firearms for self-defense, particularly defense of the home. *Heller*, 554 U.S. at 628–29.

13 The Supreme Court found that “the American people have considered the handgun to be
14 the quintessential self-defense weapon [in common use] . . . for self-defense in the home.”
15 Thus, the District of Columbia’s “complete prohibition of their use [was] invalid” because it
16 “[amounted] to a prohibition of an entire class of ‘arms’ that was overwhelmingly chosen by
17 American society for that lawful purpose” and therefore failed “any of the standards of scrutiny
18 that [the Supreme Court has] applied to enumerated constitutional rights.” *Heller*, 554 U.S. at
19 628–29.

20 A very recent decision by our court of appeals extended *Heller* to protect the right to bear
21 arms for purposes of self-defense in public, *i.e.*, outside the home. *Peruta v. County of*
22 *San Diego*, No. 10-56971, at *47 (Feb. 13, 2014). *Peruta* held that the Second Amendment was
23 violated by a combination of laws that amounted to a *total* ban on carrying a firearm in public for
24 self-defense. *Id.* at *52–55. Significantly, the ordinance in question herein would not be such a
25 *total* ban. Possessing magazines that have the capacity to accept ten rounds or fewer would still
26 be perfectly legal under the challenged ordinance. *Peruta* repeatedly recognized the authority of
27 the government to impose at least some limits for public safety. *See, e.g., id.* at 11, 15, 75–76.
28 Given that the San Francisco rule is not a total ban on self-defense at home or in public, there is

1 no occasion whatsoever to apply the “categorical” prohibition advanced by plaintiffs, even if
2 such a “categorical” test had ever been adopted by our appellate courts (which has not occurred).

3 Nonetheless, the district judge is required to assess the extent to which the ordinance will
4 burden the Second Amendment, for the closer the burden comes to the core of the Second
5 Amendment, the stricter must be our scrutiny. *United States v. Chovan*, 735 F.3d 1127, 1138
6 (9th Cir. 2013); *Peruta*, slip op. at *50.

7 It is possible, of course, to use a magazine holding more than ten rounds for self-defense.
8 But, again, we are not dealing with a total ban on all magazines. Instead, we are dealing with a
9 total ban only on magazines holding more than ten rounds. Magazines holding up to ten rounds
10 are perfectly legal under the ordinance. The record shows that the average number of shots fired
11 in self-defense is 2.2 rounds (Allen Decl. ¶ 7). The record further shows that the number of
12 instances in which more than ten rounds have been fired in self-defense (in our entire country)
13 by civilians is exceedingly rare (Ayoob Decl. ¶¶ 4–17). Moreover, it would be perfectly lawful
14 under the San Francisco ordinance to carry or keep two magazines, each holding ten rounds, for
15 a total of twenty rounds — even more if more magazines are desired. If and when the first
16 magazine ran out, the self-defender could eject it and insert a backup. The scenario described by
17 counsel for plaintiffs in which an assailant keeps coming, though riddled with bullets, even
18 through the heart, so that more than ten shots are needed, even if fully credited, is nonetheless
19 answered by the ability of the self-defender to have two or more magazines. The same is true of
20 the scenario in which there are multiple assailants.

21 In sum, the San Francisco ordinance does not “destroy” the right to self-defense; it
22 “merely burdens” it. *Peruta*, slip op. at 48, 50, 52, 56, 60–61. In turn, the degree of scrutiny
23 required is less severe. This order will apply the so-called intermediate scrutiny, but will also
24 find below that even under any higher scrutiny, the San Francisco ordinance is constitutional.

25 This order pauses to note that while the *Peruta* majority (and dissent) extensively
26 examined the history of the American and English experience at the time of the ratification of
27 our Second Amendment, plaintiffs (and defendants) have completely ignored the pertinent
28 history in the briefing on this order. On appeal, counsel are requested to own up to this gap in

1 their record. The bottom line on history is that there is no proof that multi-bullet magazines for
2 firearms were in use at the time of the ratification of the Second Amendment. Historians will
3 remember, in any event, that the Spencer and Henry repeating rifles came along during our Civil
4 War and would appear, at least to the undersigned judge, to have introduced the earliest
5 magazines for firearms.

6 Perhaps in light of this gap in the record, plaintiffs' counsel have fallen back on the
7 argument that magazines holding more than ten are commonplace and prevalent today. The
8 record provided by counsel does not actually show that such magazines are common or prevalent
9 among law-abiding citizens (as opposed to criminals and law enforcement). The record shows
10 only that a large number of such magazines have been made and sold, but does not break down
11 how they are possessed. Nonetheless, passing that shortfall in the record, the main point is that
12 we are *not* concerned with a total ban on magazines and thus the burden on Second Amendment
13 interests is reduced.

14 Turning to intermediate scrutiny, this order finds that the San Francisco ordinance is
15 substantially related to its interests in promoting public safety and preventing gun violence. Its
16 ordinance prevents mass murderers from firing a larger number of rounds faster by depriving
17 them of magazines with the capacity to accept more than ten rounds (Koper Decl. ¶ 7; Zimring
18 Decl. ¶¶ 16–19). The record demonstrates that there is a very high correlation between mass
19 shootings and the use of magazines with the capacity to accept more than ten rounds (Koper
20 Decl. ¶ 14; Allen Decl. ¶ 17). The ordinance specifically identifies several high-profile mass
21 shootings where magazines with the capacity to accept more than ten rounds were used:

22 (1) The shooting on the campus of Virginia Tech on
23 April 16, 2007, where 32 people were killed and many others
wounded,

24 (2) The shooting in a gym in Pittsburgh on August 4, 2009,
25 where three people were killed and nine others injured,

26 (3) The shooting on November 5, 2009, at Fort Hood,
Texas, where 13 people were killed and 34 more were wounded,

27 (4) The shooting on January 8, 2011, at Tucson, Arizona,
28 where six people were killed, including U.S. District Judge John
Roll, and 13 people were injured, including a then-member of the
United States House of Representatives Gabrielle Giffords,

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2 (5) The shootings on December 14, 2012, at Newtown,
3 Connecticut, where 27 people (not including the shooter) were
4 killed (Van Aken Decl., Exh. 1 at 2).

5 San Francisco has proven that its ordinance is substantially related to its goals of protecting
6 public safety and reducing injuries resulting from criminal use. This is true on the motion
7 record without giving any deference to San Francisco's legislative judgment.

8 Turning to the least restrictive means, the San Francisco ordinance has taken care to
9 recognize exemptions designed to accommodate instances in which there may be an unusual
10 need for magazines holding more than ten bullets, such as, for example, owners of firearms for
11 which no magazine holding ten or fewer rounds is available, and law enforcement, to take only
12 two of the thirteen exemptions set forth above. But the thrust of the prohibition on possession is
13 to remove these especially lethal items from circulation so that they will be unavailable, or at
14 least less available, to mass murderers. Had the line been drawn at say twelve or fifteen, the
15 incremental benefit to self-defense would have been minuscule, but the incremental risk to
16 school children and other victims would have been proportionately worse and palpable.
17 Therefore, a least restrictive means test, if it applies, has been met by San Francisco.

18 Notwithstanding the earlier holding by our court of appeals in *Chovan*, this order
19 recognizes that the majority opinion in *Peruta* includes passages that cast doubt on the
20 continuing use of intermediate scrutiny in Second Amendment cases (*see Peruta*, slip op. at
21 *63–73, particularly page 73). Please bear in mind, however, that even *Peruta* reserved its
22 stricter test for *total* bans on the right of self-defense and recognized that “mere burdens” were
23 permitted under the Second Amendment. This order need not choose because, even under the
24 stricter test in *Peruta*, the San Francisco ordinance passes muster.

25 Finally, please remember that, as *Peruta* states, “[t]he right is, and always has been,
26 oriented to the end of self-defense.” Therefore, the fact that a clip with more than ten rounds
27 may be handy in target practice or competitions fails to cut a figure under the Second
28 Amendment. Self-defense is what matters.

1 **2. EXTENT OF IRREPARABLE HARM.**

2 Plaintiffs argue that they will suffer irreparable harm absent a preliminary injunction
3 because they will have to surrender their magazines with the capacity to accept more than
4 ten rounds by April 7 in order to comply with the San Francisco ordinance. Should they prevail
5 on the merits after that date, they will be unable, they say, to acquire new ones because of
6 California’s prohibition on the sale or transfer of new magazines with the capacity to accept
7 more than ten rounds.

8 In the event that plaintiffs prevail on the merits, however, the City and County of
9 San Francisco is ordered to return plaintiffs’ surrendered magazines back to them. Moreover,
10 plaintiffs can always store their magazines with the capacity to accept more than ten rounds out
11 of state. This greatly minimizes the likelihood of irreparable injury. In the meantime, they can
12 use magazines accepting ten rounds or fewer to defend themselves.

13 Because plaintiffs have not shown a constitutional violation or a likelihood thereof,
14 there is no occasion to consider their argument that irreparable injury must automatically be
15 presumed to flow from the violation.

16 **3. BALANCE OF EQUITIES.**

17 In ruling on a preliminary injunction, courts “must balance the competing claims of
18 injury and must consider the effect on each party of the granting or withholding of the requested
19 relief.” *Winter*, 555 U.S. at 24 (citations omitted). Here, the balance of the equities lies in favor
20 of San Francisco. If a preliminary injunction is denied, then plaintiffs will have to resort to
21 using magazines that can accept ten rounds or fewer. Moreover, San Francisco will return
22 plaintiffs’ surrendered magazines back to them if the ordinance is ultimately found
23 unconstitutional. These considerations are vastly outweighed by the demonstrated need to
24 remove magazines from circulation that are capable of accepting more than ten rounds. Such
25 magazines allow mass killers to shoot more victims before reloading, multiplying the number of
26 deaths (Zimring Decl. ¶¶ 16–19). If a mass murderer has to reload because he or she does not
27 have a magazine with the capacity to accept more than ten rounds, there is a better chance that
28 someone present will subdue him or her sooner (Van Aken Decl., Exhs. 18, 22–23).

1 Although there will be some occasions when a law-abiding citizen needs more than
2 ten rounds to defend himself or his family, the record shows that such occasions are rare. This
3 will be even rarer in a dense urban area like San Francisco where police will likely be alerted at
4 the outset of gunfire and come to the aid of the victim. Nonetheless, in those rare cases, to
5 deprive the citizen of more than ten shots may lead to his or her own death. Let this point be
6 conceded. In assessing the balance of equities, those rare occasions must be weighed against
7 the more frequent and documented occasions when a mass murderer with a gun holding eleven
8 or more rounds empties the magazine and slaughters innocents. *One critical difference is that*
9 *whereas the civilian defender rarely will exhaust the up-to-ten magazine, the mass murderer*
10 *has every intention of firing every round possible and will exhaust the largest magazine*
11 *available to him.* On balance, more innocent lives will be saved by limiting the capacity of
12 magazines than by allowing the previous regime of no limitation to continue.

13 **4. PUBLIC INTEREST.**

14 For the same reason, the public interest favors immediate enforcement of the
15 San Francisco ordinance. Within the last thirty years, 86 percent of mass shootings involved
16 at least one magazine with the capacity to accept more than ten rounds (Koper Decl. ¶ 15;
17 Allen Decl. ¶ 17). More people are injured or killed per mass shooting with a magazine with
18 the capacity to accept more than ten rounds than without (Allen Decl. ¶ 14; Koper Decl. ¶ 20).
19 San Francisco’s interest in preventing another Sandy Hook tragedy constitutes a “critical public
20 interest.”

21 Moreover, San Francisco’s ordinance explicitly cites the danger that police officers face
22 when targeted with magazines with the capacity to accept more than ten rounds as one of its
23 justifications for the ban (Van Aken Decl., Exh. 1 at 3). San Francisco’s interest in protecting
24 the lives and safety of its police officers is also central to the public interest (Lazar Decl. ¶¶
25 8–9, Exh. A). Thus, it has compellingly established two critical reasons why immediate
26 enforcement is in the public interest.

