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FAX TRANSMITTAL SHEET

TO: City Clerk

FIRM: City of Los Angeles

FAX NO.: (213) 978-1027

TEL. NO.

FROM: Anna M. Barvir

DATE: September 13, 2013

RE: File No. 13-0068: "Large Capacity Magazines" - OPPOSITION

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September 12, 2013

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Councilmember Mitch O'Farrell
CITY OF LOS ANGELES
PUBLIC SAFETY COMMITTEE
200 N. Spring Street
Los Angeles, California 90012
VIA FAX, EMAIL & U. S. MAIL

Re: File No. 13-0068: "Large-Capacity Magazines" – OPPOSITION

Dear Public Safety Committee Members:

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 Los Angeles (the "City").

Our clients oppose adoption of File No. 13-0068 ("the Proposed Ordinance"), which seeks to declare any "large-capacity magazine" within the City a "public nuisance," allowing for the confiscation and summary destruction of such magazines by the Los Angeles Police Department.

With the Public Safety Committee scheduled to hear a revised proposal at its September 13, 2013 meeting, we write to share our clients' concerns regarding adoption of the Proposed Ordinance. Specifically, the proposal is preempted by state law and violates the Second Amendment.

I. The Proposed Ordinance is Preempted by State Law

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws.*" Cal. Const., art. XI, § 7 (emphasis added). "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." *O'Connell v. City of Stockton*, 41 Cal.4th 1061, 1067 (2007) (quoting

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Sherwin-Williams Co. v. City of Los Angeles, 4 Cal.4th 893, 897 (1993); citing *Am. Fin. Servs. Assn. v. City of Oakland*, 34 Cal.4th 1239, 1251 (2005)). Legislation is said to “conflict with” state law if it “*duplicates, contradicts, or enters an area fully occupied* by general law, either expressly or by legislative implication.” *Id.* (emphasis added).

While there is some confusion as to what exactly the Proposed Ordinance applies to, it is nonetheless preempted by state law on all three counts.

A. To the Extent the Proposed Ordinance Applies Only to “Large-Capacity Magazines” Acquired After 2000, It Unconstitutionally Duplicates State Law

The proposed ordinance cannot declare that those “large-capacity magazines” that might already be a nuisance under state law are likewise a nuisance within the City without running afoul of the constitution. “A local ordinance *duplicates* state law when it is ‘coextensive’ with state law.” *O’Connell*, 41 Cal.4th at 1067. It “cannot prohibit exactly the same thing prohibited by the state law and still be valid.” *Ex Parte Daniels*, 183 Cal. 636, 645 (1920).

California Penal Code section 32390 provides that, subject to certain exceptions, “any large-capacity magazine is a nuisance and is subject to Section 18010,” which states that weapons classified as nuisances may be enjoined by the Attorney General, district attorney, or city attorney and are subject to confiscation and summary destruction. Cal. Penal Code § 18010(a)(20), (b).

The Proposed Ordinance is very nearly identical. Indeed, it expressly relies on Section 32390, in designating “large capacity magazines” as nuisances, and Section 18010, in identifying the consequences attached to possessing one. The ordinance thus declares the very same magazines that state law already defines as nuisances to be nuisances within Los Angeles as well. And then adds that these “nuisances” – which are already subject to confiscation and destruction under state law – are subject to confiscation and destruction under Los Angeles City law as well.

Because the Proposed Ordinance seeks to “punish[] the same act denounced by state law,” *Abbott v. City of Los Angeles*, 53 Cal.2d 674, 682 (1960), the ordinance is preempted by state law (and is therefore invalid).

B. To the Extent the Proposed Ordinance Is Interpreted to Apply to “Large-Capacity Magazines” Acquired Prior to 2000, It Contradicts State Law

A local law “*contradicts* state law when it is inimical to or cannot be reconciled with state law.” *O’Connell*, 41 Cal.4th at 1068. The Proposed Ordinance is preempted as contradictory to state law to the extent it is intended to apply to “large-capacity magazines” acquired prior to January 1, 2000. Those magazines are not nuisances under state law and, in fact, owners of such magazines enjoy various uses expressly granted by various Penal Code sections. To the extent the Proposed Ordinance applies to “large capacity magazines” acquired before 2000, it deprives those in lawful possession of such magazines from conduct they are expressly entitled to engage

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in under state law. Flatly prohibiting what the state expressly allows, the proposal conflicts with state law and is preempted. *See Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 915 (2008).

There seems to be some confusion, leading the City to believe that even magazines acquired before 2000 are declared nuisances under Penal Code section 32390, and thus would be declared public nuisances in Los Angeles under the Proposed Ordinance. They are not.

Section 32390 became operative on January 1, 2012, as part of legislation to “reorganize *without substantive change* the provisions of the Penal Code relating to deadly weapons.” SB 1080, 2010 Cal. Stat. ch. 711 (emphasis added). To determine which “large-capacity magazines” might constitute a nuisance under the Penal Code, it is therefore necessary to examine the statutory scheme *prior to its non-substantive reorganization*.

In 1999, Senate Bill 23 amended Section 12020(a) of the Penal Code to add the prohibition on manufacture, import, sale, gift, or loan of “large-capacity magazines.” This bill was careful to note that it “would make it a crime to do anything with detachable large-capacity magazines after January 1, 2000 – *except possess and personally use them . . .*” Sen. Comm. Pub. Safety, SB 23, 1999 Cal. Stat. ch. 129 p. 7 (emphasis added). The limited nature of this legislation is significant for determining which magazines constitute a nuisance under the Penal Code.

Before the non-substantive renumbering of the Penal Code, items listed as prohibited in Former Section 12020(a) were also declared nuisances under Former Section 12029. For example, Former Section 12029 specifically declares that “blackjacks, slungshots, billies, nunchakus, sandclubs, sandbags, shurikens, metal knuckles, short-barreled shotguns or short-barreled rifles . . . are nuisances.” And because it is illegal to *possess* each of these specific items under Section 12020(a)(1), this nuisance statute logically provides that their possession may be enjoined and that *all* of these listed items are subject to summary destruction.

For items not specifically listed as nuisances under Former Section 12029, the statute effectively provides a “catch-all,” stating that “any other item which is listed in subdivision (a) of Section 12020 . . .” is likewise a nuisance. For example, although “any flechette dart” or “any leaded cane” is not specifically listed in Section 12029, any flechette dart or leaded cane is prohibited under Section 12020(a)(1). Because it is illegal to possess a flechette dart or leaded cane, Section 12029 provides that they may be deemed a nuisance, their possession may be enjoined, and they may be summarily destroyed.

This is not the case with “large-capacity magazines.” Unlike all blackjacks, billies, and flechette darts or leaded canes – whose possession is illegal – “large-capacity magazines” are perfectly legal to possess (if acquired prior to January 1, 2000). And because their possession is legal, Former Section 12029 never contemplated them being a nuisance. Nuisances under Section 12029, after all, are limited only to those items listed in Section 12020(a). Because the only “large-capacity magazines” referred to in Section 12020(a) are those that are manufactured,

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imported, sold, gifted, or loaned after *January 1, 2000*, and because all of Former Section 12020 is silent as to *possessed* "large-capacity magazines," such magazines cannot constitute nuisances. Instead, consistent with the Penal Code's internal logic, the only "large-capacity magazines" that might arguably constitute a nuisance are those that are manufactured, imported, given, or sold after January 1, 2000.

Thus, although Section 32390 provides that all "large-capacity magazines" are nuisances, this was an unintended, substantive restructuring that resulted when reorganizing the Penal Code. But, because substantive changes were not intended by the reorganization, it is non-binding and void. Our office is currently in communications with the Law Revision Commission to rectify this oversight.

Ultimately, because "large capacity magazines" acquired before January 1, 2000, are not actually considered nuisances under Section 32390, the Proposed Ordinance does not apply to such magazines, on its face. To the extent it is interpreted or intended to apply to *all* magazines, including these "grandfathered" magazines, it contradicts existing state law because it bans conduct expressly allowed by state law and is preempted.

C. The Proposed Ordinance Improperly Enters an Area of Law That Is Fully Occupied by State Law

Similarly, attempts to apply the Proposed Ordinance to "large-capacity magazines" acquired prior to 2000 is impliedly preempted by state law. A local ordinance that encroaches on an area of law impliedly occupied by the Legislature will be stricken as unconstitutional. State law impliedly preempts local regulation under any of the three following circumstances:

(1) [T]he subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

Fiscal, 158 Cal. App. 4th 895 at 904.

First, "large-capacity magazines" are fully and completely regulated under the Penal Code, thereby foreclosing any local interference with the state statutory scheme (except that which was expressly authorized). Indeed, sixteen different statutes *specifically* concern "large-capacity magazines."¹ And because a "large-capacity magazine" is also a "generally prohibited

¹ See Cal. Penal Code §§ 16740; 18010; 32310; 32315; 32390; 32400; 32405; 32410; 32415; 32420; 32425; 32430; 32435; 32440; 32445; 32450.

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weapon” under Penal Code section 16590, an additional eight statutes apply.² In sum, these twenty-four state statutes govern “large-capacity magazines” and provide a broad and comprehensive regulatory regime. Woven into this intricate statutory scheme are numerous exceptions to the general “large-capacity magazine” transfer prohibition. Tellingly, these exceptions do not expressly indicate that the *possession* of large-capacity magazines is lawful under specified circumstances – because simple possession of large-capacity magazines is not unlawful. Indeed, some of those exceptions specifically reference “lawfully possessed large-capacity magazines.”

Under the “large-capacity magazine” statutes, the Legislature has provided – albeit unclearly – which “large-capacity magazines” might constitute a nuisance under state law. It is clear, though, that *not all* “large-capacity magazines” are nuisances under state law. *See* Part I.B., *supra*. The Legislature clearly intended to leave untouched the possession of such magazines acquired prior to January 1, 2000. The Proposed Ordinance may not, therefore, ignore state law and declare *all* “large-capacity magazines” a nuisance within the City without “completely frustrat[ing] a broad, evolutionary statutory regime enacted by the Legislature.” *Id.* at 911.

Second, a local ordinance that declares *all* “large-capacity magazines” nuisances is impliedly preempted because its adverse effect on transient citizens far exceeds any purported benefit to a locality. *Id.* at 904. As previously noted, state law already provides that certain “large-capacity magazines” are not nuisances. If local governments are nonetheless permitted to declare such magazines nuisances, their possessors will be confronted with a patchwork quilt of different “large-capacity magazine” restrictions each time they enter another jurisdiction. The doctrine of implied preemption exists to prevent such a result.

In considering the Proposed Ordinance, you should heed the admonition of the California Court of Appeal: “[T]he goal of any local authority wishing to legislate in the area of gun control should be to accommodate the local interest with the least possible interference with state law . . . Therefore, when it comes to regulating firearms, *local governments are well advised to tread lightly.*” *Id.* at 919 (emphasis added).

II. The Proposed Ordinance Violates the Second Amendment

The United States Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008), is clear that arms “typically possessed by law-abiding citizens for lawful purposes” or those “in common use” are protected by the Second Amendment. That protection surely extends to commonly used ammunition feeding devices – e.g., magazines – which are necessary for the meaningful exercise of the right. *Cf. Andrews*, 50 Tenn. at 178; *see also Bateman v. Perdue*, 881 F. Supp. 2d 709, 714 (E.D. N.C. 2012). 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 (finding D.C. ban on handguns, arms typically possessed by law-abiding citizens for lawful purposes, unconstitutional regardless of the standard of review applied).

² *See* Cal. Penal Code §§ 16590; 17715; 17720; 17725; 17730; 17735; 17745; 17800.

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The lawful use of ammunition feeding devices with a capacity of ten or more rounds is exceedingly common. Indeed, 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, these items 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 the City from banishing these items from its borders.

As the Proposed Ordinance violates the Second Amendment, its adoption will make the City a prime target for litigation.

III. CONCLUSION

For the foregoing reasons, we strongly urge the Public Safety Committee to reject this proposal. Note that adoption of the Proposed Ordinance will result in immediate litigation against the City to enjoin enforcement and have it declared invalid.

Should you require further guidance, our office is available to discuss in further detail the nuances of the constitutional issues raised by this proposal and analyzed in this correspondence.

Sincerely,
Michel & Associates, P. C.



Anna M. Barvir