employee against overtime payments it owes the employee. However, how such credit is to be calculated is not clear.

The Sixth and Seventh Circuits have determined that the credit must be calculated on a week-to-week basis, while the Eleventh and Fifth Circuits have held that the payments can be calculated on a cumulative basis. The Ninth Circuit sided with the Sixth and Seventh on this issue for two reasons. First, it noted that § 207(a) sets out how overtime in general shall be paid, using a forty-hour, seven-day week and determined that any requirement in the act for a calculation of back pay must be "read" within this context. Second, it was persuaded by reasoning in the Seventh Circuit which held that if a city were able to use a cumulative calculation "the City would be the recipient of the windfall, and in fact would be placed in a substantially better position than if it had complied with the overtime requirements of the FLSA all along. . . ."

http://www.gpo.gov/fdsys/pkg/USCOURTS-ca9-12-55310/pdf/USCOURTS-ca9-12-55310-0.pdf (last accessed Apr. 3, 2014).

Guns: San Francisco Ordinance Requiring Guns to Be Locked Up and Prohibiting Sale of Hollow Point Bullets is Upheld

Jackson v. City and County of San Francisco, No. 12-17803 (9th Cir. Mar. 25, 2014)

In another decision construing *Heller*, the Ninth Circuit has upheld a San Francisco ordinance which prohibits the sale of hollow-nosed bullets and requires handguns to be locked up or disabled unless in the possession of an adult. The Circuit Court found that these restrictions do not unreasonably burden the core of the Second Amendment right and satisfy a significant governmental interest, sufficient to satisfy the appropriate standard of review—intermediate scrutiny.

The San Francisco Code has two ordinances with which Espanola Jackson and the National Rifle Association disagree. First, §4512 provides that handguns within homes must be either in a locked container or disabled with a trigger lock, unless a person over 18 years of age physically has the gun on their person. Second, §613.10(g) prohibits the sale (but not the possession) of "hollow point" bullets, e.g. those designed to expand or fragment upon impact.

Jackson brought suit in 2009 against the City claiming these sections were impermissible violations of the Second Amendment. In 2012 Jackson moved for a preliminary injunction, which the district court denied. Jackson appealed.

HELD: The Ninth Circuit affirmed the district court's denial of a preliminary injunction, holding the provisions at issue restrict but do not destroy the Second Amendment rights

of San Franciscans and survive intermediate scrutiny, meaning the challenge would like not succeed on the merits.

DISCUSSION: To win a preliminary injunction Jackson had to prove that "(1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest." To determine whether the district court abused its discretion in denying the preliminary injunction the Circuit reviewed the Supreme Court's *Heller* decision. It noted the opinion has since been interpreted by the Courts of Appeal to require a two-step analysis: step "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and [step] (2) [says] if so, [] courts [determine and] apply an appropriate level of scrutiny." In determining the level of scrutiny courts consider "(1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.'" It also noted the circuits have recognized that this test bears a close resemblance to free-speech case law and have since incorporated principles from that doctrine into Second Amendment analysis.

Before delving in to the Second Amendment principles outlined above the Circuit Court addressed San Francisco's threshold arguments. First, San Francisco claimed Jackson could not bring a facial challenge to § 4512 (locking up or disabling guns while in the home) because she conceded that using locked storage for guns in homes is appropriate in some circumstances. The court denied this threshold claim because it held this facial challenge did not raise either of the two policy-based reasons for disfavoring facial challenges. The provision at issue is not a "complex and comprehensive" regulation that could be constitutional in a broad swath of cases, and it did not give courts the chance to construe it constitutionally because it is a flat ban on keeping guns in a home without either locking them or having them on a person. Next, the city claimed Jackson lacked standing to challenge §613.10(g) because Jackson suffered no injury: she was free to obtain hollow-point bullets outside San Francisco and use them in San Francisco, she simply could not purchase them within the City. The court denied this argument because the "injury [she alleged wa]s not the inconvenience," but rather that she had a "legally protected interest" in purchasing such ammunition in San Francisco. The court looked to the First Amendment for guidance on this issue and declared that in that context it is not sufficient for the government to answer a claim answer that free speech has been denied in one place by saying it may be exercised elsewhere. The court held the same principle applied in the Second Amendment context, thus defeating San Francisco's second threshold argument.

In evaluating whether §4512 regulated conduct "historically understood to be protected by the Second Amendment," the court began with *Heller's* list of presumptively lawful regulations and found it resembled none of them. It next held the law did not resemble the most on-point historical prohibition because, while many states regulated the storage of gunpowder (the thing most similar to today's ammunition) those laws were really fire-safety laws and not gun-safety laws. As for §613.10(g), the court similarly found it regulated conduct within the scope of the Second Amendment. As a result, the court determined and applied the appropriate level of scrutiny for both provisions.

The court first held §4512 implicates the core of the Second Amendment since it regulates conduct in the home. Jackson argued that requiring guns to be in a locked container makes it more difficult for citizens to use their guns for the core right of self-protection - essentially, she said it is harder to get to the gun and thus harder to exercise the right. The court held this regulation is a burden, but not a severe one demanding strict scrutiny because it does not substantially prevent law-abiding people from using firearms to defend themselves. Looking again to the First Amendment for guidance, the Court noted §4512 only burdened the *manner* in which people may exercise their right. As a result, the court applied intermediate scrutiny and found the provisions survived. San Francisco's stated objective in enacting §4512 was to reduce the number of gun-related injuries and deaths in the home, and presented legislative findings that supported the conclusion that having easily accessible and/or unlocked guns in the home increases the chance of death and injury.

Recognizing that public safety is an important government interest, the court held San Francisco carried its burden of showing its law served a significant government interest. The court found San Francisco's method of pursuing this interest - §4512 – was substantially related because firearm injuries are the third-leading cause of death in the city. Jackson argued §4512 was over-inclusive because even when the risk of unauthorized access - e.g. children – is low the law applied, but the court rejected this argument because intermediate scrutiny does not require the *least* restrictive means of addressing the government interest at issue.

Next, the court applied the facts surrounding §613.10(g) to see if it survived intermediate scrutiny. The City stated it had enacted this provision based on its interest in reducing the likelihood that shooting victims in San Francisco will die of their injuries from gunshot wounds, which it argued was the case when hollow point bullets were used. Jackson argued this was not a legitimate reason because it was based on bad science and erroneous assumptions. She claimed, based on an ABA article, that there is no difference in death rates between individuals shot with hollow-point bullets and traditional round-nosed bullets. The court was not persuaded by Jackson's contentions because, again looking to the First Amendment, it held municipalities "may rely on any evidence reasonably believed to be relevant," and the legislative record "fairly support[ed] the City's position." Again Jackson contended the City could have adopted a less restrictive approach, but the court again denied this argument, noting again that intermediate scrutiny does not require the *least* restrictive means of furthering its given end. Thus, §613.10(g) survived intermediate scrutiny and, ultimately, Jackson's challenge.

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/25/12-17803.pdf (last accessed Apr. 3, 2014).