



Securing the Civil Rights of California Gun Owners

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February 1, 2010

VIA EMAIL

RE: Proposed Firearms Ordinances: Ammunition and Firearms Dealer Permitting,
Ammunition Sales Recording, and Lost & Stolen Reporting

Hon. City Councilmen and Mayor:

I write to you to introduce The Calguns Foundation, Inc. and voice our opposition to the recently proposed firearms ordinances.

The Calguns Foundation, Inc. is a 501(c)(3) organization founded to protect and defend the civil rights of California's law abiding gun owners. One of our board members resides in the City of Oakland. The Calguns Foundation was recently awarded the "Grass Roots Gun Rights Organization of the Year, 2009" by the Citizens Committee for the Right to Keep and Bear Arms, a sister organization of the Second Amendment Foundation. We are well-known for our accomplishments, which include clarifying the definition of "assault weapon" in California by promulgating the Assault Weapons Identification Flow Chart which is being adopted by law enforcement agencies throughout California, and defending various gun owners *improperly* charged with firearms crimes. In addition, our amicus brief in the historic *McDonald v. Chicago* (United States Supreme Court Docket No. 08-1521) was cited by the *McDonald* petitioners in their reply brief.

Our litigation has so far forced changes the District of Columbia's adoption of California's Handgun Roster. With the assistance of Alan Gura (lead counsel in *D.C. v. Heller* (2008) 128 S. Ct. 2783, and *McDonald v. Chicago*), we are currently litigating the constitutionality of the handgun carry licensing policies of the Sheriffs of Sacramento and Yolo County in *Sykes et. al. v. McGinness et. al.* which is a companion case to *Palmer v. D.C.* challenging the lack of a right to carry a firearm in D.C. Additionally we are challenging the constitutionality of California's Handgun Roster in *Peña et. al. v Cid*, which is a companion case to *Hanson v. D.C.* that was rendered moot when D.C. vastly liberalized its Handgun Roster.

Now is a particularly poor time for the City of Oakland to be passing new restrictions on the civil rights of firearms owners and sellers. Currently pending before the Supreme Court is *McDonald v. Chicago*, which is the follow up case to *D.C. v Heller* that

challenges Chicago's virtually identical handgun ban and the City's re-registration requirement. Oral argument in the case is scheduled for March 2, 2010. A decision is widely expected in late June of 2010. Almost everyone (including The Brady Campaign to Prevent Gun Violence who filed an amicus for neither party in *McDonald* and California's Attorney General Jerry Brown who filed an amicus at the cert stage) expects the Supreme Court to rule that the Second Amendment binds the states to respect the right to keep and bear arms.

The Supreme Court in *D.C. v. Heller* ruled out rational basis scrutiny for laws impacting the right to keep and bear arms leaving only intermediate or strict scrutiny as methods of reviewing laws impacting the civil rights of gun owners and sellers. An excellent example of this is a recent 7th Circuit case entitled *U.S. v. Skoien* decided November 18, 2009, where the conviction for possession of a firearm while being prohibited to possess by a prior misdemeanor crime of domestic violence was remanded to the District Court due to the Government not presenting evidence that the prohibition met intermediate scrutiny requirements. For this overarching reason, **the City Council should at least wait until the decision is announced in *McDonald v. Chicago* before acting in this fast moving area of constitutional law.**

Further, each of the three core proposals suffers from its own independent and significant constitutional and/or state law challenges.

1. With respect to proposed Oakland Municipal Code Section Amendments to Chapter 5.26," the permitting requirements for the sale of ammunition and firearms far exceed both existing *and* upcoming state requirements, and are thus preempted under well-settled case law which holds that State law supercedes local law with respect to firearms. (See *Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App 4th 895 [70 Cal.Rptr.3d 324].)
2. With respect to proposed Oakland Municipal Code Section Amendments to Chapter 9.20, the registration of both pistol and rifle ammunition purchases and their subsequent comparison with criminal records may be an unconstitutional general warrant. Data available from Sacramento, who adopted a similar ordinance, shows that 3% of ammunition buyers were prohibited purchasers of ammunition. That means that Sacramento conducted an unreasonable warrantless search on 97% of the purchasers of ammunition. One can not be forced to waive their Fourth Amendment rights to exercise their Second Amendment rights.
3. With respect to proposed Oakland Municipal Code Section Amendments to Chapter 9.36, the lost/stolen reporting has other issues beyond their likely lack of support under the intermediate scrutiny standards. Those who actually straw purchase firearms can not be constitutionally required to violate their Fifth Amendment right against self incrimination as would be required by the ordinance. The Legal Community Against Violence ("LCAV") may claim that the mode of analysis in *U.S. v. Haynes* 390 U.S. 85 (1968) does not apply to the instant ordinance, but from the case, "the correlation

between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution.”

Finally, LCAV often promises to provide pro-bono defense of the ordinances that it lobbies for. There are two significant caveats to this promise that the City of Oakland should be aware of. First, in the long running battle over an ordinance banning gun shows in Alameda County entitled *Nordyke v. King*, LCAV asked for pro-bono work to determine if that ordinance is actually constitutional as recently as only 120 days ago even though the project dates back almost 10 years. Second and most importantly, **LCAV does not, to our knowledge, promise to pay for the prevailing attorney’s fees.** San Francisco recently lost *Fiscal at. al. v. San Francisco* and paid \$38,000.00 to NRA attorneys¹. D.C. is facing a potential bill of approximately \$3,500,000.00 for Mr. Gura and his team². Should the City wish to proceed with these ordinances, it should both consider the likely costs of losing as well as require LCAV to be willing to participate in offsetting the costs should civil rights groups prevail.

These ordinances should, at minimum, be deferred until after *McDonald* has been decided by the Supreme Court and further should not be adopted, as the City gains little from becoming a test case.

Gene Hoffman
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Sincerely yours,



Gene Hoffman, Jr.
Chairman
The Calguns Foundation

cc: Mr. Alan Gura, Counsel
Mr. Don Kilmer, Counsel
Mr. Jason Davis, Counsel

¹ See <http://www.nraila.org/News/Read/NewsReleases.aspx?id=12098>

² http://www.cato.org/pub_display.php?pub_id=9693