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February 27, 2015

Ms. Jannie L. Quinn  
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CITY OF MOUNTAIN VIEW  
500 Castro Street, 3rd Floor  
Mountain View, CA 94041  
**VIA U.S. MAIL AND FAX: (650) 967-4215**

**Re: Sunnyvale Measure C Memorandum**

Dear City Attorney Quinn:

We write on behalf of our clients, the National Rifle Association ("NRA") and the California Rifle and Pistol Association ("CRPA"), as well as the hundreds of thousands of their members in California, including those members residing in the City of Mountain View (the "City"). We understand that you have been assigned to draft a memorandum on Sunnyvale's voter-passed initiative, Measure C. We write to inform you that our clients oppose adoption of any ordinance based on Sunnyvale Measure C and urge you not to recommend a similar ordinance for Mountain View.

**I. EXISTING FEDERAL AND STATE CHALLENGES TO SUNNYVALE'S MEASURE C MAKE IT PREMATURE TO RECOMMEND ADOPTING SIMILAR LAWS**

Because litigation concerning Measure C is ongoing, consideration of an ordinance similar to Measure C is simply not prudent at this time. As you may be aware, legal challenges to Measure C were swiftly brought. Indeed, our office is currently involved in litigation against Sunnyvale, challenging, on Second Amendment grounds, Measure C's provision banning the possession of ammunition magazines capable of holding more than ten rounds. That case, *Fyock v. Sunnyvale*, Case No. 14-15408, is currently pending before the Ninth Circuit Court of Appeals.

Similarly, the National Shooting Sports Foundation, Inc., is currently engaged in litigation challenging the remainder of Measure C, including its provisions regarding firearm storage, theft reporting, and ammunition sales record-keeping. That case, *U.S. Firearms Co. v. City of Sunnyvale*, Case No. 257353, is currently before the Santa Clara Superior Court of the State of California.

Second Amendment civil rights jurisprudence is evolving rapidly in the wake of the Supreme Court recognizing an individual Second Amendment right. The City would be wise to refrain from

considering and adopting these sorts of measures while this field of law develops through litigation. We urge you to not recommend adopting a package of ordinances similar to Measure C while challenges to that measure are still ongoing. Doing so will preserve taxpayer funds for legitimate and important matters that the City is currently facing.

## II. THE PROVISIONS OF MEASURE C ARE RIFE WITH PROBLEMS

It should be no surprise that Measure C is currently being challenged in multiple courts, for the majority of its provisions are flawed, ineffective, or outright unconstitutional. Mountain View should be aware of these concerns before it moves to adopt a similar ordinance package.

### A. Measure C's Duty to Report Firearm Theft or Loss Within 48 Hours Is Unsound Public Policy, and It Will Do Little to Achieve Its Goals

Proponents of reporting requirements often claim that requiring firearm owners to report the theft or loss of firearms will encourage responsible gun ownership and assist in the investigation and prosecution of crime. While laudable goals, these claims are overstated.

In 2006, the Sacramento Law and Legislation committee asked the Sacramento Police Department to research the effectiveness of theft-reporting requirements like the one found in Measure C. The resulting report demonstrates that such ordinances are unused and ineffective in the cities that have adopted them. For instance, an experienced inspector in the Weapons Unit of the San Francisco Police Department, who reads 3,000 reports every month, stated that he had not handled nor had he heard of any cases in which the ordinance was invoked. When asked about the effectiveness of the ordinance, a San Francisco Assistant District Attorney stated, "I do not believe it will expand my ability to prosecute crime . . .," adding that "[i]t will take special circumstances for the ordinance to be useful in prosecution, in that the person charged under the ordinance would have to be proven cognizant of the burglary or theft of the firearm."

Even Sacramento Councilwoman Lauren Hammond, while acknowledging that Sacramento is a city at the forefront of gun violence prevention, conceded that "on top of an ordinance that sounds really good, it hasn't done anything. Although I do support the concept, we've had an opportunity to see what it's done in other jurisdictions and it hasn't done a darned thing . . ."

What's more, theft-reporting ordinances can actually *frustrate* police investigations, as it impacts innocent people unaware of the requirement. If a gun owner did not report the gun's loss or theft because he was unaware of the reporting requirement and is then approached by police investigating the gun after it is recovered at a crime scene, that owner faces possible criminal prosecution. The owner's self-interest dictates that he employ legal counsel rather than cooperate with police to quickly provide information they need in order to investigate the crime and trace the firearm.

Once an attorney is involved, that attorney then engages in a dialog with the police and often advises the victim to remain silent. This is not mere conjecture. It is currently happening in Los Angeles County and in San Francisco, where similar laws have been on the books for years. Many individuals who have been the victim of firearm theft have retained legal counsel to respond to inquiries from law enforcement seeking information concerning a recovered firearm. The process bogs down

negotiations while the possible liability of the victim for having the firearm stolen is evaluated. Meanwhile, the investigation of a crime involving the lost or stolen firearm is hindered.

Further, a theft-reporting ordinance actually discourages reporting if the 48-hour reporting window is missed. Most people already report the theft or loss of a firearm in hopes of getting it back if recovered by law enforcement or for insurance purposes. To mandate such a report and to attach a penalty for not complying amounts to little more than harassment of lawful residents. It further victimizes the victim of the crime. And because of the penalty, the ordinance will encourage those who miss the 48-hour window *to not report their loss at all* for fear of criminal penalties.

### **B. Measure C's Locked-Storage Mandate Violates the Second Amendment, While Increasing the Risk of Gun Accidents**

Measure C also requires a firearm to be stored in a locked container or disabled with a trigger lock unless it is under one's immediate control. This requirement makes it practically impossible for residents to use their firearms for the core lawful purpose of self-defense—particularly in urgent, life-threatening situations when the need to exercise the Constitutional right to self-defense is most acute. The Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), explicitly noted that in such life-threatening situations, one has little time—if any—to fumble around and attempt to remove a trigger lock or open and retrieve a handgun from a safe to ward off a violent attack. As such, this measure violates citizens' rights to defend themselves against such attacks by exercising their fundamental right to keep and bear arms under the Second Amendment.

Aside from being unconstitutional on their face, laws requiring either trigger locks or locked containers pose policy concerns as such items are ineffective, dangerous, or both. For instance, studies have shown that trigger locks often increase rather than decrease the potential for an accidental discharge. All firearms currently manufactured or imported into the United States can pass a "drop test." A loaded firearm that passes the test will not fire when it is dropped. When a trigger lock is applied, however, the loaded firearm may accidentally discharge.

As with trigger locks, lock boxes often promote a false sense of security. Unlike safes, lock boxes are easily accessible and can be broken into with minimal effort. Consider *Wood v. Groh*, 7 P.3d 1163 (2000), where an adolescent gained access to a lock box with a simple screwdriver. Effective lock boxes that prevent most unwanted access are expensive and difficult to obtain. For this provision to be effective, every firearm owner must purchase an expensive, difficult-to-obtain lock box. The result will be homeowners expending enormous resources to comply with the locked-storage mandate—an endeavor many working families can scarcely afford.

Ultimately, firearm locked-storage laws violate the Second Amendment by making effective self-defense practically impossible in life-threatening emergencies, while increasing the risk of gun accidents. While such laws sound good in theory, they often do more harm than good.

### **C. Measure C's Ban on the Possession of Standard-Capacity Ammunition Magazines Violates the Second Amendment**

As mentioned above, *Fyock v. Sunnyvale* challenges Sunnyvale's ban on the possession of

ammunition magazines capable of holding more than ten rounds. The Supreme Court's decision in *Heller* is clear that arms "typically possessed by law-abiding citizens for lawful purposes" or those "in common use" are protected by the Second Amendment. 554 U.S. at 624-25. That protection necessarily extends to commonly used ammunition feeding devices—e.g., magazines—which are necessary for the meaningful exercise of the right. See *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014). Under any standard of review, a flat ban on items protected by the Second Amendment is unconstitutional. See *Heller*, 554 U.S. at 628-29.

The lawful use of ammunition feeding devices with a capacity of ten or more rounds is exceedingly common. Indeed, the district court in *Fyock v. City of Sunnyvale* found the magazines to be arms "in common use" within the scope of and protected by the Second Amendment. 25 F. Supp. 3d 1267, 1275 (N.D. Cal. Mar. 5, 2014). Such magazines are "standard equipment" on firearms owned by millions of Americans. Due to the popularity of these magazines, and because of their effectiveness for personal defense, they are widely used (and often preferred) for home defense. Accordingly, law-abiding citizens are guaranteed the right to acquire, possess, and use them for lawful purposes. *Heller*, 554 U.S. at 624. That guarantee prevents any city from banishing them from its borders.

Since Measure C bans standard-capacity ammunition magazines in violation of the Second Amendment, adoption of a similar ordinance will make Mountain View a prime target for litigation. The City would be wise to refrain from moving forward with such a measure until the litigation of similar bans are final. Waiting the outcome of these cases will allow the City to more fully consider the effects of such an ordinance, assured that whatever action it takes is supported by legal precedent.

**D. Measure C's Ammunition Sales Record-Keeping Requirement Overly Burdens Ammunition Retailers and Gun Owners, and It Is an Ineffective Police Tool**

Sunnyvale Municipal Code section 9.44.060 further burdens an already overly regulated sector of the business community. Ammunition retailers will be required to expend significant time with each ammunition purchaser to explain the new law, obtain the required information, fill out the necessary forms, maintain the records, and transmit requested information to the police. The additional time devoted to each ammunition transaction will undoubtedly lead to a reduction in the volume of sales for each retailer, ultimately impacting the City's tax revenues.

Additionally, the requirement that licensed ammunition sellers maintain detailed records of customers who purchase ammunition infringes on the customer's privacy rights and alienates and drives off customers. Many customers will simply purchase ammunition elsewhere. Local businesses will suffer lost sales and revenue, and the City will lose tax revenues on both the legal purchase of ammunition and the purchase of other items which, but for this ordinance, would have been purchased together with ammunition.

Most significantly, however, registration of ammunition sales creates an unnecessary backlog for the police department, and it wastes valuable law enforcement resources and taxpayer dollars. In 1997, for instance, the City of Pasadena examined the effectiveness of its ammunition sales registration ordinance and found that the ordinance did not work. The record-keeping requirements were onerous to those who sell ammunition legally, and the ordinance provided no deterrent at all to those who peddle bullets on the street. As a crime-fighting tool, the ordinance was totally ineffective. The records never

helped police to solve a crime. Indeed, the Pasadena Police Department confirmed that ammunition registration had been of no use in reducing the rate of gun-related violence and that, in the years it had been in effect, the law proved to be nothing more than a distraction and an ineffective tool for law enforcement. Pasadena ultimately voted to repeal the ordinance.

Similarly, through the 1980s, Congress considered repeal of a federal ammunition regulation package that required licensing of ammunition retailers, registration of ammunition sales, and a ban on the mail-order sale of ammunition. In 1986, the director of the Bureau of Alcohol, Tobacco and Firearms supported eliminating the record keeping requirement: "The Bureau and the [Treasury] Department have recognized that current *recordkeeping requirements for ammunition have no substantial law enforcement value*. In addition, their elimination would remove an *unnecessary recordkeeping burden from licensees*."<sup>1</sup> As a result, the Firearms Owners Protection Act of 1986 repealed the ammunition restrictions with little opposition despite heated debate over other provisions of the bill.

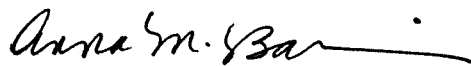
Combined, these experiences are a clear signpost counseling against the implementation of a do-nothing ammunition record-keeping ordinance. Plainly put, such laws are largely ineffective and substantially burdensome, causing more harm than good.

### III. CONCLUSION

Simply put, Measure C is wrought with practical and legal shortcomings, as well as with significant potential liabilities for gun owners, retailers, and the city. Our clients understand the need to fight the criminal misuse of firearms and gun violence, and it is not the intention of the NRA, CRPA, or individual gun owners to frustrate legitimate regulations. But, because local governments should "tread lightly" when regulating firearms, *Fiscal v. City of San Francisco*, 158 Cal. App. 4th 895, 919 (2008), Mountain View would be well advised to consider closely the ineffectiveness and detrimental effects of laws like those included as part of Sunnyvale's Measure C. And it should certainly not adopt any law, the constitutionality of which is still the subject of ongoing litigation in the courts of appeals.

For these reasons, we respectfully oppose the drafting and enactment of a package of gun laws similar to Measure C. Should you have any questions or concerns, please feel free to contact us.

Sincerely,  
Michel & Associates, P.C.



Anna M. Barvir

AMB/mel

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<sup>1</sup> *Legislation To Modify the 1968 Gun Control Act*, Hearing Report, Committee on the Judiciary, U.S. House of Representatives, October 38, 30, Nov. 8, 1985, and February 19 and 27, 1986 (emphasis added). The BATF was an agency of the Treasury Department until 2003.

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**FAX TRANSMITTAL SHEET**

**TO:** Jannie L. Quinn, City Attorney  
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**FAX NO.:** (650) 967-4215  
**TEL. NO.**  
**FROM:** Anna M. Barvir  
**DATE:** February 27, 2015  
**RE:** Sunnyvale Measure C Memorandum

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**SPECIAL INSTRUCTIONS**



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