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CITY OF SUNNYVALE and SUNNYVALE CITY
9 COUNCIL

10
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SANTA CLARA

13
14 U.S. FIREARMS COMPANY LLC, a
limited liability company;
15 ERIC W. FISHER; and THE NATIONAL
SHOOTING SPORTS FOUNDATION,
16 INC., a non-profit trade association,

17 Petitioners,

18 vs.

19 CITY OF SUNNYVALE and
SUNNYVALE CITY COUNCIL,

20 Respondents,
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24
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28

Case No. 113cv257353

**[REDACTED] RESPONDENTS'
OPPOSITION TO ORDER TO SHOW
CAUSE RE PRELIMINARY INJUNCTION**

Judge: The Hon. Kevin E. McKenney
Department: 20
Action Filed: December 10, 2013

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1 **I. INTRODUCTION**

2 On November 6, 2013, the voters of Sunnyvale convincingly approved Measure C, several
3 common sense gun violence prevention measures, passing the measure with over 66% of the vote.
4 (Schoenberg Decl. Ex. A). Petitioners, an out-of-state gun rights organization and a single citizen
5 of Sunnyvale, now seek to thwart the clear will of the voters. They ask the Court to enjoin an
6 important part of Measure C—the required logging of ammunition sales—based on misguided
7 preemption theories, an untenable privacy claim, and a specious Fourth Amendment argument.
8 Petitioners have not shown a likelihood that they will succeed on the merits under any of these
9 theories. In addition, Petitioners have not established they will suffer the requisite irreparable
10 harm required to obtain the extraordinary relief that they request. Accordingly, Petitioners’
11 request for a preliminary injunction should be denied.

12 **II. LEGAL STANDARD**

13 “Injunction is extraordinary power and should always be exercised with great caution.”
14 *Family Record Plan, Inc. v. Mitchell*, 172 Cal.App.2d 235, 242 (1959). And, no injunction
15 should issue “except for the prevention of great and irreparable injury.” *Pellissier v. Whittier*
16 *Water Co.*, 59 Cal.App. 1, 6 (1922). Courts evaluate two interrelated factors in deciding whether
17 to issue a preliminary injunction: (1) the likelihood that the party seeking relief will prevail on the
18 merits at trial; and (2) where there is a threat of irreparable harm, the interim harm that party may
19 suffer if the injunction is denied, as compared to the harm that the other party will endure if the
20 injunction is granted. *See, e.g., Tahoe Keys Prop. Owners’ Assn. v. State Water Res. Control Bd.*,
21 23 Cal.App.4th 1459, 1470-71 (1994) (*citing I.T. Corp. v. County of Imperial*, 35 Cal. 3d 63, 69-
22 70 (1983)). Although both factors (the likelihood of success on the merits and the threat of
23 irreparable harm) can be considered, if the one is not present the court need not consider the
24 other. *Jessen v. Keystone Sav. & Loan Assn.*, 142 Cal.App.3d 454, 459 (1983).

25 **III. ARGUMENT**

26 **A. Petitioners Are Not Likely To Succeed On The Merits**

27 **1. State Law Does Not Preempt Section 9.44.060**

28 In their moving papers, Petitioners attempt to argue that a variety of state laws directly or

1 impliedly preempt Section 9.44.060. As explained below, each of Petitioners' preemption
2 theories fails as a matter of law.¹

3 a. AB 962 Is Permanently Enjoined And Cannot Preempt
4 Section 9.44.060

5 Petitioners first claim that Penal Code sections 30345-30365 (originally enacted as part of
6 Assembly Bill No. 962) (hereafter "AB 962" or "Anti-Gang Act") preempts § 9.44.060. This
7 claim fails for because AB 962 has been permanently enjoined since January 2011 and therefore
8 cannot have preemptive effect. On November 6, 2013, the Fifth Appellate District affirmed the
9 lower court ruling permanently enjoining the statutes at issue on the grounds that they are
10 unconstitutionally vague. *See, Parker v. State of Calif.*, 221 Cal. App. 4th 340 (2013). An
11 invalidated state statute cannot preempt local legislation, as the enjoined state law has no legal
12 effect.

13 Petitioners all but concede this obvious defect in their argument, by claiming that the
14 court's ruling in *Parker* is not a "final decision" and thus in the future the statute may still have
15 preemptive effect if *Parker* is reversed. Petitioners' argument is built on a misunderstanding of
16 the nature and timing of appeals to the California Supreme Court. While a petition for review
17 regarding the decision in *Parker* was filed on December 16, 2013, the California Supreme Court
18 has not yet determined whether it will review the *Parker* decision. (Schoenberg Decl. ¶ 2). If the
19 Supreme Court refuses to hear the case, the law will be forever permanently enjoined. More
20 importantly, even if the California Supreme Court were to exercise its discretion and decide to
21 hear the case – which would be a rare occurrence – the Fifth District's holding in *Parker* would
22 remain the law unless and until the Supreme Court reverses its decision. It is well settled that a
23 prohibitory injunction, like the permanent injunction issued in the *Parker* case, is not stayed by an
24 appeal. *City of Hollister v. Monterey Ins. Co.*, 165 Cal.App.4th 455, 482 (2008) ("A prohibitory
25

26 ¹ "A conflict causing preemption by state law can occur in three different ways: the local ordinance (1) duplicates
27 state law; (2) contradicts state law; or (3) enters an area or field fully occupied by state law....Local legislation is
28 duplicative when it is coextensive with state law. It is contradictory when it is 'inimical to or cannot be reconciled
with state law'....Local legislation enters an area or field that is 'fully occupied' by state law when the Legislature
has either (1) expressly manifested its intent to fully occupy the area or (2) impliedly has done so." *Conejo Wellness
Ctr., Inc. v. City of Agoura Hills*, 214 Cal.App.4th 1534, 1552 (2013)(internal citations omitted).

1 injunction is not stayed by an appeal.”) *See Byington v. Super. Ct.*, 14 Cal.2d 68, 70 (1939) (“It is
2 well settled that a prohibitory injunction is not stayed by an appeal therefrom while an injunction
3 mandatory in character is automatically stayed by appeal.”)² Since any such ruling by the
4 Supreme Court would not happen for many months, AB 962 would remain permanently enjoined
5 well beyond the date on which the court will consider Petitioners’ request for a preliminary
6 injunction in this case. Thus, for purposes of this petition, AB 962 is invalid and cannot preempt
7 § 9.44.060.

8
9 b. State Handgun Regulations Do Not Preempt Section 9.44.060

10 Petitioners next argue that a hodgepodge of state statutes generally regulating other
11 aspects of firearm sales preempt the field of ammunitions regulations in California, thereby
12 implicitly preempting § 9.44.060.³ Such a claim is at odds with the legislative history of AB 962
13 and well-established California case law.

14 As a preliminary matter, Petitioners’ claim that other, more general statutes regarding
15 firearm regulation, such as Government Code § 53071 and Penal Code § 16150, occupy the field
16 of ammunition regulation such that they preempt § 9.44.060 is illogical, especially given
17 Petitioners’ other arguments regarding AB 962 (now enjoined by *Parker*). As Petitioners
18 acknowledge, and as the Bill Analysis for AB 962 states, the legislature believed that AB 962’s
19 ammunition sales logging requirements “would also appear to preempt any local ordinance
20 regarding this issue.” (*See Pls.’ RJN, Ex. K at 19/20*).). At the time AB 962 was introduced,
21 thirteen cities in California had enacted ammunitions logging requirements, and there is no hint
22 that the Legislature considered those ordinances preempted by more general statutes. To the
23 contrary, the State endorsed the efficacy and enforceability of those local ordinances. Governor
24 Schwarzenegger’s signing statement for AB 962 explained:

25 [L]ocal governments have demonstrated that requiring ammunition vendors to

26 ² Injunctions staying the enforcement of state statutes are “prohibitory injunctions.” 6 Witkin, *Cal. Procedure* (5th ed.
27 2008) Provisional Remedies § 278) (*citing Sun-Maid Raisin Growers of Calif. v. Paul* (1964) 229 Cal.App.2d 368,
369).

28 ³ “In general, courts are cautious in applying the doctrine of implied preemption.” *San Diego Gas & Elec. Co. v. City
of Carlsbad*, 64Cal.App.4th 785, 793 (1998)

1 keep records on ammunition sales improves public safety. These records have
2 allowed law enforcement to arrest and prosecute persons who have no business
3 possessing firearms and ammunition: gang members, violent parolees, second and
4 third strikers, and even people previously serving time in state prison for murder.
Utilized properly, this type of information is invaluable for keeping communities
safe and preventing dangerous felons from committing crimes with firearms.

5 “Moreover, this type of recordkeeping is no more intrusive for law abiding citizens
6 than similar laws governing pawnshops or the sale of cold medicine....”

7 *Parker*, 221 Cal. App. 4th at 378 (Cornell, J., dissenting).

8 If the legislature believed that it had already occupied the field of ammunition sales
9 information logging through statutes such as Government Code § 53071, it would have been
10 unnecessary for the Bill Analysis to note that AB 962 would preempt such local ordinances, as
11 these ordinances would already have been preempted. As Governor Schwarzenegger’s signing
12 statement makes clear, the legislature was aware of these local ordinances (some of which had
13 been in place for more than a dozen years), and felt the need to explicitly note that AB 962 had
14 preemptive effect. The legislature did not intend its prior, more general legislation to preempt
15 local regulation in this area.

16 In any event, as a matter of law, Petitioners are simply wrong that in generally addressing
17 topics related to firearm registration, such other statutes preempt § 9.44.060. While no court has
18 directly considered whether other California state statutes preempt local ammunition sales
19 information logging requirements like § 9.44.060, the California Attorney General issued an
20 opinion in 1994 expressly stating that a proposed Pasadena city ordinance requiring “ammunition
21 vendors within the city to record and maintain identification information with respect to each
22 purchaser” of ammunition was not preempted under state law:

23 “[T]he record keeping duties of the proposed ordinance would not materially
24 affect handgun possession. No statute appears to prohibit, directly or indirectly, a
25 city from requiring ammunition purchasers to provide identification
26 information.... On the basis of all three tests for implied preemption, we conclude
27 that the record keeping portion of the proposed ordinance would not be preempted
28 by general law.”

THE HONORABLE VICTOR J. KALETA 1994 WL 323316 at * 5 (July 7, 1994) (internal
citations omitted). In making the determination whether general state firearms regulations

1 preempted the local ammunition sales information logging requirement, the Attorney General
2 explicitly discussed the statutes that Petitioners claim preempt § 9.44.060, finding that § 53071
3 does not preempt such local ammunition sales logging ordinances. *Id.* at *2-3 (also citing statutes
4 regulating sales of “ammunition containing a flechette dart,” “ammunition of a caliber greater
5 than .60 caliber,” “ammunition designed to penetrate metal or armor,” etc.) Despite the
6 enactment of several state laws regarding certain aspects of ammunition sales, the Attorney
7 General did not believe that the state had impliedly occupied the field of ammunition sales
8 information logging, as Petitioners now argue.

9 As the Attorney General Opinion also explains, Petitioners are impermissibly and
10 illogically conflating *firearm* registration laws with *ammunition* registration laws, arguing that
11 section 53071 contains “broad language” indicating that “ammunitions sales fall within the
12 statute’s scope,” despite the statute’s complete dearth of reference to ammunition sales of any
13 kind. (Pet. at 10). The Attorney General has expressly stated that firearm regulations are
14 materially different than ammunition regulations for preemption purposes:

15 It is apparent that the Legislature has treated the sale of ammunition separately
16 from that of firearms sales, registration, licensing, possession, or use. The
17 purchase of ammunition and the purchase of a firearm need not take place at the
18 same time or involve the same considerations. Just as the various aspects of
19 firearms control have been treated differently in the legislative schemes, we
believe that the sale of ammunition constitutes a separate field for purposes of
applying state preemption principles.

20 THE HONORABLE VICTOR J. KALETA 1994 WL 323316 at * 3.

21 Furthermore, courts uniformly and consistently hold that the state’s regulation of certain
22 aspects of gun ownership does not mean that the state has generally and broadly preempted the
23 field of firearms regulation: “The statutes, the judicial rulings interpreting the statutes, and the
24 legislative responses to the judicial rulings demonstrate that the Legislature has carefully avoided
25 the blanket preemption in the field of firearms regulation. Instead, the Legislature has left many
26 aspects of a municipality’s constitutional police power to regulate firearms intact.” *California*
27 *Rifle and Pistol Assn. v. City of West Hollywood*, 66 Cal.App.4th 1302, 1311 (1998); *see also*,
28 *Great Western Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal.4th 853, 861 (2002) (“A review of the

1 gun law preemption cases indicates that the Legislature has preempted discrete areas of gun
2 regulation rather than the entire field of gun control.”); *Calguns Found., Inc. v. Cnty. of San*
3 *Mateo*, 218 Cal.App.4th 661, 676 (2013) (courts “uniformly construe state regulation of firearms
4 narrowly, finding no preemption of areas not specifically addressed by state law.”)

5 As to the specific regulations Petitioners point to in order to argue that the legislature
6 intended to occupy the field of gun regulation, Courts have consistently held that Government
7 Code § 53071 does not demonstrate an intent to occupy the field:

8 It could be, and has been, argued that Government Code section 53071 is itself an
9 expression of intent to occupy the whole field of firearm regulation. However, the
10 cases uniformly construe state regulation of firearms narrowly, finding no
11 preemption of areas not specifically addressed by state law. (*E.g.*, *Galvan v.*
12 *Superior Court*, 70 Cal.2d 851, 76 (1969) [legislation prohibiting licensing of
13 firearms does not preclude local government from registering firearms]; *Olsen v.*
14 *McGillicuddy*, 15 Cal.App.3d 897, 93 (1971) [legislation preempting area of
licensing and registration of firearms does not preempt local government from
regulating the use of firearms]; *Doe v. City and County of San Francisco*, 136
Cal.App.3d 509, 516 (1982) [legislative response to case law suggests “that the
Legislature has not prevented local governmental bodies from regulating all
aspects of the possession of firearms.”]).

15 *Suter v. City of Lafayette*, 57 Cal.App.4th 1109, 1122 n.2 (1997) (parallel citations omitted).

16 Here, because “state law does not preempt the broad field of sales of firearms or
17 regulation of firearm dealers,” § 9.44.060 will only be preempted if it “contradict[s] or
18 duplicate[s] state law, or if [it] enter[s] a specific area that the state intends fully to occupy.” *Id.* at
19 *1122. As there is no valid state law regarding the logging of ammunition purchasers that either
20 contradicts, duplicates or suggests a state intent to fully occupy the field, § 9.44.060 is not
21 preempted by state law.

22 c. California Customer Record Keeping Laws Do Not Occupy The
23 Field of Ammunition Sales Logging Regulations

24 Petitioners also argue that the California Customer Records Act (“CCRA”), Cal. Civ.
25 Code §§ 1798.80-1798.84 – a statute regulating certain aspects of how California businesses must
26 secure information they collect from customers – somehow preempts § 9.44.060. Petitioners do
27 not explain how, exactly, § 9.44.060 is preempted by, contradicts, or is inconsistent with the
28 CCRA. In fact, nothing in the CCRA contradicts, duplicates or suggests an intent to occupy the

1 field of ammunition record keeping. The statement of intent set forth in the State statute makes
2 clear that it concerns the entirely separate and largely unrelated field of informational security:
3 “It is the intent of the legislature to ensure that personal information about California residents is
4 protected. To the end, the purpose of this section is to encourage businesses that own or license
5 personal information about Californians to provide reasonable security for that information.” Cal.
6 Civ. Code § 1798.81.5(a). The statute itself notes that it is not impliedly preempting the
7 incredibly broad field of “customer information recording” as Petitioners suggest, noting that the
8 CCRA is intended to preempt only “the matters *expressly* set forth in this act.” (Pet.’s RJN ¶ 14,
9 Ex. L) (emphasis added). Nowhere in the CCRA does the California legislature expressly address
10 anything about ammunition sales. As such, the CCRA does not evince any implied or express
11 intention to preempt local regulations related to the logging of information regarding ammunition
12 sales.

13 **2. Section 9.44.060 Does Not Invade Any Recognized Privacy Rights.**

14 Petitioners also contend that § 9.44.060 violates the right to privacy enumerated in Article
15 I, Section 1 of the California Constitution and should therefore be enjoined. This argument fails
16 both because Petitioners cannot assert privacy rights on behalf of U.S. Firearms’ customers and
17 because Petitioners cannot reasonably claim that § 9.44.060 violates any privacy rights,
18 particularly considering firearms purchasers are already obligated under federal and state law to
19 disclose all of the personal information required under § 9.44.060 when purchasing firearms.

20 **a. Petitioners Lack Standing To Assert Privacy Claims on Behalf of**
21 **U.S. Firearms’ Customers.**

22 As a preliminary matter, the Petitioners lack standing to assert a privacy interest on behalf
23 of parties not before the court. Petitioner U.S. Firearms as a business lacks standing to bring an
24 invasion of privacy claim on behalf of its customers. *See, e.g., Moreno v. Hanford Sentinel, Inc.*,
25 172 Cal.App.4th 1125, 1131 (2009) (“[T]he right of privacy is purely personal. It cannot be
26 asserted by anyone other than the person whose privacy has been invaded.”). The sole case
27 Petitioners cite in support of their assertion that U.S. Firearms has standing, *Ballard v. Anderson*,
28 4 Cal.3d 873, 877 (1971), addresses the ability of physicians to bring privacy claims on behalf

1 underage patients seeking abortions to maintain their sexual privacy rights. *Ballard* has not been
2 applied outside of the context of privacy cases relating to abortion rights.

3 b. Section 9.44.060 Does Not Impinge On Any Protectable Privacy
4 Interests

5 Insofar as Petitioner Fisher is asserting his own privacy rights, he does not have a
6 protectable privacy interest in the information implicated by the ordinance. Indeed, state and
7 federal law already require firearms vendors to log from firearms purchasers every piece of
8 personal information that § 9.44.060 requires ammunition vendors to log from ammunition
9 purchasers. In fact, current state and federal law require firearms vendors to record *even more*
10 information from firearms purchasers than § 9.44.060 requires. Under § 9.44.060, an ammunition
11 vendor must record: the purchaser's name, the purchaser's address, the purchaser's date of birth,
12 the date of the sale, the purchaser's driver's license number, the identity of the person making the
13 sale, the type of ammunition being sold, the purchaser's signature, and the purchaser's
14 thumbprint. *See* § 9.44.060. Under current California law, when a firearms vendor sells a
15 firearm, he or she must fill out a Dealer's Record of Sale ("DROS") form that requires the vendor
16 to log all of the information that ammunition vendors are required to collect from ammunition
17 purchasers under § 9.44.060, as well as the following additional information: the purchaser's
18 height, weight, eye color, and hair color; whether the purchaser has been convicted of a felony;
19 whether the purchaser has been subject to a restraining order; and the serial number of the gun
20 being sold. *See* Schoenberg Decl. Ex. B ("DROS"); Ex. D (Deposition of Eric Fisher ("Fisher
21 Depo.") at 47:13-19 (firearms vendors required to log fingerprints)). Federal law requires the
22 vendor to fill out a separate worksheet that contains even more personal information from the
23 purchaser, including the race/ethnicity of the purchaser, the purchaser's discharge status from the
24 Armed Forces, and the purchaser's drug use habits. *See* Schoenberg Decl. Ex. C. It is
25 implausible to suggest that § 9.44.060 violates any right to privacy considering that any
26 ammunition purchaser will presumably already have provided significantly more information to
27 the government when he or she purchased the firearm needed to use the ammunition.

28 Even if that were not the case, § 9.44.060 would not violate any privacy rights. Almost all

1 of the information that § 9.44.060 requires to be disclosed is contained on driver's licenses. The
2 Court of Appeal has held that this information "does not give...rise to a person's reasonable
3 expectation of privacy." *People v. Herrera*, 124 Cal.App.3d 386, 389 (1981); *see also Puerto v.*
4 *Superior Court*, 158 Cal.App.4th 1242, 1253 (2008) (an address "is not particularly sensitive, as
5 it is merely contact information"). Such information is routinely required by the state as a means
6 of identification, and phone numbers are also readily available. Nor does the disclosure of a
7 fingerprint implicate privacy concerns sufficient to warrant an injunction. California courts have
8 long recognized that the use of fingerprinting in various noncriminal contexts as a guard against
9 fraud does not itself violate the right to privacy.⁴ *Perkey v. Dep't of Motor Vehicles*, 42 Cal.3d
10 185 (1986) (DMV applicants); *Miller v. Murphy*, 143 Cal.App.3d 337 (1983) (*superseded by*
11 *statute*) (customers of pawnbrokers); *People v. Stuller*, 10 Cal. App. 3d 582 (1970) (bartenders).

12 Even if Mr. Fisher's privacy interests were implicated, § 9.44.060 does not rise to the
13 level of an *egregious* invasion of that interest, which is required in order for a privacy intrusion to
14 be legally remediable. "Actionable invasions of privacy must be sufficiently serious in their
15 nature, scope, and actual or potential impact to constitute an egregious breach of the social norms
16 underlying the privacy right." *Hill v. NCAA*, 7 Cal.4th 1 (1994); *Cf. Folgelstrom v. Lamps Plus,*
17 *Inc.*, 195 Cal.App.4th 986, 992 (2011) (no serious invasion of privacy where store obtained
18 customers' zip codes for the purpose of finding out their home addresses without their knowledge
19 or permission.). Lastly, the inspections of ammunition sales logs envisioned by Section 9.44.060
20 are a far cry from any of the actions in the case the Petitioners rely on, *White v. Davis*, 13 Cal.3d
21 757, 760 (1975), where police officers posed as students enrolled in college to "engage in the
22 covert practice of recording class discussions, compiling police dossiers and filing 'intelligence'
23 reports [of] students and professors." There is no comparable privacy invasion here.

24 3. Section 9.44.060 Does Not Violate The Fourth Amendment

25 Petitioners' Fourth Amendment argument fails as well. This argument appears to be
26 based on Section 9.44.060's statement that ammunition vendors' sales logs shall be "open to

27
28 ⁴ The thumbprint required by § 9.44.060 serves an important investigative purpose. It prevents wrongdoers from
eluding law enforcement by providing false information or false identification.

1 reasonable inspection by peace officers at all times the ammunition vendor is regularly open for
2 business” Plfs’ RJN, Ex. I (emphasis added).

3 As a preliminary matter, Petitioners have not raised a justiciable controversy under the
4 Fourth Amendment. “The concept of justiciability involves the intertwined criteria of ripeness
5 and standing.” *City of Santa Monica v. Stewart*, 126 Cal.App.4th 43, 59 (2005). Standing
6 requires a party to show that it has suffered an injury that is “concrete and particularized” and
7 “actual or imminent, not conjectural or hypothetical.” *Cornelius v. Los Angeles Cnty. Metro.
8 Transp. Auth.*, 49 Cal.App.4th 1761, 1769 (1996). “Ripeness” refers to “the requirements of a
9 current controversy.” *Stewart*, 126 Cal.App.4th 59 (“A controversy becomes ‘ripe’ once it
10 reaches, ‘but has not passed, the point that the facts have sufficiently congealed to permit an
11 intelligent and useful decision to be made.”). Standing and ripeness are both absent where a
12 plaintiff’s claim “rests on contingent future events that may not occur as anticipated, or indeed
13 may not occur at all.” *See Bova v. City of Medford*, 564 F.3d 1093, 1096 (2009).

14 Petitioners’ Fourth Amendment claim is not justiciable because it is contingent on a
15 potential future event that may not occur as anticipated, or at all – the inspection of Petitioners’
16 ammunition sales logs by Sunnyvale police officers. This is exactly the type of conjectural and
17 contingent claim that the justiciability doctrines of standing and ripeness prohibit.⁵ For this
18 reason alone, Petitioners’ Fourth Amendment argument should be rejected.⁶

19 In any event, even if Petitioners had a justiciable claim, Section 9.44.060 is consistent
20 with the Fourth Amendment. Administrative searches of closely regulated businesses – such as
21 firearms merchants – are permitted under the Fourth Amendment without a search warrant so
22 long they are reasonable. *People v. Roman*, 227 Cal.App.3d 674, 678 (1991), *citing People v.*

23
24 ⁵ To the extent Petitioners are purporting to assert the Fourth Amendment rights of U.S. Firearms’ customers,
25 Petitioners are not the real parties in interest and, thus, lack standing to assert such claims. *See Cal. Civ. Proc. § 367;*
Gantam v. United Pac. Ins. Co., 232 Cal.App.3d 1560, 1566 (1991).

26 ⁶ Injunctions in the Fourth Amendment context are inherently problematic due to the fact-specific nature of Fourth
27 Amendment claims. “From a policy standpoint, the fact-specific nature of Fourth Amendment rulemaking counsels
28 strongly against broad Fourth Amendment injunctions. Fourth Amendment rules are almost always fact-specific:
most rules have exceptions, and the exceptions have their own exceptions. As a result, it is difficult for a court to
pronounce how the Fourth Amendment might apply to a general set of facts.” Orin S. Kerr, *The Limits of Fourth
Amendment Injunctions*, 7 J. On Telecomm. & High Tech L. 127, 133 (2009), attached to the Schoenberg Decl. Ex.
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1 *Lopez*, 116 Cal.App.3d 600, 606-607 (1981). Owners of such businesses have a lower
2 expectation of privacy than homeowners or owners of other businesses not subject to close
3 regulation. *De La Cruz v. Quackenbush*, 80 Cal.App.4th 775, 781 (2000). Searches of closely
4 regulated businesses, including firearms dealers, have thus been upheld without a warrant,
5 probable cause, or a reasonable suspicion of illegal conduct where they serve as part of a broader
6 governmental regulatory scheme. *United States v. Biswell*, 406 U.S. 311 (1972). That Petitioner
7 U.S. Firearms falls within the category of businesses subject to the administrative search
8 exception to the Fourth Amendment is not disputed. The U.S. Supreme Court has explicitly
9 recognized the firearms industry's "long tradition of close government supervision." *Burger v.*
10 *New York*, 142 U.S. 691, 700-01 (1987) (internal citations omitted). Indeed, Petitioners
11 acknowledge that U.S. Firearms is a closely regulated business. (Pet. at 14 fn. 4).

12 Administrative inspections of closely regulated businesses are reasonable if they further a
13 substantial government interest, are necessary for the regulatory scheme, and are limited as to
14 time, place and scope. *Burger*, 482 U.S. at 702. The reasonable inspection contemplated by
15 Section 9.44.060 satisfies each of these requirements. First, it undoubtedly furthers a substantial
16 government interest, as this type of record keeping "is invaluable for keeping communities safe
17 and preventing dangerous felons from committing crimes with firearms." *Parker*, 221
18 Cal.App.4th at 378 (Cornell, J., dissenting). Second, the inspection provision in Section 9.44.060
19 is necessary for the regulatory scheme's purpose of assisting law enforcement to find individuals
20 who are illegally in possession of firearms. Without the ability to conduct reasonable inspections
21 of the ammunition sales logs required by the ordinance, this purpose would be thwarted.⁷ Finally,
22 the reasonable inspections contemplated by Section 9.44.060 are limited in time, place, and
23 scope. They may only occur during the times the ammunition dealer is "regularly open for
24 business." They can only be made of persons engaged in the business of selling, leasing or

25 ⁷ The U.S. Supreme Court has already noted the appropriateness of unannounced inspections of the premises and
26 records of gun dealers. "Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even
27 frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and
28 if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant
would be negligible.... When a dealer chooses to engage in this pervasively regulated business and to accept a federal
license [to deal firearms], he does so with the knowledge that his business records, firearms, and ammunition will be
subject to effective inspection." *Biswell*, 406 U.S. at 316.

1 transferring ammunition. And the permissible scope of the contemplated inspection is extremely
2 limited: peace officers may inspect only the ammunition sales logs. In this final respect, the
3 inspection contemplated by Section 9.44.060 is narrower, and more defined, than that which the
4 Supreme Court found valid in *Biswell*, which allowed searches of both a dealer's physical
5 property and business records.

6 For each of the foregoing reasons, Petitioners cannot show a likelihood that they will
7 succeed on the merits of their Fourth Amendment claim.

8 **B. Respondents Will Suffer More Harm From A Preliminary Injunction Than**
9 **Petitioners Will Suffer In The Absence of A Preliminary Injunction**

10 Even assuming Petitioners could show that they are likely to prevail on the ultimate merits
11 of their complaint, which they cannot, Petitioners cannot demonstrate any irreparable harm that
12 they will suffer if Section 9.44.060 is not preliminarily enjoined. And enjoining Section 9.44.060
13 will significantly injure Respondents by impairing Respondents' ability to find individuals
14 illegally in possession of firearms and to keep ammunition out of their hands.

15 **1. Petitioners Have Not Shown That U.S. Firearms' Business Will Be**
16 **Destroyed Between Now and the Hearing on the Merits of the Complaint**

17 Petitioners U.S. Firearms and Eric Fisher claim that they will be irreparably harmed by the
18 enforcement of § 9.44.060 because the logging requirements of that statute will "destroy" U.S.
19 Firearms' business. Mr. Fisher claims that he will permanently lose customers who would rather
20 purchase ammunition from jurisdictions that do not require the logging of purchaser information
21 than have any personal information logged when purchasing ammunition. (Fisher Decl. ¶ 12.)
22 Mr. Fisher has supported this claim by submitting declarations from several U.S. Firearms
23 customers who have indicated that they will no longer purchase ammunition from the business if
24 they are required to divulge any personal information when buying ammunition. *See, e.g.,*
25 Declaration of Eugene Tan ISO Request for TRO and Mot. for Preliminary Injunction.
26 According to Mr. Fisher, the losses associated with these disenchanting firearms purchasers will
27 somehow "destroy" his business. (Pet. at 3).

1 The cases on which Petitioners rely to support their contention that damage to Petitioners'
2 business warrants an injunction – *Greenfield* and *Barajas* – are inapposite in that they concerned
3 local governmental action that completely took businesses out of operation.⁸ See *Greenfield v.*
4 *Bd. of City Planning Comm'rs*, 6 Cal.App.2d 515 (1935) (city interpreted a zoning ordinance to
5 prohibit a general contractor from continuing to operating its business); *Barajas v. City of*
6 *Anaheim*, 15 Cal.App.4th 1808 (1993) (city passed an ordinance – expressly directed at produce
7 vendors who sold from vehicles – that prohibited anyone from selling any goods from a vehicle).
8 In contrast, the ordinance here simply imposes a modest record-keeping requirement. There is no
9 indication that § 9.44.060 will put U.S. Firearms out of business, as Mr. Fisher implies.

10 In fact, the evidence in the record tells a very different story. First, it appears that
11 Mr. Fisher is vastly overstating the amount of ammunition sales U.S. Firearms is losing because
12 of § 9.44.060. [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

27 ⁸ The other case on which Petitioners rely, *Huong Que, Inc. v. Luu*, 150 Cal.App.4th 400 (2007) is irrelevant, as that
28 case involved misappropriation and use of a customer list by the plaintiff's managing agent. There are no remotely
similar facts here.

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[REDACTED]

2. Petitioners Will Suffer No Irreparable Privacy Injury Between Now and the Hearing on the Merits of the Complaint

As described more fully in section III.2.b *supra*, § 9.44.060 does not implicate the disclosure of any personal information that individuals are not already obligated to disclose when purchasing firearms. Since Mr. Fisher (and other potential ammunition purchasers at U.S. Firearms) has presumably already disclosed this information when purchasing firearms (and, when applying for a driver’s license, transacting business with a pawn shop, etc.), Mr. Fisher will suffer no privacy harm if § 9.44.060 is immediately enforced. Furthermore, Mr. Fisher himself can entirely avoid the supposed privacy harm he claims he will suffer when purchasing ammunition in Sunnyvale simply by purchasing ammunition at one of the stores outside of Sunnyvale that Petitioners have identified in their moving papers. *See* Fisher Decl. ¶ 10.

A. **Respondents Will Suffer Significant Harm If Section 9.44.060 Is Preliminarily Enjoined**

The harm to Sunnyvale from a delay in implementing § 9.44.060 is immediate and real. By delaying the imposition of § 9.44.060’s logging requirements, the court would be signaling to banned purchasers of ammunition that they have until the expiration of the preliminary stay to illegally purchase as much ammunition as they want from Sunnyvale vendors before the logging requirements prevent such purchases. This threat is not speculative. A 2004 study of firearms

1 sales in Los Angeles showed that in a two month period, 2.6% of ammunitions purchasers were
2 legally prohibited from purchasing ammunition, acquiring more than 10,000 rounds of
3 ammunition. George E. Tita, et al., *The Criminal Purchase of Firearm Ammunition*, 12 Inj.
4 Prevention, 308, 308-311 (2006). Thus, even after Los Angeles had an ammunition logging
5 ordinance on the books for almost a decade, the ammunition logging requirement was effective in
6 identifying illegal purchasers. See Los Angeles Municipal Code § 55.11. The threat posed by
7 10,000 rounds of ammunition in the hands of individuals barred from owning firearms is self-
8 evident. Requiring ammunitions vendors to log their sales allows law enforcement personnel to
9 locate illegal gun owners – precisely the type of individuals most likely to use their firearms to
10 commit crimes. Other California cities have recognized the need for ammunition logging
11 ordinances; thirteen cities had ordinances similar to § 9.44.060 in effect in 2009, including
12 Sacramento, Los Angeles, and San Francisco. (Pl.’s RJN at Ex. K, p. 15); See, e.g. Sacramento
13 City Code, section 5.66.020; Los Angeles Municipal Code section 55.11; San Francisco Police
14 Code section 615.

15 Petitioner Fisher himself demonstrated the danger posed by ammunition sales, [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED] Absent § 9.44.060, there is simply no way to know whether ammunition is being
19 sold to prohibited purchasers. Delaying enforcement of § 9.44.060 impairs the city’s ability to
20 locate these prohibited purchasers and will essentially grant illegal purchasers a grace period to
21 illegally stock up on ammunition before the law makes it more difficult for them to obtain
22 dangerous ammunition.⁹ Sunnyvale and its citizens will face immediate and irreparable harm if
23 § 9.44.060 is preliminarily enjoined.

24 **IV. CONCLUSION**

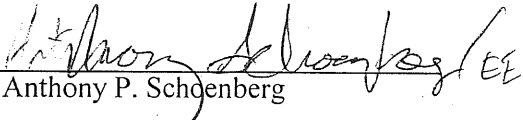
25 For the foregoing reasons, Respondents request that the Court deny Petitioners’ request
26 for a preliminary injunction.

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28 ⁹ [REDACTED]

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Dated: December 30, 2013

Farella Braun + Martel LLP

By: 
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10
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SANTA CLARA

13
14 U.S. FIREARMS COMPANY LLC, a
limited liability company;
15 ERIC W. FISHER; and THE NATIONAL
SHOOTING SPORTS FOUNDATION,
16 INC., a non-profit trade association,

17 Petitioners,

18 vs.

19 CITY OF SUNNYVALE and
SUNNYVALE CITY COUNCIL,

20 Respondents.
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Case No. 113cv257353

PROOF OF SERVICE

1 PROOF OF SERVICE

2 I, Alison Brown, declare:

3 I am a citizen of the United States and employed in San Francisco County, California. I
4 am over the age of eighteen years and not a party to the within-entitled action. My business
5 address is 235 Montgomery Street, 17th Floor, San Francisco, California 94104. My e-mail
6 address is bheuss@fbm.com. On December 30, 2013, I served a copy of the within document(s):

7 **[Redacted] Respondents' Opposition To Order To Show Cause Re
8 Preliminary Injunction**

9 **[Unredacted] Respondents' Opposition To Order To Show Cause Re
10 Preliminary Injunction**

11 **Declaration Of Anthony P. Schoenberg In Support Of Respondents'
12 Opposition To Order To Show Cause Re Preliminary Injunction -
13 *Exhibits D and E SEALED***

14 by placing the documents listed above in a sealed Federal Express envelope addressed to:

15 Robert C. Wright, Esq.
16 Wright & L'Estrange
17 401 West A Street, Suite 2250
18 San Diego, CA 92101

19 Following ordinary business practices, the envelope was placed for collection by Federal
20 Express on this date, and would, in the ordinary course of business, be retrieved by Federal
21 Express for overnight delivery on this date.

22 I declare under penalty of perjury under the laws of the State of California that the above
23 is true and correct.

24 Executed on December 30, 2013, at San Francisco, California.

25 
26 Alison Brown