



Securing the Civil Rights of California Gun Owners

Gene Hoffman, Jr.
3200 Bridge Parkway
Suite 202C
Redwood City, California 9065
Phone: 650-275-1015
Fax: 650-264-4701
hoffmang@hoffmang.com

December 14, 2009

Honorable Mike Church
Honorable Carole Groom
Honorable Rich Gordon
Honorable Rose Jacobs Gibson
Honorable Adrienne Tissier
COUNTY OF SAN MATEO
BOARD OF SUPERVISORS
400 County Center, 1st Floor
Redwood City, CA 94063
VIA EMAIL

RE: Proposed Firearms Ordinances: Dealers, Ammunition, Age
Restrictions, and Lost & Stolen Reporting

Hon. Supervisors:

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. The Calguns Foundation, Inc. is also a resident of San Mateo County. 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 prefer to be known by 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.

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*, United States Supreme Court Docket No. 08-1521), 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 County of San Mateo 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 is Incorporated and thus 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 Board of Supervisors 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 suffer from their own independent significant constitutional challenges.

The restrictions on locations of FFLs are both impractical and cannot survive intermediate scrutiny. The County has no empirical research that gun stores create the kinds of secondary effects that have in the past allowed some localities to limit the hours or activities of adult book sellers, which would be required to regulated First or Second Amendment activity. It would be highly ironic if the county attempted to regulate stores that sell constitutionally protected material more strongly than it regulates sellers of protected adult material in the same county.

The "under 21" portion of the age restriction ordinance is unconstitutional. Individuals who are 18 and over but under 21 have the right to acquire long arms. As a practical matter, the vast majority of gun stores sell both handguns and long arms. This practical

implication is that the right to self defense would be abrogated to any county resident under 21. No other constitutional right allows the state to deny those 18 and over its protection. Even if the constitutional analysis of these sorts of regulations parallels the abortion access rights cases, this restriction would be an undue burden on County resident's right to keep arms.

The registration of 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.

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 Board of Supervisors should be aware of. First, in the long running battle over an ordinance banning gun shows in Alameda County (an ordinance which LCAV convinced this board to pass also at 3.53.010 Ord. 4146, 12/17/02) entitled *Nordyke v. King*, LCAV asked for pro-bono work to determine if that ordinance is actually constitutional as recently as only 90 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 County wish to proceed with these ordinances, it should both consider the likely costs of losing as well as ask 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 County gains little from becoming a test case.

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

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

Gene Hoffman
The Calguns Foundation
3200 Bridge Parkway Suite 202C
Redwood City, CA 94065.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'G. Hoffman', with a stylized flourish extending from the end.

Gene Hoffman, Jr.
Chairman
The Calguns Foundation

cc: Mr. Alan Gura, Counsel
Mr. Don Kilmer, Counsel
Mr. Jason Davis, Counsel
Mr. David Boesch, County Manager
Mrs. Marie Peterson, Deputy Clerk of the Board
Mr. Michael P. Murphy, County Counsel