

1 C. D. Michel – SBN 144258
2 Anna M. Barvir – SBN 268728
3 Sean A. Brady – SBN 262007
4 Tiffany D. Chevront – SBN 317144
5 MICHEL & ASSOCIATES, P.C.
6 180 East Ocean Blvd., Suite 200
7 Long Beach, CA 90802
8 Telephone: 562-216-4444
9 Facsimile: 562-216-4445
10 cmichel@michellawyers.com

11 Attorneys for Plaintiffs

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 NATIONAL RIFLE ASSOCIATION
15 OF AMERICA; JOHN DOE,

16 Plaintiffs,

17 vs.

18 CITY OF LOS ANGELES; ERIC
19 GARCETTI, in his official capacity as
20 Mayor of City of Los Angeles;
21 HOLLY L. WOLCOTT, in her official
22 capacity as City Clerk of City of Los
23 Angeles; and DOES 1-10,

24 Defendants.

Case No.: 2:19-cv-03212 SVW (GJSx)

**PLAINTIFFS' MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW**

Pretrial Conference: February 10, 2020
Time: 3:00 p.m.
Courtroom: 10A
Judge: Hon. Judge Stephen V. Wilson

Trial Date: February 25, 2020
Action Filed: April 24, 2019

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1 **I. PLAINTIFFS’ CLAIMS**

2 **A. Summary of Claims Plaintiffs Plan to Pursue**

3 Plaintiffs’ complaint stated five claims against Defendants the City of Los
4 Angeles, Mayor Eric Garcetti, and City Clerk Holly L. Wolcott. Defendants moved to
5 dismiss Plaintiffs’ complaint in its entirety. The Court granted Defendants’ motion to
6 dismiss as to Plaintiffs’ Third Cause of Action (compelled speech) and Fifth Cause of
7 Action (Fourteenth Amendment equal protection). The Court also dismissed claims
8 against Defendants Garcetti and Wolcott. Plaintiffs thus intend to pursue the
9 following claims against Defendant City of Los Angeles (“City”):

10 Claim 1: Defendant City violated 42 U.S.C. § 1983 when it violated Plaintiffs’
11 First Amendment right to freedom of association;

12 Claim 2: Defendant City violated 42 U.S.C. § 1983 when it violated Plaintiffs’
13 right to free speech; and

14 Claim 4: Defendant City violated 42 U.S.C. § 1983 when it retaliated against
15 Plaintiffs for exercising their First Amendment rights to freedom of association and
16 free speech.

17 **B. Elements of Plaintiffs’ Claims and Evidence in Support**

18 “To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) he or
19 she was deprived of a right secured by the Constitution or federal law; and (2) the
20 defendant acted ‘under color of state authority’ in depriving the plaintiff of this
21 right.” *Franklin v. Terr*, 201 F.3d 1098, 1100 (9th Cir. 2000).

22 **1. Claim 1: Violation of Right to Freedom of Association**

23 **a. Elements**

24 1. Plaintiffs were engaged in First Amendment protected activities;

25 2. Plaintiffs sought to associate with others in joint pursuit of the same
26 First Amendment protected activities;

27 3. Defendant City took an action hostile to Plaintiffs’ First Amendment
28 activities with the intent to (1) chill Plaintiffs’ political speech or (2) harass Plaintiffs

1 due to their desired associational conduct; and

2 4. Defendant City's action is not substantially related to a compelling
3 government interest.

4 *See Doe v. Reed*, 561 U.S. 186, 208 (2010); *Nat'l Ass'n of Gun Rights, Inc. v.*
5 *Mangan*, 933 F.3d 1102, 1121 (9th Cir. 2019); *Ams. for Prosperity Found. v.*
6 *Becerra*, 903 F.3d 1000, 1006 (9th Cir. 2018); *Ctr. for Competit. Politics v. Harris*,
7 784 F.3d 1307, 1312-13 (9th Cir. 2015); *Acorn Invests., Inc. v. City of Seattle*, 887
8 F.2d 219 (9th Cir. 1989).

9 **b. Key Evidence in Support**

10 Plaintiffs' key evidence in support of their association claim is not dissimilar to
11 what Plaintiffs submitted in support of their successful preliminary injunction
12 request. The evidence here consists of: (1) party testimony about the expressive and
13 associative nature of their activities and the ways in which those activities were
14 affected by the City's actions; (2) documentation of the City's efforts leading up to,
15 enacting, and then repealing the challenged ordinance, including the text of the
16 ordinance, legislative history, and public statements made by the ordinance's
17 legislative sponsor(s).

18 **2. Claim 2: Violation of Right to Free Speech**

19 **a. Elements**

20 Under the First Amendment, a citizen has the right to free expression. In order
21 to prove the Defendant City deprived Plaintiffs of this First Amendment right,
22 Plaintiffs must prove the following additional elements by a preponderance of the
23 evidence:

24 1. Plaintiffs were engaged in a constitutionally protected activity;

25 2. Defendant City's actions against Plaintiffs would chill a person of
26 ordinary firmness from continuing to engage in the protected activity; and

27 3. Plaintiffs' protected activity was a substantial or motivating factor in
28 Defendant City's conduct.

1 See Ninth Circuit Manual of Model Civil Jury Instructions § 9.11 (2019).

2 **b. Key Evidence in Support**

3 Plaintiff’s key evidence in support of their free speech claim is not dissimilar
4 to what Plaintiffs submitted in support of their successful preliminary injunction
5 request. The evidence here consists of: (1) party testimony about the expressive
6 nature of their activities and the ways in which those activities were affected by the
7 City’s actions; and (2) documentation of the City’s efforts leading up to, enacting,
8 and then repealing the challenged ordinance, including the text of the ordinance,
9 legislative history, and public statements made by the ordinance’s legislative
10 sponsor(s).

11 **3. Claim 4: Retaliation for Protected Speech and Association**

12 **a. Elements**

- 13 1. Plaintiffs engaged in constitutionally protected activity;
14 2. Defendant City’s actions would chill a person of ordinary firmness from
15 continuing to engage in the protected activity; and
16 3. The protected activity was a substantial motivating factor in Defendant
17 City’s conduct—i.e., that there was a nexus between Defendant City’s actions and an
18 intent to chill speech.

19 *See Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir.
20 2016); *O’Brien v. Welty*, 818 F.3d 920, 933034 (9th Cir. 2016); *see also Capp v. Cty.*
21 *of San Diego*, 940 F.3d 1046 (9th Cir. 2019).

22 **b. Key Evidence in Support**

23 Plaintiffs’ key evidence in support of their retaliation claim is not dissimilar to
24 what Plaintiffs submitted in support of their successful preliminary injunction
25 request. The evidence here consists of: (1) party testimony about the expressive and
26 associative nature of their activities and the ways in which those activities were
27 affected by the City’s actions; (2) documentation of the City’s efforts leading up to,
28 enacting, and then repealing the challenged ordinance, including the text of the

1 ordinance, legislative history, and public statements made by the ordinance’s
2 legislative sponsor(s).

3 **II. DEFENDANT’S COUNTERCLAIMS & AFFIRMATIVE DEFENSES**

4 **A. Summary of Defenses Defendant Plans to Pursue**

5 The City did not plead any counterclaims against Plaintiffs. The City pled the
6 following affirmative defenses:

7 First Defense: Plaintiffs have failed state a claim under 42 U.S.C. § 1983 for
8 which relief can be granted against any Defendant City.

9 Second Defense: Plaintiffs lack standing to bring any and all claims alleged
10 under 42 U.S.C. § 1983.

11 Third Defense: Plaintiffs have not suffered damages attributable to any act or
12 omission of Defendant City.

13 Fourth Defense: The measure of Plaintiffs’ damages, if any, is based on
14 speculation and conjecture.

15 Fifth Defense: Plaintiffs have failed to set forth facts showing a serious risk of
16 irreparable harm.

17 **B. Elements Required to Establish Defendant’s Affirmative Defenses
18 and Plaintiffs’ Evidence in Rebuttal**

19 **1. Defendant’s First “Affirmative Defense” for “Failure to State
20 a Claim” Is Not a Cognizable Affirmative Defense**

21 “[F]ailure to state a claim is not an affirmative defense; it is a defect in a
22 plaintiff’s claim and not an additional set of facts that would bar recovery
23 notwithstanding the plaintiff’s valid prima facie case.” *Vogel v. Huntington Oaks Del.
24 Partners, LLC*, 291 F.R.D. 438, 442 (C.D. Cal. 2013). “This allegation asserts a
25 defect in [plaintiff’s] case and should properly be brought as a motion to dismiss.”
26 *Ross v. Morgan Stanley Smith Barney, LLC*, 2013 WL 1344831, *3 (C.D. Cal. 2013).
27 Because this is not a cognizable affirmative defense, there are no elements or
28 evidence to identify individually.

28 ///

1 **2. Second Affirmative Defense: Plaintiffs Lack Standing**

2 **a. Elements**

3 Article III of the Constitution limits the authority of the federal court to actual
4 cases and controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). To
5 bring a case within the jurisdiction of the federal court, Plaintiffs must prove the
6 following three elements:

- 7 1. Plaintiffs have suffered a concrete injury;
- 8 2. That injury is fairly traceable to Defendant City’s actions; and
- 9 3. Plaintiffs; injuries can be redressed by judicially ordered relief.

10 *See Lujan*, 504 U.S. at 559-61.

11 **b. Key Evidence & Argument in Opposition**

12 Plaintiffs’ standing to bring this lawsuit is, largely, a question of law. But key
13 evidence in support of Plaintiffs’ standing consists of: (1) party testimony about the
14 expressive nature of their expressive and associative activities and the ways in which
15 those activities were affected by the City’s actions; (2) documentation of the City’s
16 efforts leading up to, enacting, and then repealing the challenged ordinance, including
17 the text of the ordinance, legislative history, and public statements made by the
18 ordinance’s legislative sponsor(s).

19 **3. Third & Fourth Affirmative Defense: No Known Damages**
20 **and Damages Are Speculative**

21 **a. Elements**

22 Defendant City’s third and fourth “affirmative” defenses pertain to Plaintiffs’
23 ability to prove actual damages related to Defendant City’s conduct. This is an
24 argument that Plaintiffs have failed to meet their burden of proof on the remedy of
25 damages, not an affirmative defense. *Taylor v. Stave, Inc.*, 2016 WL 6674987, * 2
26 (C.D. Cal. 2016). Because this is not a cognizable affirmative defense, there are no
27 elements or evidence to describe under the Local Rules.

28 ///

1 **b. Key Evidence & Argument in Opposition**

2 Though the City damages “defenses” are not cognizable affirmative defenses
3 that trigger disclosure of Plaintiffs’ key evidence opposing the City’s claim, Plaintiffs
4 hereby disclose that evidence on the amount of compensatory damages is likely to
5 include party and witness testimony and documentary evidence showing the impact
6 of the challenged ordinance and disclosure requirement on Plaintiff NRA’s
7 sponsorships and contractual arrangements, as well its impact on NRA’s membership
8 numbers. That said, Plaintiffs’ investigation into the amount of compensatory
9 damages Plaintiffs have suffered as a result of the challenged ordinance is ongoing.
10 Written discovery requests relevant to the issue of damages are pending. Responses
11 are due on or before February 11, 2020. Plaintiffs thus preserve their right to amend
12 their witness list, exhibit list, and this summary of key evidence should pending
13 discovery identify additional evidence supporting Plaintiffs’ claim of actual damages.

14 Even if Plaintiffs do not establish to the jury’s satisfaction that they are entitled
15 to an award of compensatory damages, “[t]he law that applies to this case authorizes
16 an award of nominal damages. If you find for [Plaintiffs] but you find that [Plaintiffs
17 have] failed to prove damages . . . you must award nominal damages. Nominal
18 damages may not exceed one dollar.” *See* Ninth Circuit Manual of Model Civil Jury
19 Instructions § 5.6 (2017); *see also Hazle v. Crofoot*, 727 F.3d 983, __ n.6 (9th Cir.
20 2013) (“The Supreme Court has explicitly held that when a defendant is found to
21 have violated an individual’s right to procedural due process, the plaintiff is “entitled
22 to recover nominal damages,” even “without proof of actual injury.” *Carey v.*
23 *Piphus*, 435 U.S. 247, 266-67 (1978). Our circuit’s case law makes clear that “neither
24 the judge nor the jury has any discretion in this matter,” and that the rule entitling a
25 plaintiff to nominal damages applies with equal force to violations of substantive
26 constitutional rights. *Floyd v. Laws*, 929 F.2d 1390, 1402 (9th Cir. 1991); *see*
27 *also Schneider v. Cnty. of San Diego*, 285 F.3d 784, 794-95 (9th Cir. 2002). Nominal
28 damages must be awarded in cases in which the plaintiff is not entitled to

1 compensatory damages, such as cases in which no actual injury is incurred or can be
2 proven.”).

3 **4. Fifth Affirmative Defense: Lack of Irreparable Harm**

4 **a. Elements**

5 Defendant City’s fifth “affirmative defense” is simply that Plaintiffs cannot
6 show a “serious risk of irreparable harm” attributable to the City’s actions. This is
7 more properly an argument that Plaintiffs have failed to meet their burden of proof on
8 the remedy of injunctive relief, not an affirmative defense. Because this is not a
9 cognizable affirmative defense, there are no elements or evidence to identify
10 individually here.

11 **b. Key Evidence & Argument in Opposition**

12 To the extent the City intends to continue pursuit of its argument that Plaintiffs
13 cannot provide admissible evidence of irreparable harm, Plaintiffs respond that, if
14 they have provided sufficient evidence that the challenged disclosure ordinance
15 violated their First Amendment rights to association and/or speech, they have
16 satisfied the requirement of irreparable harm.

17 What’s more, Plaintiff Doe will testify that he fears that if he were to comply
18 with the challenged ordinance, the City will deny him appropriate consideration for
19 his contract bids or he will be “outed” as an NRA supporter, creating stigma against
20 him and his business. And, as the text of the ordinance, its legislative history, and the
21 primary sponsor’s remarks make clear, this was exactly the sort of irreparable harm
22 the City intended when it adopted the ordinance. ECF No. 36 at 18 (noting that the
23 record amply supports Plaintiff Doe and Plaintiff NRAs “well-founded” fears of
24 irreparable harm).

25 **III. PLAINTIFFS’ POSITION ON ANTICIPATED EVIDENTIARY ISSUES**

26 **A. Plaintiff Doe’s Anonymity**

27 Per the Court’s civil trial preparation order, Plaintiff Doe must submit a sworn
28 declaration and submit to in-person cross-examination and re-direct in any bench trial

1 and must be prepared to take the stand in any jury trial. This presents an evidentiary
2 dilemma for Doe because of his interest in maintaining the privacy of his identity,
3 preventing the City from identifying him, effectively “outing” him as an NRA
4 supporter, and causing the very irreparable harm Doe alleges the challenged
5 ordinance invites upon him. Should Defendant wish to cross examine Doe at trial,
6 that presents an obvious threat to Doe’s interest in the privacy of his identity.

7 In support of Plaintiffs’ Motion for Preliminary Injunction, Doe made factual
8 contentions via Doe’s attorney’s sworn declaration. The Court noted that no parties
9 requested an evidentiary hearing on the matter and accepted Doe’s factual assertions
10 as true “for the purposes of [the preliminary injunction] motion.” ECF No. 36 at 2. It
11 is not at all clear that the Court would accept the same at trial. Plaintiffs have
12 investigated how best to address this situation and determined that a protective order
13 will likely be required. Plaintiffs thus anticipate filing a motion for protective order
14 so that Doe may proceed anonymously in the coming days.

15 **B. Other Evidentiary Issues**

16 Plaintiffs will move to bar the admission of any evidence or testimony
17 protected by the attorney-client communication privilege or the work-product
18 doctrine. Plaintiff NRA also anticipates filing motions in limine to bar reference to it
19 as a “domestic terrorist organization” or similar phrase. Such references are unduly
20 prejudicial to Plaintiff and they are not relevant to any material issue.

21 Further, on January 21, 2020—the deadline to file this memorandum per the
22 Local Rules—the Los Angeles City Council voted unanimously to repeal the
23 ordinance that Plaintiffs challenge in this action. Plaintiffs are still determining how
24 the imminent repeal would impact this litigation. And discovery is ongoing. Plaintiff
25 NRA propounded on Defendant City written discovery in the form of Requests for
26 Production of Documents on January 9, 2020, seeking documents Plaintiff NRA
27 believes are important to proving its claims in this matter. Responses to those
28 discovery requests are due on February 11, 2020. For these reasons, Plaintiffs

1 anticipate that they will need to amend their witness list and exhibit list should they
2 learn of additional evidence supporting for their claims from the City’s responses to
3 Plaintiff NRA’s discovery or from the City’s process to repeal the challenged
4 ordinance.

5 **IV. GERMANE ISSUES OF LAW**

6 1. What constitutes a “burden” on the First Amendment right of free
7 association when the government mandates disclosure of association with certain
8 groups? In the Court’s ruling on Plaintiffs’ motion for preliminary injunction, the
9 Court first held that “a disclosure requirement intended to chill political speech or
10 harass a certain speaker does create an actual burden on the First Amendment right of
11 association.” ECF No. 36 at 16 (citing *Competit. Politics*, 784 F.3d at 1313). The
12 Court went on to hold that “a disclosure requirement intended to chill expression and
13 unsupported by a reasonable justification is itself a First Amendment burden.” *Id.*
14 (citing *Competit. Politics*, 784 F.3d at 1313). But later, the Court instructed Plaintiffs
15 that, to succeed at trial, they “will need to demonstrate that the Ordinance “places an
16 actual burden on First Amendment” rights (either through harassment or chilled
17 association) and that burden is not justified by a “compelling government interest.”
18 ECF No. 36 at 18 (citing *Ams. for Prosperity*, 903 F.3d at 1006).

19 The preliminary injunction order thus presents two different standards for
20 proving that the challenged ordinance burdens Plaintiffs’ First Amendment right to
21 free association. Respectfully, Plaintiffs believe the Court’s first characterization of
22 the rule is the correct one. That is, the “actual burden” on the right is presumed when,
23 as here, the government’s disclosure requirement was *intended* to chill political
24 speech or harass sponsors, contractors, and members of Plaintiff NRA. Accordingly,
25 Plaintiffs to raise this argument at trial.

26 **V. BIFURCATION OF ISSUES**

27 The parties have not requested bifurcation of any issues at this time.

28 ///

1 **VI. DEMAND FOR JURY TRIAL**

2 The City made a timely demand for a jury trial in its answer as to all issues so
3 triable.

4 **A. Issues Triable to the Jury**

5 1. Compensatory damages.

6 **B. Issues Triable to the Court**

7 1. Whether the challenged disclosure ordinance violates the First
8 Amendment right to freedom of association;

9 2. Whether the challenged disclosure ordinance violates the First
10 Amendment right to free speech;

11 3. Whether the challenged disclosure ordinance violates the First
12 Amendment as retaliation against Plaintiffs for their associative and expressive
13 activities;

14 4. Whether Plaintiffs have standing to bring their constitutional claims;

15 5. Injunctive and declaratory relief;

16 6. Award of nominal damages;

17 7. Entitlement to and amount of attorneys' fees.

18 **VII. ATTORNEYS' FEES**

19 Plaintiffs seek an award of attorneys' fees, costs, and expenses under 28 U.S.C.
20 § 2412 and 42 U.S.C. § 1988. Under these statutes, if Plaintiffs are the "prevailing
21 party" on their 42 U.S.C. § 1983 claim(s), they are entitled to reasonable costs and
22 attorneys' fees.

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1 **VIII. ABANDONMENT OF ISSUES**

2 Plaintiff has only abandoned those issues the Court expressly dismissed via its
3 order partially granting the City’s motion to dismiss. Plaintiffs are unaware of any
4 issues the City has abandoned.

5
6 Dated: January 21, 2020

MICHEL & ASSOCIATES, P.C.

7
8 s/ Anna M. Barvir
9 Anna M. Barvir
10 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Name: *National Rifle Association, et al., v. City of Los Angeles, et al.*
Case No.: 2:19-cv-03212 SVW (GJSx)

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFFS' MEMORANDUM OF CONTENTIONS OF FACT AND LAW

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Benjamin F. Chapman
Los Angeles City Attorney
200 N. Main St., Suite 675
Los Angeles, CA 90012
benjamin.chapman@lacity.org
Attorneys for Defendants

I declare under penalty of perjury that the foregoing is true and correct.

Executed January 21, 2020.

s/ Laura Palmerin

Laura Palmerin