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13 *Admission *pro hac vice* pending

14 UNITED STATES DISTRICT COURT

15 FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 SAN JOSE DIVISION

17
18 NATIONAL ASSOCIATION FOR GUN
RIGHTS, INC., a nonprofit corporation, and
19 MARK SIKES, an individual,

20 Plaintiffs,

21 v.

22 CITY OF SAN JOSE, a public entity,
23 JENNIFER MAGUIRE, in her official capacity
as City Manager of the City of San Jose, and the
24 CITY OF SAN JOSE CITY COUNCIL,

25 Defendants.
26
27
28

Case Number: 5:22-cv-00501-BLF

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
INJUNCTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Hearing Date: July 21, 2022

Hearing Time: 9:00 a.m.

Location: Courtroom 3, 5th Floor

Robert F. Peckham Federal Building

280 South First Street, San Jose, CA

Judge: Honorable Beth Labson Freeman



1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on July 21, 2022, at 9:00 a.m. or as soon thereafter this matter
3 may be heard before the Honorable Beth Labson Freeman, in Courtroom 3 of the above-entitled
4 Court, located at the Robert F. Peckham Federal Building & United States Courthouse, 280 South
5 1st Street, Room 2112, San Jose, California, 95113.

6 Plaintiffs National Association for Gun Rights, Inc. (“NAGR”) and Mark Sikes (“Sikes”),
7 pursuant to Fed. R. Civ. P. 65, will and hereby do move this Court for the issuance of a preliminary
8 injunction prohibiting Defendants from enforcing Part 6 of Chapter 10.32 of Title 10 (§§10.32.200-
9 10.32.250) of the City of San Jose’s local ordinances.

10 The grant of a preliminary injunction is warranted because: (i) to allow the Ordinance to go
11 into effect would deprive Plaintiffs, as well as all citizens of San Jose, of their First, Second, Fifth,
12 and Fourteenth Amendment rights under the United States Constitution, articles XI and XIII of the
13 California Constitution, and the San Jose Charter, (ii) the denial of such relief would irreparably
14 harm Plaintiffs, (iii) providing said relief would not harm Defendants; and (iv) the public interest
15 favors upholding the United States and California Constitutions and the San Jose City Charter, and
16 (v) Plaintiffs are likely to succeed on the merits.

17 In support of this Motion, Plaintiffs respectfully refer this Court to this Motion, the
18 Memorandum of Points and Authorities in Support of the Motion for Preliminary Injunction, the
19 attached exhibits, the pleadings on record, and the arguments of counsel.

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Date: March 8, 2022

Respectfully submitted,

DHILLON LAW GROUP INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 “The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.”
4 *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S. Ct. 870, 874, 87 L. Ed. 1292 (1943).

5
6 The Supreme Court has made it clear that laws designed to burden the exercise of the
7 fundamental right to own a gun and keep it in one’s own home is unconstitutional. Just as taxing
8 the press for the right to circulate its content is unconstitutional, so too is an annual tax on the
9 right to own a gun. Yet, the City of San Jose (“City”) has taken the unprecedented step of
10 requiring virtually all gun owners who reside in the City to pay annual fees just for their right to
11 own a gun and to pay for special insurance, or risk forfeiture of their guns.

12 The amount of the fees and the cost of the insurance are not defined by this new law and
13 are subject to the whims of the San Jose City Council and private insurance companies—who may
14 not even offer the policy that the City demands to avoid nullification of a person’s Second
15 Amendment rights. To make matters worse, one of the fees comprises a compulsory donation to a
16 government-chosen nonprofit, forcing gun owners to associate with a group against their will and
17 to fund educational programs targeting themselves that they didn’t ask for and may not want,
18 need, or agree with.

19 This new law does not just violate the United States Constitution. It also violates the
20 California Constitution and the City’s own Charter. The California Constitution prevents local
21 governments from enacting laws when state law already occupies the field and California already
22 has extensive gun regulations thoroughly occupying this field. Additionally, the insurance
23 requirement and the Gun Harm Reduction Fee are taxes within the meaning of the law and the
24 City failed, as required by the California Constitution, to submit them to the electorate for
25 approval. Finally, by forcing gun owners to pay the City’s Gun Harm Reduction Fee directly to a
26 third party nonprofit to spend as it chooses outside of the control of the City Council, the City’s
27 new gun ordinance violates provisions of its own Charter by unlawfully delegating the City
28 Council’s budgetary and appropriation powers and by not depositing all of the Ordinance’s

1 proceeds into the City’s general fund.

2 Accordingly, this Court should immediately issue a preliminary injunction to prevent the
3 City from enforcing the unconstitutional and unlawful Ordinance.

4 **RELEVANT FACTUAL BACKGROUND**

5 On June 29, 2021, the City Council directed San Jose City Attorney Nora Frimann “to return
6 to Council with an ordinance for Council consideration that would require every gun owner residing
7 in the City of San José, with certain exceptions, to obtain and maintain a City-issued document
8 evincing payment of an annual fee, and attestation of insurance coverage for unintentional firearm-
9 related death, injury, or property damage.” Frimann Mem. re Gun Harm Reduction Ord., Jan. 14,
10 2022, (“City Attorney Mem.”) (attached hereto as Exhibit A). Plaintiff National Association for Gun
11 Rights immediately sent the City a cease and desist letter warning that the proposed ordinance was
12 unconstitutional. *See* Ltr. From D. Warrington and H. Dhillon to San Jose City Council, July 14,
13 2021 (attached hereto as Exhibit B).

14 On January 14, 2022, in advance of the City Council’s January 25 meeting, the San Jose City
15 Attorney issued a memorandum in compliance with the City Council’s directions that recommended
16 the Council “[c]onsider approving an ordinance amending Title 10 of the San José Municipal Code
17 to add Part 6 to Chapter 10.32 to reduce gun harm by: (a) requiring gun owners to obtain and
18 maintain liability insurance; and (b) authorizing a fee to apply to gun harm reduction programs.”
19 City Attorney Mem. at 1(Ex. A). Under a section addressing penalties for noncompliance, the City
20 Attorney stated that “[f]ailure to comply shall constitute a civil violation subjecting the owner to the
21 temporary or permanent seizure of the gun, and under specified circumstances, a fine.” *Id.* at 2.

22 In an op-ed published on January 19, 2021, in the Los Angeles Times, San Jose Mayor Sam
23 Liccardo wrote “[l]ast June our City Council unanimously approved my proposals that will mitigate
24 gun harm in our community — and a final vote on Jan. 25 should turn them into law.” Mayor Sam
25 Liccardo, *Op-Ed: My City’s New Gun Control Laws Will Help More Than Waiting On Congress To*
26 *Do Something*, LOS ANGELES TIMES, Jan. 19, 2022), [https://www.latimes.com/opinion/story/2022-](https://www.latimes.com/opinion/story/2022-01-19/op-ed-new-gun-control-laws-help-congress)
27 [01-19/op-ed-new-gun-control-laws-help-congress](https://www.latimes.com/opinion/story/2022-01-19/op-ed-new-gun-control-laws-help-congress) (attached as Exhibit C).

28 //

1 On January 21, 2022, Mayor Liccardo, Vice Mayor Jones, Councilmember Cohen, and
2 Councilmember Carrasco issued “Directions” to the City Council, including to “[a]pprove the
3 proposed ordinance,” with certain modifications. Mayor’s Mem. to City Council, Jan. 21, 2022, 2
4 (attached as Exhibit D). The Mayor’s Memorandum also noted that “Members of the California
5 legislature are exploring bills to have law enforcement agencies *seize guns as a sanction for*
6 *violations of local gun regulations*, with subsequent restoration of ownership as required by
7 constitutional due process.” *Id.* at 4 (emphasis added).

8 Following the City Council’s January 25, 2022, meeting, the Mayor immediately issued a
9 press release the night of the vote, in which he boasted that “Tonight San José became the first city
10 in the United States to *enact* an ordinance to require gun owners to purchase liability insurance, and
11 to invest funds generated from fees paid by gun owners into evidence-based initiatives to reduce gun
12 violence and gun harm.” Liccardo Press Release, Jan. 25, 2022 (emphasis added) (attached as
13 Exhibit E).

14 Within 24 hours, articles were published about San Jose enacting an unprecedented
15 regulation of gun ownership, including the San Francisco Chronicle and the Los Angeles Times. *See*
16 Lauren Hernández, *Gun Owners In San Jose Must Buy Liability Insurance Under Newly Passed*
17 *First-In-The-Nation Law*, SAN FRANCISCO CHRONICLE, Jan. 25, 2022 (updated Jan. 26, 2022),
18 [https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-](https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-16804951.php)
19 [16804951.php](https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-16804951.php) (“The San Jose City Council adopted a measure Tuesday night requiring gun owners
20 in the South Bay city to buy liability insurance for their firearms, city officials said.”)(attached as
21 Exhibit F); Olga R. Rodriguez and Juliet Williams, *San Jose Approves First Law In U.S. Requiring*
22 *Gun Owners To Have Insurance*, LOS ANGELES TIMES, Jan. 25, 2022,
23 <https://www.latimes.com/california/story/2022-01-25/san-jose-gun-liability-insurance> (attached as
24 Exhibit G)(“The city of San Jose voted Tuesday night to require gun owners to carry liability
25 insurance in what’s believed to be the first measure of its kind in the United States. The San Jose
26 City Council overwhelmingly approved the measure despite opposition from some gun owners who
27 said it would violate their 2nd Amendment rights.”).

28 The Ordinance was placed on the consent calendar for the City Council’s February 8, 2022,

1 meeting, during which a majority of the City Council voted again to approve the Ordinance. Def.'s
2 Mem. Supp. Mot. Dismiss 3.

3 **The Ordinance**

4 The Ordinance will take effect on August 8, 2022, one hundred eighty days from the date
5 of its adoption on February 8, 2022, Ord., Sec. 2, and will be codified as Chapter 10.32 of Title
6 10 of the San Jose Municipal Code, Ordinance section 1-2. Ordinance (attached as Exhibit H). It
7 will require 50,000-55,000 San Jose residents, minus a few exceptions, to keep proof with their
8 guns that they have an insurance policy for gun accident liability and have paid an annual Gun
9 Harm Reduction Fee to a nonprofit chosen by the City Manager. *Id.*, §§ 10.32.210, 10.32.215,
10 10.32.250; Liccardo Mem. Re Gun Harm Reduction Ord., Jan. 19, 2022 (attached as Exhibit I).
11 The penalties for noncompliance include “impoundment” (seizure) of a person’s guns and the
12 payment of fines. Ordinance §§ 10.32.240, 10.32.245.

13 This Ordinance targets gun ownership in the home because it does not apply to those who
14 have a license to carry a concealed weapon. Ordinance §10.32.225. (Without a concealed carry
15 permit, there is virtually no other way San Jose residents can exercise their Second Amendment
16 rights outside of the home. *See* CAL. PENAL CODE §§ 25850, 26150, 26155, 26350, 26400.)

17 **The Purpose and Justifications of the Ordinance**

18 The City’s vague purpose for the Ordinance is “to reduce gun harm.” Ordinance
19 § 10.32.200.A. The Ordinance cites overall state and national injury data for homicide, suicide, and
20 accidents, and statistics on the total number of youth injured in California in certain years. Ordinance
21 § 10.32.200.B.2. As to “gun harm” in San Jose, specifically, the Ordinance notes that in *Santa Clara*
22 *County*, in which San Jose is located, “sixteen (16%) of hospitalizations from firearms injuries were
23 due to unintentional shootings.” Ordinance § 10.32.200.B.4. The nonprofit organization helping the
24 City enact and justify the Ordinance, Pacific Institute for Research and Evaluation (PIRE), concluded
25 in its own analysis that an average of “206 people suffer death or serious bodily injury from gunshots
26 each year” in San Jose, though the Ordinance does not specify how many were typically due to
27 accidents or suicide, or intentional violence. *See* Ordinance § 10.32.200.B.7.

28 The Ordinance contains an estimation that “San Jose taxpayers annually spend approximately

1 \$39.7 million, or approximately \$151 per firearm-owning household, to respond to gun violence with
2 such public services as emergency police and medical response, victim assistance, incident
3 investigation, acute and long-term care, and perpetrator adjudication and judicial sanctioning.”
4 Ordinance § 10.32.200.B.8. This estimation also does not differentiate between the costs arising due
5 to intentional violence, suicide, and accidents.

6 The Ordinance boldly claims that “including private costs to individuals and families...San
7 Jose residents incur an annual financial burden of \$442 million per year.” *Id.*, § 10.32.200.B.9.
8 However, more than \$328,355,500 or 74% of these alleged costs are for the impact of guns on
9 “quality of life,” which includes the “value of pain, suffering, and lost quality of life.” Liccardo Jan.
10 19, 2022, Memo., 4 (Ex. I). The next highest figure within the asserted \$442 million calculation is
11 “lost work,” accounting for \$78,272,000 or nearly 18% of the total. *Id.* In other words, 92% of the
12 \$442 million in “costs” claimed in the Ordinance comprises artificially calculated “quality of life”
13 and “lost work” due to all causes of firearm deaths and injuries.

14 Accordingly, the costs used to calculate the total financial burden on San Jose, which the
15 Ordinance aims to fully or partially recoup from all gun owners, does not correct for the
16 overwhelming costs imposed by the perpetrators of violent criminal conduct that the Ordinance does
17 not target, and 92% of the highest dollar figure the Ordinance cites for support does not comprise
18 actual expenses incurred by the City. And yet, the Ordinance uses these sham figures to justify:

19 (A) imposing a collective financial burden on all gun owners (except those with a permit to
20 carry their guns) through the Gun Harm Reduction Fee;

21 (B) compelling gun owners to pay the Gun Harm Reduction Fee directly to a City-chosen
22 nonprofit, a forced donation, allegedly for programs to re-educate gun owners about the dangers of
23 guns *and other purposes*; and

24 (C) requiring all gun owners to buy insurance to cover the costs to victims of the accidental
25 use of guns (but not all crime victims).

26 As to compelling purchase of insurance, the Ordinance provides no studies or statistics
27 establishing that gun liability insurance will reduce gun violence. Instead, the Ordinance includes
28 only the conclusory statement that “Liability insurance can reduce the number of gun incidents by

1 encouraging safer behavior....” Ordinance § 10.32.200.B.12.

2 Thus, every citizen of San Jose will be forced to pay a fee and buy insurance to exercise their
3 fundamental Constitutional right to home and self-defense by owning a gun based on the direct and
4 societal costs primarily caused by criminals using guns illegally. Liccardo Jan. 19, 2022, Memo. 1
5 (Ex. I) (noting that “Assaults and homicides are most common” and “Unintentional gunshot wounds
6 tend to be less serious.”). Specifically, according to PIRE, the alleged costs to the City of homicide
7 and assault are \$7,067,303 out of \$7,940,358 (or 89%) of the total costs, *id.* at 2, and PIRE also
8 attributed the majority of its artificially calculated societal costs of guns to “Homicide/Assault/Legal
9 Intervention.” *Id.* at 5 (\$253,828,000 out of \$441,699,000).

10 *a. The Insurance Mandate*

11 The insurance mandate requires that “A person who resides in the City of San Jose and owns
12 or possesses a Firearm in the City shall obtain and continuously maintain in full force and effect a
13 homeowner’s, renter’s or gun liability insurance policy...specifically covering losses or damages
14 resulting from any accidental use of the Firearm, including but not limited to, death, injury, or
15 property damage.” Ordinance § 10.32.210.A. The Ordinance does not include any information about
16 minimum insurance coverage thresholds or premiums. *See generally* Ordinance. Thus, the insurance
17 requirement lacks certainty as to the cost of insurance, what has to be covered, and minimum
18 coverage thresholds. This guesswork will allow private for-profit corporations to dictate the
19 government mandated cost of owning a gun. Additionally, based on the insurance companies’
20 economic interests, they may choose not to insure a person who nonetheless has a Constitutional
21 right to keep and bear arms.

22 To comply with the Ordinance, gun owners must present a “City-designated attestation form”
23 signed under penalty of perjury identifying their insurance policy to any police officer who “knows
24 or *has reason to believe*” they possess a firearm. Ordinance § 10.32.230.A (emphasis added).
25 Failure to comply with the Ordinance authorizes seizure (“impoundment”) of the person’s gun and
26 fines. Ordinance §§ 10.32.240; 10.32.245.

27 *b. Gun Harm Reduction Fee*

28 The first of two fees the Ordinance imposes requires that “A person who resides in the City

1 and owns or possesses a Firearm in the City shall pay an Annual Gun Harm Reduction Fee to the
2 Designated Nonprofit Organization each year.” Ordinance § 10.32.215. The fee amount is not
3 specified in the Ordinance, which neither contains any criteria to determine what the fee will be nor
4 any limits on how high it can be set. *See id.* Rather, the City Council reserved the right for itself to
5 determine this amount at an unspecified later date. *Id.*

6 The Ordinance requires gun owners to pay this fee directly to a nonprofit chosen by the City
7 Manager, Defendant Jennifer Maguire (“Maguire”). *Id.*, §§ 10.32.205; 10.32.220. No part of the
8 City’s fee actually goes to the City. Further, “all monies...shall be expended by the Designated
9 Nonprofit Organization.” *Id.*, § 10.32.220.A. Additionally, once the money is in the nonprofit’s
10 coffers, “the City shall not specifically direct how the monies from the Gun Harm Reduction Fee are
11 expended.” *Id.*, §10.32.220.C. Accordingly, without City oversight or even knowledge of the fees
12 being paid to the nonprofit, and with the City prohibiting itself from controlling how the funds are
13 being spent, the potential for waste, fraud, and abuse is staggering. As discussed below, it is also
14 illegal.

15 The Ordinance provides scant information about the Designated Nonprofit Organization,
16 other than the fact that it will have a contract with the City. In recent public comments, Mayor
17 Liccardo has claimed that, in addition to funding this nonprofit, the City will also be creating it and
18 choosing its members—but this is not stated anywhere in the Ordinance. Mary Harris, *San Jose’s*
19 *New Gun Law Is the First of Its Kind*, Slate.com (Feb. 3, 2022), [https://slate.com/news-and-](https://slate.com/news-and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html)
20 [politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html](https://slate.com/news-and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html) (attached as Exhibit
21 J)(“We’re forming a 501(c)(3) foundation, which is going to receive the dollars, and the board,
22 which will be comprised of a host of folks, . . .”).

23 The only criteria for the City’s contract with the nonprofit as to how the funds are ultimately
24 spent is that the nonprofit’s services are to “include, but are not necessarily limited to” suicide
25 prevention services or programs, violence reduction or domestic violence services or programs,
26 addiction intervention and substance abuse treatment, mental health services related to gun violence,
27 and firearms safety education or training. *Id.*, § 10.32.220.A. “All monies from the Gun Harm
28 Reduction Fee shall be expended by the Designated Nonprofit Organization” to provide the services

1 and programs listed above exclusively to “residents of the city that own or possess a Firearm in the
2 City, to members of their household, or to those with whom they have a close familial or intimate
3 relationship.” *Id.*

4 The fee thus functions as a way to compel gun owners to give their money to a government
5 approved nonprofit, that will inevitably hold the City’s anti-gun biases, to spend on unspecified
6 programs targeting gun owners at the nonprofit’s sole discretion with little to no City oversight. The
7 program forces gun owners to subsidize an organization that is hostile to gun ownership, to be used
8 for their own re-education. But although the Gun Harm Reduction Fee must be exclusively spent on
9 programs to re-educate gun owners, members of their household, or to those with whom they have a
10 close familial or intimate relationship, *id.*, the Ordinance in fact does not include *any* requirement for
11 gun owners or anyone else to attend the nonprofit’s programs.

12 Despite justifying the Ordinance on the grounds that gun injuries are allegedly costing the
13 City hundreds of millions of dollars, the Gun Harm Reduction Fee does not compensate the city for
14 any of those alleged losses. The Ordinance authorizes the City Manager to collect *another*
15 undetermined fee to administer the Ordinance, that is, to “charge and collect any and all cost
16 recovery fees associated with fulfilling the policies of this Part relating to the reduction of gun harm,
17 including any associated third-party costs.” Ordinance § 10.32.250.

18 Any gun owner who does not pay the Gun Harm Reduction Fee could be issued an as yet
19 undetermined fine, Ordinance § 10.32.240 (it “shall be set forth in the schedule of fines established
20 by resolution of the City Council”) and may have their gun “impounded.” *Id.* at §10.32.245.
21 In a recent interview, the Mayor disclosed how the Ordinance could allow the police new
22 opportunities to confiscate guns.

23
24 Encountering people with guns, out on the street, in bars and nightclubs—you can
25 imagine a host of different venues where a police officer would really like to have the
26 ability to remove a gun from a potentially combustible situation. For example, there’s
27 a bar brawl and they’re patting down everybody and someone’s got a gun. “Have you
28 paid your fee? You have insurance?” “No.” OK, well, there’s an opportunity for us to
remove the gun.

San Jose’s New Gun Law Is the First of Its Kind, Supra. (Ex. J).

* * * *

The insurance requirement and both of the fees in the Ordinance are unknown costs imposed on gun owners that are designed to deter gun ownership. These unknown costs are subject to the whims of the City Council and insurance companies and bear a significant risk of making gun ownership cost prohibitive. The unknown extent of the costs further, whatever they may be now or in the future, chills the exercise of Second Amendment rights.

Plaintiffs therefore seek a preliminary injunction to prevent the City from enforcing the Ordinance, which it will do should this Court not take action prior to August 8, 2022.

ARGUMENT

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008); see *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (applying *Winter* to claim under 42 U.S.C. § 1983); *All for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

I. PLAINTIFFS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.

A. There Is a Strong Likelihood Plaintiffs’ Will Succeed in Proving Their Claims on Multiple Grounds.

1. The Ordinance violates the Second Amendment of the United States Constitution.

Defendants’ Ordinance violates the Second Amendment to the U.S. Constitution, which prohibits the government from infringing “the right of the people to keep and bear Arms.” U.S. Const., amend. II. The Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Even in the face of “the problem of handgun violence in this country...the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Id.* at 636. “[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago, Ill.*,

1 561 U.S. 742, 778 (2010). “The upshot of [*Heller* and *McDonald*] is that there now exists a clearly-
2 defined fundamental right to possess firearms for self-defense within the home.” *United States v.*
3 *Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011). Local governments, including the City of San Jose,
4 are bound by the Second Amendment. *McDonald*, 561 U.S. at 790; *Nordyke v. King*, 681 F.3d 1041,
5 1044 (9th Cir. 2012).

6 In Second Amendment challenges, the Ninth Circuit, along with other circuits have “looked
7 to the First Amendment as a guide.” *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013).
8 In *Murdock v. Pennsylvania*, the Supreme Court considered a payment for a license to solicit or
9 deliver orders for goods, as applied to the evangelizing activity of Jehovah’s Witnesses. 319 U.S.
10 105, 106 (1943). The court thus examined the constitutionality of a requirement to, as it called it,
11 “pay a license *tax* as a condition to the pursuit of their activities” that were protected by the First
12 Amendment. *Murdock*, 319 U.S. at 110 (emphasis added).

13 Similarly, the Ordinance’s requirement that gun owners pay a Gun Harm Reduction Fee and
14 purchase insurance comprise taxes as a condition for the ownership of a gun, a constitutional right.
15 “This tax is not a charge for the enjoyment of a privilege or benefit *bestowed by the state*,” but rather
16 “[t]he privilege in question *exists apart from state authority*” because “[i]t is guaranteed [to] the
17 people by the federal constitution.” *Murdock*, 319 U.S. at 115 (emphasis added).

18 Under the California Constitution, too, the Gun Harm Reduction Fee and the Insurance
19 Mandate are deemed taxes. A “‘tax’ means any levy, charge, or exaction of any kind imposed by a
20 local government,” with the exception of seven kinds of charges not relevant here. Cal. Const. Art. X
21 III C §1 (e).

22 Courts have historically rejected taxing First Amendment rights and therefore Second
23 Amendment rights cannot be taxed. “A tax that burdens rights protected by the [Constitution] cannot
24 stand unless the burden is necessary to achieve an overriding government interest.” *Minneapolis Star*
25 *and Tribune Co. v. Minnesota Comm’r. of Rev.*, 460 U.S. 575, 582 (1983). Taxing the press’s
26 circulation of content “suggests that the goal of the regulation is not unrelated to the suppression of
27 expression.” *Id.* at 585. The same is true for the taxation of guns. It is a thinly veiled attempt at
28 suppressing the exercise of the right to keep and bear arms by making it more costly and

1 burdensome to own a gun—in addition to compelling the subsidization of anti-gun education
2 programs.

3 Courts evaluate Second Amendment challenges by using a two-step inquiry. First, a court
4 asks “whether the challenged law burdens conduct protected by the Second Amendment.” *Chovan*,
5 735 F.3d at 1136. This step evaluates “a textual and historical inquiry into original meaning.” *Ezell*
6 *v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (citing *Heller*, 554 U.S. at 634-35; *see also*
7 *Chovan*, 735 F.3d at 1137). This first step has a low bar. Even a prohibition on “domestic violence
8 misdemeanants” from possessing firearms satisfied the first step of the test. *Chovan*, 735 F.3d at
9 1137.

10 *a. The Ordinance Burdens the Right to Keep and Bear Arms*

11 Regulations on guns in the home fall squarely into the Second Amendment’s protections.
12 Indeed, it is at home “where the need for defense of self, family, and property is most acute.” *Heller*,
13 554 U.S. at 628. The Ordinance’s primary, if not sole, aim is at guns possessed within the home, as
14 evidenced by it only applying to citizens who cannot carry a weapon outside the home. Ordinance
15 §10.32.225.

16 Further, Mayor Liccardo’s January 21, 2022, Memo states that the insurance mandate will
17 encourage “use of gun safes [and] install child-safe trigger locks,” which address storage in the
18 home, and noted that “4.6 million children live in a *household* where a gun is kept and unlocked and
19 loaded, and 72% of gun injuries occur *at home*.” Pg. 3 (Ex. D) (emphasis added). Additionally, in
20 justifying the fee, the Memo states that “a properly stored firearm *in the home* doubles occupants’
21 risk of becoming a victim...[and] prioritizing those investments for residents living with guns *in the*
22 *home* will provide the most direct path for reducing gun harm.” *Id.* at 4. (emphasis added).

23 The Ordinance thus directly regulates firearms *in the home*, where the need is “most acute.”
24 Consequently, the Ordinance burdens protected Second Amendment rights.

25 *b. If Applying a Level of Scrutiny, the Court Should Apply Strict Scrutiny*

26 The second step of the traditional test is for the court to “apply an appropriate level of
27 scrutiny.” *Id.* “Given *Heller*’s focus on ‘core’ Second Amendment conduct and the Court’s frequent
28 references to First Amendment doctrine, we agree with those who advocate looking to the First

1 Amendment as a guide in developing a standard of review for the Second Amendment.” *United*
2 *States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). Thus, like the First Amendment, some burdens
3 receive strict scrutiny, such as content based speech restrictions, while others receive intermediate
4 scrutiny, such as time, place and manner restrictions. *Id.* The level of scrutiny “should depend on (1)
5 ‘how close the law comes to the core of the Second Amendment right, and (2) ‘the severity of the
6 law’s burden on the right.’” *Chovan*, 735 F.3d at 1138 (quoting *Ezell*, 651 F.3d 703).

7 Strict scrutiny should apply because this law strikes at the very core of the Second
8 Amendment. It specifically targets guns in the home, “where the need for defense of self, family, and
9 property is most acute,” *Heller*, 554 U.S. at 628, and threatens the impoundment of guns—the
10 complete denial of Second Amendment rights—for noncompliance with its arbitrary insurance and
11 annual fee requirements.

12 The Ordinance will severely burden a gun owner’s ability to exercise his right to own a gun
13 for home or self-defense by imposing uncertain costs just to exercise a constitutional right. Even if
14 the fees are initially a low sum, the Ordinance does not cap or otherwise provide a limiting principle
15 for the total amount the Council may impose as a cost for owning a gun, and the cost of insurance
16 will be at the mercy of private insurers. This unbridled discretion that the City Council has given
17 itself, along with the discretion left to a private, for-profit, industry, can, and likely will, severely
18 burden or chill the residents of San Jose’s Second Amendment rights. It also gives the City the
19 ability to strategically play possum in this litigation, proffering the Ordinance imposes a lower
20 financial burden and citing economic hardship exceptions, despite the Ordinance not limiting the
21 costs they can impose tomorrow.

22 For example, if the essential purpose and mechanism of the Ordinance are ratified by the
23 Court, regardless of the amount of the City’s fees and the cost of the mandatory insurance and the
24 actual direct costs to the city, there would be nothing to prevent the City from attempting to shift the
25 full brunt of its bogus claim of \$442 million in societal costs in San Jose onto the estimated 55,000
26 gun owners, for a per-owner charge of \$8,036.36 per person—in addition to whatever insurance
27 companies may charge, if they cover the liabilities the City mandates they cover.

28 //

1 Accordingly, strict scrutiny is the appropriate level of scrutiny if the Court applies any level
2 of scrutiny.

3 *c. The Ordinance Even Fails Intermediate Scrutiny*

4 This Ordinance does not satisfy the lower standard of an intermediate scrutiny analysis, let
5 alone the strict scrutiny standard. Intermediate scrutiny requires “1) the government’s stated
6 objective to be significant, substantial, or important; and 2) a reasonable fit between the challenged
7 regulation and the asserted objective.” *Chovan*, 735 F.3d at 1139.

8 While neither the Supreme Court nor the Ninth Circuit have found reducing gun violence to
9 be a compelling government interest, the Ninth Circuit has stated that it is important. *Chovan*, 735
10 F.3d at 1139. Nevertheless, the Ordinance’s provisions are not a reasonable fit, much less narrowly
11 tailored, to its claimed purposes. The City makes no findings, other than conclusory self-serving
12 statements, that special gun accident insurance or compulsory donations to anti-gun nonprofits will
13 reduce gun violence or other injuries, particularly gun violence by those who lawfully possess
14 firearms to be kept in the home, much less the root cause of most costs cited in the Ordinance:
15 criminals who use guns to commit intentional acts of violence. *See generally* Ordinance § 10.32.200.

16 That the Ordinance does not in fact limit how the chosen nonprofit would spend the City’s
17 Gun Harm Reduction Fee, and specifically forbids the City from directing the spending of its own
18 fee, renders speculative any argument that payment of the fee furthers the Ordinance’s aims. And, so
19 far, there is no requirement that any particular gun owner (or their household members and close
20 personal associates) subject to the Ordinance must actually receive the services for which the City’s
21 fee is paying the nonprofit to provide.

22 Additionally, the Ordinance embodies a second government purpose of shifting the claimed
23 collective costs of gun injuries caused by some onto nearly all gun owners. *See* Ordinance
24 § 10.32.200.B.8, 9. The extrajudicial exaction of payments from a whole class of persons (those
25 exercising their Second Amendment rights) to pay City or societal costs arising from the actions of a
26 few individuals (violent criminals, including perpetrators of domestic gun violence, and careless gun
27 owners) smacks of collective punishment. It is neither a reasonable fit with a significant, substantial,
28

1 or important government interest, nor narrowly tailored to a compelling interest—indeed it is an
2 illegitimate government practice.

3 Further, the city’s costs related to police, fire, judicial expenses form a substantial part of the
4 City’s costs—but none of the Ordinance’s measures will compensate the city for these claimed
5 municipal losses. They are also *normal* government costs, shared by all, that have historically been
6 financed through general tax revenue, not taxes imposed selectively on particular citizens or
7 communities.

8 The other private costs related to loss of work and quality of life are purely manufactured and
9 arbitrary abstract concepts that will only be impacted by the Ordinance in equally arbitrary, abstract,
10 speculative, and attenuated ways. The City’s own hired research firm concluded that \$253,828,000
11 of the \$411,699,000 in total costs it calculated came from “Homicide/Assault/Legal Intervention”
12 alone. Liccardo Jan. 19 Memo 5 (Ex. I). Thus, roughly 57% of the costs incurred by the City, by its
13 own calculation, comes from crime alone, which neither insurance nor the fee will ever reimburse.
14 Indeed, the City’s research states that its “primary costs” are for “fire department and police
15 response.” The Gun Harm Reduction Fee going to the nonprofit is supposed to be for educational
16 programs, not to compensate San Jose for its losses and there is no indication in the Ordinance that
17 the City expects to claim any funds from the gun owners’ insurance policies.

18 Finally, the government cannot impose fees on guns for purposes other than administrative
19 costs. The government “may not impose a charge for the enjoyment of a right granted by the federal
20 constitution.” *Murdock*, 319 U.S. at 113. It may collect a fee to “meet the expense incident to the
21 administration of the act and to the maintenance of public order in the matter licensed.” *Cox v. New*
22 *Hampshire*, 312 U.S. 569 (1941). “[I]mposing fees on the exercise of constitutional rights is
23 permissible when the fees are designed to defray (and do not exceed) the administrative costs of
24 regulating the protected activity.” *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2nd Cir. 2013). The
25 Ninth Circuit has adopted this *Murdock/Cox* fee-jurisprudence for the Second Amendment. *Bauer v.*
26 *Becerra*, 858 F.3d 1216 (9th Cir. 2017). Here, the Gun Harm Reduction Fee goes directly to a
27 nonprofit for the purposes of reeducating gun owners. Ordinance §§ 10.32.215, 10.32.220. The
28

1 administrative costs of the Ordinance, if any, are actually covered by an entirely separate fee
2 authorized by the Ordinance. *Id.* at § 10.32.250.

3 *d. Alternatively, the Ordinance is Unconstitutional Because It Burdens the Second Amendment*
4 *Right to Keep and Bear Arms*

5 The majority opinion in *Heller* noted that “We know of no other enumerated constitutional
6 right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.” 554
7 U.S. at 634. This was in response to Justice Breyer’s dissent, which claimed that a law restricting
8 guns was constitutional after weighing its burden on Second Amendment rights against handgun
9 violence, urban geography, and history. *Id.* But the majority stated that “The very enumeration of the
10 right takes out of the hands of government—even the Third Branch of Government—the power to
11 decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Id.* Indeed, as
12 Justice Kavanagh noted, while on the D.C. Circuit, “The Court’s failure to employ strict or
13 intermediate scrutiny appears to have been quite intentional and well-considered.” *Heller v. District*
14 *of Columbia*, 670 F.3d 1244, 1273 (D.C. Cir. 2011)(Kavanagh, B., dissenting) (quoting Tr. Of Oral
15 Arg. at 44, *Heller*, 554 U.S. 570 (No. 07-290)) (“[T]hese various phrases under the different
16 standards that are proposed, ‘compelling interest,’ ‘significant interest,’ ‘narrowly tailored,’ none of
17 them appear in the Constitution...these standards that apply in the First Amendment just kind of
18 developed over the years as sort of baggage that the First Amendment picked up.”). Thus, a
19 balancing tests that weighs a government interest against a constitutional right under a strict scrutiny
20 or intermediate scrutiny analysis is inappropriate under *Heller*.

21 The Ordinance is therefore unconstitutional based on the mere fact that its insurance
22 requirement and fees burden Plaintiffs’ ability to exercise their Second Amendment rights.

23 **2. The Ordinance Violates Plaintiffs’ Free Speech and Association Rights.**

24 To continue to exercise their Second Amendment rights, the Ordinance unconstitutionally
25 forces gun owners to associate with and subsidize the speech of others with whom they may
26 disagree.

27 “[M]andatory associations are permissible only when they serve a compelling state interest
28 that cannot be achieved through means significantly less restrictive of associational freedoms.” *Knox*

1 v. *SEIU*, 567 U.S. 298, 310 (2012). “Compelling a person to subsidize the speech of other private
 2 speakers raises similar First Amendment concerns.” *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448,
 3 2464 (2018)(citing *Knox*, 567 U.S. at 309). “As Jefferson famously put it, ‘to compel a man to
 4 furnish contributions of money for the propagation of opinions which he disbelieves and abor[s] is
 5 sinful and tyrannical.” *Id.* (quoting A Bill for Establishing Religious Freedom, in 2 papers of
 6 Thomas Jefferson 545 (J. Boyd ed. 1950)). “Because the compelled subsidization of private speech
 7 seriously impinges on First Amendment rights, it cannot be casually allowed.” *Id.* Thus, in *Janus*,
 8 the Supreme Court concluded that a law that requires government agencies to extract “agency fees”
 9 from “nonconsenting employees,” violates the First Amendment. *Id.* at 2486.

10 The operation of the Ordinance is strikingly similar to the imposition of mandatory union
 11 “agency fees” on public sector employees, addressed by the Supreme Court in *Janus*. In *Janus*, an
 12 employee, whether or not he/she wanted to associate with the union, was required to pay an “agency
 13 fee” to the union. *Janus*, 138 S.Ct. at 2460. Here, whether a gun owner wants to associate with or
 14 donate to the nonprofit or not, he/she must pay the Gun Harm Reduction Fee directly to the City’s
 15 chosen nonprofit. Ordinance § 10.32.215. In *Janus*, no form of employee consent was required by
 16 the state’s statute. *Janus*, 138 S.Ct. at 2486. Likewise, the Ordinance does not have any consent
 17 provision. *See generally* Ordinance. Such a procedure “violates the First Amendment.” *Janus*, 138
 18 S.Ct. at 2486.

19 In another illustrative case, the Supreme Court held that the California Bar could use
 20 members’ dues to “fund activities germane” to the “State’s interest in regulating the legal
 21 profession” but it could not use members’ dues to “fund activities of an ideological nature which
 22 falls outside of those areas of activity.” *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). So
 23 likewise, the City of San Jose cannot force gun owners to pay fees to a nonprofit for whatever
 24 purposes they desire, particularly to discourage exercising the right to keep and bear arms.
 25 It is a well-established principle that:

26 [T]he right of freedom of thought protected by the First Amendment against state
 27 action includes both the right to speak freely and the right to refrain from speaking at
 28 all. A system which secures the right to proselytize religious, political, and
 ideological causes must also guarantee the concomitant right to decline to foster such

1 concepts. The right to speak and the right to refrain from speaking are complementary
2 components of the broader concept of individual freedom of mind.

3 *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citations and internal quotations
4 omitted).

5 In recent comments, Mayor Liccardo has likened the compulsory payment of the Gun Harm
6 Reduction Fee to forced membership in a club. After describing the nonprofit’s activities the gun
7 owner’s payment of the annual fee to the nonprofit would fund, a reporter asked the mayor if “it’s
8 almost like joining a club,” to which the Mayor responded:

9 Yeah, and look, I don’t pretend to believe these are overwhelmingly folks who are
10 willing to want to do this. I recognize that this is by government fiat, and many would
11 prefer not to pay the fee.

12 Mary Harris, *San Jose’s New Gun Law Is the First of Its Kind*, Slate.com, [https://slate.com/news-
13 and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html](https://slate.com/news-and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html).

14 Here, the forced association and subsidization of speech is more severe even than in *Janus*.
15 In *Janus*, the employees’ union fees were a condition of employment. While conditioning
16 employment on forgoing constitutional rights is significant, here, the Ordinance conditions a
17 constitutional right on forgoing other constitutional rights.

18 Indeed, “government may not deny a benefit to a person because he exercises a constitutional
19 right.” *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983). Here, the
20 Ordinance denies citizens a benefit (freedom of speech and association) by forcing them to associate
21 with and subsidize a nonprofit that will communicate messages which gun owners will not agree
22 with solely because the citizens exercise their constitutional right to own a gun. The Gun Harm
23 Reduction Fee therefore violates the First Amendment.

24 As stated above, in *Heller*, Justice Roberts noted that interest-balancing tests for the First
25 Amendment are “baggage.” Tr. of Oral Arg. At 44, *Heller*, 554 U.S. 570 (No. 07-290). Currently,
26 the Supreme Court has not assigned a test for compelled subsidization of speech. *See Janus*, 138
27 S.Ct. at 2465 (“[W]e again find it unnecessary to decide the issue of strict scrutiny because the
28 Illinois scheme cannot survive under even the more permissive standard....”). The Court did say,

1 however, that “minimal scrutiny is foreign to our free-speech jurisprudence.” *Id.* As Justices Scalia
 2 and Roberts have noted in *Heller*, the Constitution does not prescribe a balancing test, so there
 3 should not be one. However, if such a test is administered, for the reasons stated above, this
 4 Ordinance cannot pass even intermediate scrutiny; therefore, the Ordinance should be enjoined for
 5 violating the First Amendment.

6 **3. The Ordinance Violates article XI, § 7 of the California Constitution.**

7 Article XI, section 7 of the California Constitution states that “A county or city may make
 8 and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in
 9 conflict with general laws.” This provision prohibits a local law that “duplicates, contradicts, or
 10 *enters an area fully occupied by general law*, either expressly or by legislative implication.” *Fiscal*
 11 *v. City and County of San Francisco* 158 Cal.App.4th 895, 903 (Cal. Ct. App. 2008)(quotation
 12 omitted)(emphasis added).

13 The State of California has voluminous statutes comprehensively regulating firearm
 14 ownership in California. *See generally* Cal. Penal Code §§ 23500-34370. This includes firearm
 15 safety, CAL. PENAL CODE §§ 23500-23520, the appearance of firearms, *id.*, §§ 23800-24790, storage
 16 of firearms, *id.*, §§ 25000-25225, how to handle lost or stolen firearms, *id.*, §§ 25250-25225,
 17 carrying firearms, *id.*, §§ 25300-26406, the sale, lease, or transfer of firearms, *id.*, §§ 26500-28490,
 18 the registration and assignment of firearms, *id.*, §§ 28010-28024, how to transfer firearms between
 19 private persons, *id.*, §§ 28050-28070, recordkeeping, background checks, and fees related to transfer,
 20 *id.*, §§ 28100-28490, the manufacture of firearms, *id.*, §§ 29010-29184, who may not possess a
 21 firearm, *id.*, §§ 29610-30165, rules pertaining to “firearm equipment,” *id.*, §§ 30150-30165, and, in
 22 some cases, firearm registration, *id.*, §§ 30900-30965. This is but a sample of all of the separate
 23 statutes regulating firearms in California.

24 California courts have already determined that “the Legislature intended to occupy the field
 25 of residential handgun possession to the exclusion of local government entities.” *Fiscal*, 158
 26 Cal.App.4th at 909 (citing Cal. Penal Code § 12026).¹ Thus, the Ordinance, insofar as it intends to
 27

28 ¹ The specific mandates in the state laws cited in *Fiscal* have since been transferred into other statutes with no substantive change.

1 impose gun storage and safety requirements, plainly encroaches upon a field already occupied by
2 state law, and thus violates Article XI, section 7.

3 **4. The Ordinance Violates Article XIII C, Section 1 of the California Constitution.**

4 The California Constitution requires that “No local government may impose, extend, or
5 increase any *general tax* unless and until that tax is submitted to the electorate and approved by a
6 majority vote.” Article XIII C, §2(b) (emphasis added). It also requires that “No local government
7 may impose, extend, or increase any *special tax* unless and until that tax is submitted to the
8 electorate and approved by a two-thirds vote.” Article XIII C, §2(d) (emphasis added). A “tax” is
9 “any levy, charge, or exaction of any kind imposed by a local government,” with exceptions that do
10 not apply here. Article XIII C, §1(e). The Gun Harm Reduction Fee and the insurance requirement
11 (backed by the threat of a fine payable to the City) are levies, charges or exactions imposed by the
12 City of San Jose and thus each constitutes a “tax” within the meaning of the California Constitution.
13 *Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564-566 (2012) (a law describing a payment
14 as a “penalty” for not complying with an insurance requirement does not determine whether the
15 payment is a tax for constitutional purposes).

16 If the City disputes that the Gun Harm Reduction Fee or insurance requirement is a tax, “the
17 [City] bears the burden of proving by a preponderance of the evidence that a levy, charge, or other
18 exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the
19 governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or
20 reasonable relationship to the payor’s burdens on, or benefits received from, the governmental
21 activity.” Article XIII C, §1.

22 The City cannot meet this burden. The amount of the Gun Harm Reduction Fee and the
23 required insurance payments (including penalties for noncompliance) are “more than necessary to
24 cover the reasonable costs of the governmental activity” because neither is for government activity.
25 Additionally, as to both the Gun Harm Reduction Fee and the mandatory insurance, “the manner in
26 which those costs are allocated to” gun owners do not “bear a fair or reasonable relationship to the
27 payor’s burdens on, or benefits received from” the City’s “governmental activity.” Article XIII C,
28 §1. Every gun owner would be compelled by the Ordinance to pay an arbitrary amount for the Gun

1 Harm Reduction Fee and pay the city a fine if they do not have an insurance policy specifically
 2 covering them for owning a gun. The Ordinance does not establish, or claim, that each gun owner
 3 will receive a benefit in return for the fee paid having a value commensurate with the amount they
 4 paid. For the same reasons stated in the Second Amendment analysis regarding reasonable fit,
 5 neither the insurance requirement nor the Gun Harm Reduction Fee bear a fair or reasonable
 6 relationship to the payor's burdens on, or benefits received from, a governmental activity.

7 The Ordinance's required payments, whether general or special taxes, were never voted
 8 upon by the citizens of San Jose. Compl. First Am. Compl. ¶ 72. Accordingly, they violate the
 9 California Constitution.

10 **5. The Ordinance Violates the San Jose's City Charter's Reservation of Budget**
 11 **and Appropriation Powers to the City Council and Administrative Powers to**
 12 **the City Manager.**

13 The Ordinance violates the San Jose City Charter by commanding gun owners to directly pay
 14 the City's Gun Harm Reduction Fee to one nonprofit to be used for program activity that was not
 15 directed by the City Council or managed by the City Manager.

16 The San Jose City Charter vests in the City Council "[a]ll powers of the City and the
 17 determination of all matters of policy." San Jose City Charter § 400. With regard to the expenditure
 18 of City funds, only the City Council has the power to establish a budget. *Id.* §§ 1204, 1206. The
 19 Council also has the sole power to appropriate the expenditure of City funds. *Id.*, § 1207. The City
 20 Manager, by contrast, is the "Chief Administrative Officer and head of the administrative branch of
 21 the City government." *Id.*, § 502; *see also id.*, § 701.

22 The Ordinance, by prohibiting the City Council from using its budgeting and appropriating
 23 powers to direct how the receipts from the City's Gun Harm Reduction fee are expended by the
 24 chosen nonprofit, Ordinance § 10.32.220.C, violates the San Jose City Charter's reservation of
 25 budgeting and appropriation power to the City Council. The Ordinance also violates the City
 26 Charter's delegation of executive functions to the "administrative" branch of the City Government
 27 under the leadership and control of the City Manager because the Ordinance says "the City shall not
 28 specifically direct how the monies from the Gun Harm Reduction Fee are expended" other than a

1 vague direction to “reduce the risk” of harm from using firearms and “mitigate the risk” of harm or
2 liability from possessing firearms. *Id.*

3
4 **6. The Ordinance Violates the San Jose City Charter’s Requirement that City
Receipts Be Deposited into City Accounts.**

5 The San Jose City Charter states that “[a]ll revenues and receipts which are not required by
6 [the] Charter, State law or ordinances to be placed in special funds shall be credited to the [City’s]
7 General Fund.” *Id.*, § 1211. The General Fund is “a medium of control and accounting for all City
8 activities excepting activities for which special funds are established and maintained.” *Id.*

9 The Ordinance requires gun owners to pay the City-required, City-determined fee directly to
10 a nonprofit organization, *id.*, § 10.32.215, thereby diverting a City fee to a nonprofit rather than the
11 City’s General Fund or a special fund. This violates the City Charter’s requirement that all City
12 revenues and receipts be deposited into City accounts. The loss of this essential means of City
13 “control and accounting,” in combination with the Ordinance’s prohibition against City control of
14 the nonprofit’s use of the funds and the vague statements about what the nonprofits should use the
15 funds for, is an open invitation to corruption, waste, fraud, and abuse.

16 **B. Plaintiffs Face Imminent Irreparable Harm Absent Immediate Injunctive Relief.**

17 For a statute that violates the Second Amendment, the “remedy is necessarily directed at the
18 statute itself and *must* be injunctive and declaratory.” *Ezell*, 651 F.3d at 698. (emphasis in original).
19 A city ordinance that violates the Second Amendment “stands as a fixed harm to every [citizen’s]
20 Second Amendment right.” *Id.* “Irreparable harm is presumed” and cannot be remedied by damages.
21 *Id.* at 699.

22 Additionally, “where the First Amendment is implicated, the Supreme Court has made clear
23 that ‘[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably
24 constitutes irreparable injury’ for purposes of the issuance of a preliminary injunction.” *College*
25 *Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1011 (N.D. Cal. 2007)
26 (citing *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002), in turn citing *Elrod*
27 *v. Burns*, 427 U.S. 347, 373 (1976)); see also *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1148
28 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated probable success on

1 the merits of its First Amendment overbreadth claim had thereby also demonstrated irreparable
2 harm). “In other words, the requirement that a party who is seeking a preliminary injunction show
3 ‘irreparable injury’ is deemed fully satisfied if the party shows that, without the injunction, First
4 Amendment freedoms would be lost, even for a short period.” *Reed*, 523 F. Supp. 2d at 1011.
5 “Unlike a monetary injury, violations of the First Amendment ‘cannot be adequately remedied
6 through damages.’” *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1058
7 (C.D. Cal. 2016) (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)).

8 Without an injunction preventing Defendants from enforcing the Ordinance, Plaintiffs will
9 suffer irreparable harm in the form of deprivation of fundamental freedoms secured by the First,
10 Second and Fourteenth Amendment to the U.S. Constitution and the California Constitution.
11 Plaintiffs’ irreparable injuries cannot adequately be compensated by damages or any other remedy
12 available at law. Thus, irreparable injury is clearly shown, necessitating the relief Plaintiffs seek in
13 this Motion.

14 **C. The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor.**

15 “[S]erious First Amendment questions compel[] a finding that there exists the potential for
16 irreparable injury, or that at the very least the balance of hardships tips sharply in [the plaintiffs’]
17 favor.” *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (quoting
18 *Sammartano*, 303 F.3d at 973). Similarly, when there is a threat of sanctions for failure to act on a
19 law that restricts Second Amendment rights, even if the government endures hardship, the balance
20 favors the plaintiffs. *See Duncan v. Becerra*, 265 F.Supp.3d 1106, 1136 (S.D. Cal. 2017).

21 Here, if the Ordinance goes into effect and is enforced, tens of thousands of San Jose citizens
22 will risk seizure of their guns and the payment of fines if they do not forgo their fundamental rights
23 to keep arms and to free speech and association, as well as rights under the California constitution to
24 vote on tax increases, and rights under the City Charter to have City fees deposited into City
25 accounts. The balance of hardships sharply tips in favor of Plaintiffs.

26 **D. Injunctive Relief Is in The Public Interest**

27 “As the Ninth Circuit has consistently recognized, there is a significant public interest in
28 upholding First Amendment principles.” *Americans for Prosperity Foundation*, 182 F. Supp. 3d at

1 1059 (internal citations omitted); *see also Doe v. Harris*, 772 F.3d 563, 683 (9th Cir.2014);
 2 *Sammartano*, 303 F.3d at 974. Similarly, “the public interest favors the exercise of Second
 3 Amendment rights by law-abiding responsible citizens.” *Duncan*, 265 F.Supp.3d 1106.

4 As discussed above, Plaintiffs’ core constitutional rights to own guns to defend one’s home
 5 and self will remain in jeopardy so long as Defendants remain free to enforce their Ordinance.
 6 Likewise, Plaintiffs’ right to free speech and association will be jeopardized by forcing them to
 7 subsidize and associate with a nonprofit. Holding the City Council to account for the constraints on
 8 its power in the California constitution and the City Charter are also in the public interest.
 9 Accordingly, issuance of injunctive relief is proper, and the Court should grant this Motion.

10 **II. THE COURT SHOULD DISPENSE WITH ANY BOND REQUIREMENT**

11 Rule 65(c) of the Federal Rules of Civil Procedure provides that a preliminary injunction
 12 may be issued “only if the movant gives security in an amount that the court considers proper to pay
 13 the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”
 14 Fed. R. Civ. P. 65(c). However, the Court has discretion as to whether any security is required and, if
 15 so, the amount thereof. *See, e.g., Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003).

16 Plaintiffs request that the Court waive any bond requirement, because enjoining Defendants
 17 from unconstitutionally enforcing the Ordinance will not financially affect Defendants, who do not
 18 have a financial stake in enforcing the Ordinance. A bond would, however, be burdensome on
 19 already burdened Plaintiffs under these circumstances. *See, e.g., Bible Club v. Placentia-Yorba*
 20 *Linda School Dist.*, 573 F. Supp. 2d 1291, fn. 6 (C.D. Cal. 2008) (waiving requirement of student
 21 group to post a bond where case involved “the probable violation of [the club’s] First Amendment
 22 rights” and minimal damages to the District of issuing injunction)(*citing Doctor John’s, Inc. v. Sioux*
 23 *City*, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa 2004) (“requiring a bond to issue before enjoining
 24 potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because
 25 the rights potentially impinged by the governmental entity’s actions are of such gravity that
 26 protection of those rights should not be contingent upon an ability to pay.”)).

27 //

28 //

CONCLUSION

1
2 Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for a preliminary
3 injunction to restrain and enjoin Defendants, as well as their agents, employees, and successors in
4 office, from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring
5 compliance with any provision of the Ordinance.
6

7 Respectfully submitted,

8 Date: March 8, 2022

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CERTIFICATE OF SERVICE

I, Harmeet K. Dhillon, hereby certify that on March 8, 2022, I electronically filed the above document with the Clerk of the Court using CM/ECF, which will send electronic notification of such filing to all registered counsel.

Dated: March 8, 2022

By: /s/Harmeet K. Dhillon
Harmeet K. Dhillon