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15 **UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN JOSE DIVISION**

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

21 Plaintiffs,

22 v.

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

27 Defendants.
28

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

**PLAINTIFFS' REPLY TO
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

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

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1 **STATEMENT OF THE ISSUES TO BE DECIDED**

2 Whether the City of San Jose’s ordinance conditioning the constitutional right of gun
3 ownership on (1) paying an annual City “fee” directly to a nonprofit (i.e., a donation) to fund
4 private speech and activities related to gun use, and (2) purchasing an insurance policy, violates the
5 First and Second Amendments to the U.S. Constitution, the California Constitution, and/or the San
6 Jose City Charter.

7 **INTRODUCTION**

8 The City of San Jose may not have its cake and eat it too. Out of one side of its mouth, the
9 City boasted to national media about its ingenuity in enacting its Ordinance, yet before the Court
10 claimed the Ordinance had yet to be enacted. The City declares that the Ordinance is a first-of-its-
11 kind innovation, while simultaneously asserting it is a run of the mill policy sanctioned by
12 indistinguishable precedent. Even as to what exactly the Ordinance compels, the City speaks with a
13 forked tongue—the City claims it creates a City “fee,” but all “fee” revenues go to an independent
14 nonprofit, and therefore the City is prohibited from directing how the nonprofit will spend the
15 “fees,” but yet the City Manager maintains control over the nonprofit. Cutting through the City’s
16 argument whiplash, either the City (a) has no idea what its Ordinance does, or (b) knows exactly
17 what it does, but cannot admit it to this Court because it is blatantly unconstitutional. As Plaintiff
18 has shown, the answer is the latter.

19 The Ordinance is ripe for judicial review because every salient fact needed for a dispositive
20 analysis under federal, state, and city law is known. The City’s misnomer shell game cannot hide
21 that the Ordinance creates a local gun permitting requirement preempted by state law, imposes fees
22 that violate the Second Amendment, compels a donation to a nonprofit advocacy organization in
23 violation of the First Amendment, mandates either an unlawful tax not approved by voters or an
24 unlawful fee which does not pay for city services, and diverts City fees outside of City accounts
25 contrary to safeguards in the City Charter.

26 The Ordinance violates basic rules of government that were designed to protect Americans,
27 Californians, and the City’s citizens from government overreach and abuse of their rights. If Second
28 Amendment rights can be burdened by a municipality compelling donations to fund nonprofit

1 speech, any core right could be subject to such a burden. By the City’s logic, there would be
 2 nothing preventing a city from charging a voting “fee” to be paid to a local nonprofit educating
 3 voters on government’s preferred methods of civic participation. Putting aside the issue of gun
 4 rights/control, the operation of the Ordinance violates essential controls on government power that
 5 protect everyone.

6 Accordingly, Plaintiffs respectfully request this Court declare that the Ordinance is unlawful
 7 for the reasons stated in their Motion for Preliminary Injunction and enjoin its implementation.

8 **FACTUAL BACKGROUND**

9 As summarized in the Plaintiffs’ Motion for Preliminary Injunction, the City’s Ordinance
 10 conditions lawful gun ownership on a forced payment to an unknown nonprofit organization,
 11 coupled with the purchase of gun liability insurance. The City claims gun ownership imposes costs
 12 on the city, as well as society at large, but Ordinance “fees” do not compensate the City, or
 13 correspond to any individual determination of a gun owner’s alleged burden on society or their pro-
 14 rata share of the aggregate alleged burden of all gun owners.

15 The nonprofit the City will designate to receive gun owners’ mandatory donations will not
 16 represent gun owners as they will have neither membership rights nor an option to refuse to fund
 17 the nonprofit’s speech. These financial exactions are either unlawful taxes not garnering the
 18 required approval from voters, or unlawful city fees which do not correspond to City administrative
 19 costs. Further, the payments the Ordinance describe as a City “fee” are not paid to the city, but
 20 rather directly to a nonprofit, preventing City oversight and control as required by the City’s
 21 Charter.

22 **ARGUMENT**

23 **I. This Matter is Ripe for Review.**

24 The Constitution does not require citizens to allow government to violate their rights, and
 25 suffer consequential injuries, before they can sue. As the Court knows, temporary restraining
 26 orders, preliminary injunctions, and declaratory judgments are a routine mechanism by which
 27 citizens appeal to the judicial branch to *prevent* government from violating rights before the
 28 violations occur. “When the plaintiff has alleged an intention to engage in a course of conduct

1 arguably affected with a constitutional interest, but proscribed by a statute, and there exists a
 2 credible threat of prosecution thereunder, he should not be required to await and
 3 undergo...prosecution as a sole means of seeking relief.” *Babbitt v. United Farm Workers Nat’l*
 4 *Union*, 442 U.S. 289, 298 (1979).

5 In the First Amendment context, for example, a plaintiff may make a pre-enforcement claim
 6 when there is “an actual and well-founded fear that the challenged statute will be enforced.”
 7 *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013). For the Second
 8 Amendment, a “credible threat of prosecution test” is used. *See e.g. Colorado Outfitters Ass’n v.*
 9 *Hickenlooper*, 823 F.3d 537, 550-51 (10th Cir. 2016). Plaintiffs are “not required to violate [a gun
 10 law] and subject [themselves] to prosecution to establish an injury-in-fact.” *Nichols v. Brown*, 859
 11 F.Supp.2d 1118, 1128 (C.D. Cal. 2012) (citing *Babbitt*, 442 U.S. at 298; *Thomas v. Anchorage*
 12 *Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000)).

13 Defendants argue that the undetermined fee amount, and the yet-to-be-identified non-profit,
 14 make the matter not “clean-cut and concrete” for this Court’s review. Opp. at 5 (quotation omitted).
 15 There is no doubt that the Plaintiffs or their members will be subject to the ordinance, FAC ¶13-14,
 16 and there is nothing to suggest that the City will refrain from enforcing the Ordinance. It is certain
 17 that, when the ordinance takes effect on August 7: (1) the Ordinance will condition lawful gun
 18 ownership on the making of a financial donation to a nonprofit that the Ordinance characterizes as a
 19 city “fee”; (2) none of that fee will pay for costs imposed on the City by gun owners, but is
 20 exclusively to fund the non-profit’s programs; (3) the City will have no control over use of the fee;
 21 (4) the Ordinance will condition lawful gun ownership on the purchase of insurance that will not
 22 compensate the City for any costs it incurs arising from gun use; and (5) the Ordinance was not
 23 approved by the voters. San Jose, Cal. Code of Ordinance §§ 10.32.210; 10.32.215, 10.32.250,
 24 Section 2; Opp. at 2. Regardless of the amount of the fee, and regardless of the identity of the
 25 nonprofit, Plaintiff’s claims will not change.

26 The City also contends a facial challenge is impossible because it speculates that (after it is
 27 implemented and violating citizens’ rights) there may be unspecified circumstances where the

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1 Ordinance is *not* unconstitutional. Opp. at 5-6. There is only one circumstance the Ordinance, in
 2 application, would survive: if the City does not require gun owners to comply with the Ordinance.

3 **II. Plaintiffs Have Met Their Burden for a Preliminary Injunction.**

4 **1. Plaintiffs are likely to succeed on the merits.**

5 **A. The Ordinance is preempted by state law.**

6 Defendants acknowledge that field preemption applies “regardless of the provisions of their
 7 [city] charters, if it is the intent and purpose of such general [state] laws to occupy the field to the
 8 exclusion of municipal regulation.” Opp. at 17 (quoting *Bishop v. City of San Jose*, 1 Cal.3d 56, 60-
 9 61 (1969) (overruled by *Mendoza v. Fonseca McElroy Grinding Co., Inc.*, 11 Cal.5th 1118 (2021)).
 10 It tries to distract this court from controlling authority, citing a case about a roller-skating rink, that
 11 ordinances are to be upheld if they are reasonably related to the health, safety, comfort, and welfare
 12 of the public. Opp. at 17 (quoting *Sunset Amusement Co. v. Bd. of Police Comm’rs*, 7 Cal.3d 64, 72
 13 (1972)). That may be true, but the issue of residential handgun possession has already been
 14 determined to be preempted by state law. *Fiscal v. City and County of San Francisco*, 158
 15 Cal.App.4th 895, 903 (Ct. App. 2008).

16 *Fiscal*, dealing with a law practically banning handgun possession, acknowledged that state
 17 law already prevents public entities from “adopting impediments on legally qualified citizens to
 18 ‘purchase, own, possess, keep, or carry’ a concealable firearm in their homes or businesses.” 158
 19 Cal.App.4th at 906 (citing Cal. Penal Code § 12026). This same statutory text now exists as
 20 California Penal Code Section 25605. *Fiscal* read this language to mean that local entities are
 21 deprived of “*any* power to regulate handgun possession on private property” and the legislature
 22 “intended to occupy the field of residential handgun possession.” *Id.* at 908 (emphasis added).
 23 Section 12026 “was intended to occupy the *field of residential firearm possession.*” *Id.* (emphasis
 24 added). Accordingly, a permit requirement was “easily struck down,” previously. *Id.* at 907 (citing
 25 *Sippel v. Nelder*, 24 Cal.App.3d 173 (1972)). So too should this Ordinance be, as requiring gun
 26 owners to have proof of insurance and proof of paying two separate fees is akin to a permit or
 27 license. As noted below, Defendants’ reliance on prior cases approving permit and license fees in
 28 their Second Amendment analysis is, therefore, a curious choice.

1 It should be noted, *Fiscal* is not limited to licenses or permits. Twice the court stated that the
2 statute “intended to occupy the field of residential firearm possession,” and that the law “depriv[ed]
3 local entities any power to regulate handgun possession on private property.” *Id.* at 908.

4 Defendants’ primary authority, *Great Western Shows, Inc. v. County of Los Angeles*, 27
5 Cal.4th 853 (2002), was about the sale of guns on county property. *Opp.* at 17-18. This is not about
6 the City’s ability to regulate firearm sales on its own property. It is about the state’s ability to
7 regulate firearm possession in individuals’ residences. *See McDonald v. City of Chicago*, 561 U.S.
8 742, 750, (2010) (“[T]he Second Amendment protects the right to possess a handgun in the home
9 for the purpose of self-defense.”) *Fiscal*, rather than *Great Western Shows*, is analogous. Indeed,
10 each of the preemption cases cited by Defendant are distinguishable based on this same basic
11 premise. Defendants’ cited cases each deal with the sale or possession of firearms outside of the
12 home. *Opp.* at 19. Defendant cites no authority about regulating “residential firearm possession,”
13 which was the focus of *Fiscal*—and the Ordinance. *See Opp.* at 6 (“the Ordinance . . . imposes . . .
14 burdens on the constitutional right to obtain a keep a firearm in the home for self-defense. . .”); *id.* at 7
15 (Ordinance “requires residents who own guns to obtain liability insurance for accidental gun injuries
16 and to pay a reasonable fee to reduce well established harms that result from guns being lawfully kept
17 [in their homes]”).

18 Accordingly, as an attempted regulation of residential firearm possession, the Ordinance is
19 preempted by state law.

20 **B. The Ordinance burdens core Second Amendment rights.**

21 The Second Amendment confers “an individual right to keep and bear arms.” *Heller*, 554
22 U.S. at 595. This guarantee is “among those fundamental rights necessary to our system of ordered
23 liberty.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778(2010). Moreover, “the core of the
24 Second Amendment is ‘the right of law-abiding, responsible citizens to use arms in defense of
25 hearth and home.’” *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Dist.*
26 *Columbia v. Heller*, 554 U.S. 570, 635 (2008)). Strict scrutiny applies if a challenged law
27 implicates a core Second Amendment right. *Jackson v. City and County of San Francisco*, 746 F.3d
28 953 (9th Cir. 2014).

1 “[J]ust as in the First Amendment context, the level of scrutiny in the Second Amendment
2 context should depend on the nature of the conduct being regulated and the degree to which the
3 challenged law burdens the right.” *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)
4 (citation and quotation omitted). Here, the Ordinance strikes directly at what the Ninth Circuit held
5 is the “core of the Second Amendment,” that is, the right of law-abiding citizens to use guns to
6 defend themselves and their homes. It does so by conditioning the lawful possession of guns in the
7 home on the making of annual donations to fund the speech and activities of the City’s preferred
8 nonprofit and the mandatory purchase of private insurance, threatening to fine gun owners and
9 confiscate guns to compel compliance. Accordingly, strict scrutiny is appropriate because the
10 Ordinance regulates core Second Amendment rights. Further, as Justice Roberts stated previously,
11 repeated by Justice Kavanaugh, the Constitution does not prescribe an interests balancing test for
12 the Second Amendment. *Heller v. District of Columbia*, 670 F.3d 1244, 1273 (D.C. Cir. 2011)
13 (Kavanaugh, B., dissenting) (quoting Tr. Of Oral Arg. At 44, *District of Columbia v. Heller*, 554
14 U.S. 570 (No. 07-290)). These tests are mere “baggage” and should no longer be used. *Id.* The
15 Ordinance is therefore unconstitutional by virtue of it burdening Plaintiffs’ right to own guns.

16 Yet even under the lower intermediate scrutiny standard Defendants seek, the Ordinance
17 fails. Opp. at 7-9.

18 *i. There is no reasonable fit between the Ordinance and its stated objective.*

19 Under intermediate scrutiny, the City must establish that 1) the stated objective is
20 significant, substantial, or important, and 2) a reasonable fit between the challenged regulation and
21 the asserted objective.” *Chovan*, 735 F.3d at 1139. The Ninth Circuit acknowledges that reducing
22 gun violence is important, meaning here the test turns solely on whether there is a reasonable fit
23 between the Ordinance and its claimed objectives. *Id.*

24 Defendants, however, misconstrue the “reasonable fit” requirement, conflating it with, and
25 subsuming it within, the requirement that a law’s goals must be significant, substantial, or
26 important, and further contending that courts must defer to legislative judgments on fit. Opp. at 10.
27 The result is a vision of constitutional rights jurisprudence that would collapse intermediate scrutiny

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1 into a deferential one-prong test asking whether a legislature’s stated goal for a law impacting a
2 constitutional right is well-intentioned.

3 Yet even if Defendants’ reading of the reasonable fit requirement was correct, the City relies
4 on irrelevant information as the basis for the Ordinance’s reasonableness. The Ordinance cites
5 misleading statistics, “finding[.]” that “San Jose taxpayers annually spend approximately \$39.7
6 million, or approximately \$151 per firearm-owning household.” Ordinance, §10.32.200.B.8. But
7 they fail to acknowledge that \$34.1 million of that is due to crime, regardless of its connection to
8 firearms. Doc 25-3, Ex. I, p. 5. The Ordinance “find[s]” that San Jose residents incur an annual
9 financial burden of \$442 million per year....” Ordinance, §10.32.200.B.9. But it fails to mention
10 that, even using their figures, only \$35 million of that is a “direct” burden, the rest is entirely
11 speculative for “pain, suffering, and lost quality of life” which the Defendants’ study says is the
12 “largest share” of that figure. Doc 25-3, Ex. I, p. 4. Thus, the Defendants’ findings artificially
13 inflate the costs to justify making non-criminal citizens pay for speculative costs caused primarily
14 by criminals. (Defendants cite a handful of studies in their Opposition at pages 10-11 but neither
15 supporting Declaration states that these studies were relied upon in forming the Ordinance.)

16 Regarding insurance, Defendants’ only justification is that “requiring gun liability insurance
17 *might be effective* in reducing harm, since this has occurred over a long period of time in the context
18 of automobile liability insurance.” Opp. at 10-11 (emphasis added). But the *only* studies Defendant
19 cites are for automobile insurance. The activity of driving a car—routinely, daily, and with
20 significantly more public interaction than is usually found in the average home—is entirely
21 different than merely owning a gun and keeping it in one’s home. It is an apples to oranges
22 comparison, and a “guess” that cannot justify burdening a core constitutional right.

23 Between the bait-and-switch use of crime statistics for an ordinance that does not target
24 criminals, and the wild guess about the relevance of auto insurance, Defendants’ self-serving
25 statements about the Ordinance’s “fit” with its purpose cannot be given deference. The authorities
26 cited by Defendants also do not support the wholesale deference Defendants demand. In *Chovan*
27 the important government interest at issue was an interest in “preventing domestic gun violence”
28 and the law under examination prohibited “domestic violence misdemeanants” from possessing

1 guns. *United States v. Chovan*, 735 F.3d 1127, 1140 (9th Cir. 2013). The court in *Chovan*
2 meticulously examined the evidence the law fit its purpose, finding that the law was focused on
3 violent people not prohibited from possessing guns by other laws, that domestic violence
4 misdemeanants were likely to be repeat offenders, that they use guns, and that their gun use would
5 increase the likelihood their victims would die. *Id.* This evidence satisfied intermediate scrutiny.

6 The contrast with the Defendants' Ordinance is stark. The Ordinance is justified by two
7 main purposes: (a) deterring, preventing, and reducing injuries and damages caused by guns; and
8 (b) reducing social and financial costs caused by the use of guns. Opp. at 10. But the Ordinance's
9 Gun Harm Reduction Fee does *nothing* to target criminals who use guns, the primary source—by a
10 large margin—of the injuries and damages the Defendants use to justify the Ordinance. *See e.g.*
11 Doc 25-3, Ex. I, p. 5. Rather, the Ordinance compels *every* gun owner to make an annual donation
12 to the City's chosen nonprofit. Defendants also concede that the “primary costs’ of gun violence”
13 that they cited to support enactment of the Ordinance are in fact “associated with City response costs”
14 that the Ordinance does not seek to recover. *Id.*

15 The Defendants' response to this mismatch between the Ordinance's goals and its actual
16 operation is to fall back on the worthiness of its goals in general and that the City also made
17 findings that there were other costs “related to suicide and self-inflicted harm.” *Id.* But this misses
18 the point. A “reasonable fit” analysis does not measure whether the Defendants' stated goals were
19 worthy, but whether its attendant burdens address its stated goals. Here, they do not.

20 Defendants' citations to cases permitting reimbursement for administrative costs do not
21 help. (Opp. at 9) (citing *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (fees charged to
22 implement and enforce background checks) and *Kwong v. Bloomberg*, 723 F.3d 160, 167 (2nd Cir.
23 2013) (fee imposed to enforce and implement a licensing scheme)). There is no reimbursement
24 here, and Defendant cites to no authority approving making citizens shoulder society at large's
25 financial burden for the criminal conduct of others as a condition of exercising a core constitutional
26 right. (Indeed, if the Defendants are claiming the Ordinance is a licensing scheme, more legal
27 problems ensue, such as state preemption, discussed below.) Defendants do not, and cannot, cite

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1 any case validating a law forcing gun owners to donate directly to a private third-party organization
2 as a condition of exercising their Second Amendment right of home and self-defense.

3 *ii. This does not fit within the Ninth Circuit’s Cox/Murdock Fee*
4 *Jurisprudence*

5 The *Murdock/Cox* fee-jurisprudence, adopted by the Ninth Circuit, only permits fees to
6 defray administrative and enforcement costs. *Kwong v. Bloomsberg*, 723 F.3d 160, 165 (2nd Cir.
7 2013); *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017). Defendants simply misunderstand these
8 authorities. It wishes to place fees into a level of burden analysis, citing the fact that \$19 and \$340
9 fees were not found to be unduly burdensome. Opp. at 12. However, before the Court can get to a
10 burden analysis, there must be a showing that the fees “meet the expense incident to the
11 administration of the act.” *Bauer*, 858 F.3d at 1225 (quoting *Cox v. New Hampshire*, 312 U.S. 569,
12 577 (1941)). Unlike the fees in *Bauer* and *Kwong*, the Ordinance’s fee does not defray the City’s
13 administrative costs in any way as the money goes directly to the nonprofit. Ordinance §10.32.220.

14 **C. The First Amendment prevents the City from forcing gun owners to fund**
15 **a private nonprofit’s speech and activities.**

16 Defendant fundamentally misunderstands the significance and holding of *Janus v.*
17 *AFSCME, Council 31*, 138 S.Ct. 2448 (2018). *Janus* was not, as Defendants suggest, about “the
18 expenditure of money to advance political viewpoints” and “lobbying and litigation.” Opp.15.
19 Unions were already prevented from using mandated fair share fees to support political activity
20 prior to *Janus*, and in fact had been since 1977. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36
21 (1977) (holding that a union cannot constitutionally compel dues and use them to “spend funds for
22 the expression of political views, on behalf of political candidates, or toward the advancement of
23 other ideological causes....”); *Chicago Teacher’s Union, Local No. 1 v. Hudson*, 475 U.S. 292
24 (1986) (requiring fee payers be allowed to opt out of paying funds for political activity); *Knox v.*
25 *Service Employees Intern. Union, Local 1000*, 567 U.S. 298 (2012) (requiring the ability to opt out
26 of payment even for speech related to union contracts).

27 *Janus* prevented forced subsidization of unions, regardless of whether the speech for which
28 non-members were paying was political or not, finding it was unconstitutional to “force[.]” public

1 employees “to subsidize a union, even if they choose not to join and strongly object to the positions
 2 the union takes in collective bargaining and related activities.” *Janus*, 128 S.Ct. 2459-60. Any such
 3 payment to a private organization, the Court stated, requires consent to pay, and extracting fees
 4 without consent “violates the First Amendment and cannot continue.” *Id.* Here, a nonconsenting
 5 gun owner, such as Plaintiff Mark Sikes who objects by virtue of the filing of this lawsuit, has no
 6 option to waive the payment of this annual fee/donation subsidizing the City-chosen nonprofit. He
 7 is forced to support the speech of the nonprofit, in violation of the First Amendment.

8 Defendant complains of the limited number of authorities from a different context. Opp. at
 9 14. But, one would be hard pressed to find examples of government creating law that *requires* a
 10 citizen to subsidize a nonprofit entity. And, even if Ordinance had been passed in a pre-*Janus*
 11 regime, forced subsidization of a non-profit that presumes to advocate for proscribed actions
 12 addressing suicide, violence, mental health, firearms safety, and addiction is inherently political.

13 **D. The Ordinance is an unlawful tax.**

14 Defendants’ authority for the argument that the Gun Harm Reduction Fee is not a tax,
 15 *Schmeer v. County of Los Angeles*, 213 Cal.App.4th 1310 (Ct. App. 2013), runs against the plain
 16 language of the California Constitution and is otherwise clearly distinguishable from the instant
 17 case. First, a “tax,” which must be approved by the voters, “means any levy, charge, or exaction of
 18 any kind imposed by a local government....” Article XIII C.1(e). (A “‘General tax’ means any such
 19 tax imposed for general governmental purposes.” Article XIII C.1(a).)

20 A “levy” is “the imposition or collection of an ‘assessment’,” which is defined as “an
 21 amount that a person is officially required to pay.” *Assessment, Merriam-Webster Dictionary*
 22 (2022), <https://www.merriam-webster.com/dictionary/assessment>. A “charge” is simply “the price
 23 demanded for something.” *Charge, Merriam-Webster Dictionary* (2022), [https://www.merriam-](https://www.merriam-webster.com/dictionary/charge)
 24 [webster.com/dictionary/charge](https://www.merriam-webster.com/dictionary/charge). An “exaction” is defined as “something exacted,” to especially
 25 include “a fee, reward, or contribution demanded or levied with severity or injustice.” *Exaction,*
 26 *Merriam-Webster Dictionary* (2022), <https://www.merriam-webster.com/dictionary/exaction>.

27 First, there is no question that the Gun Harm Reduction fee is a levy, charge, or exaction,
 28 and that it will be imposed by the City of San Jose. The California Constitution does not limit its

1 definition of a tax based on whether a municipality deposits the tax revenue into a city account or if
 2 it diverts the tax payment directly to another person. It would be a curious interpretation of the
 3 California Constitution and a profound loophole to hold that a city could evade the constitutional
 4 requirement of voter approval for taxes by ordering payments directly to third parties.

5 Second, the Gun Harm Reduction Fee and the insurance requirement (backed by the threat
 6 of a fine payable to the City) are levies, charges or exactions imposed by the City of San Jose and
 7 thus each constitutes a “tax” within the meaning of the California Constitution. *Cf. Nat’l Fed’n of*
 8 *Indep. Bus. v. Sebelius*, 567 U.S. 519, 564-566 (2012) (a law describing a payment as a “penalty”
 9 for not complying with an insurance requirement does not determine whether the payment is a tax
 10 for constitutional purposes).

11 Third, *Schmeer’s* actual holding was that the language “any levy, charge, or exaction of any
 12 kind imposed by a local government” in the first paragraph of article XIII C, section 1, subdivision (e) is
 13 limited to charges payable to, *or for the benefit of, a local government. Schmeer*, 213 Cal. App. 4th at
 14 1328–29, as modified (Mar. 11, 2013) (italics added). While Defendants focus exclusively on the fact
 15 that the Fee is not payable to the City, *Schmeer* also treated charges “for the benefit of” the government
 16 as taxes. If, as Defendants have argued elsewhere, the Ordinance benefits San Jose, article XIII C
 17 applies.

18 Fourth, *Schmeer* is also distinguishable. The grocery stores in *Schmeer* were to use the 10-cent
 19 fee *to compensate themselves* for complying with a City requirement imposed on them – a prohibition
 20 against plastic bags that was only imposed on persons who used their bags. Here, the Ordinance *neither*
 21 requires the fee to compensate the nonprofit for the costs of its compliance with a City regulation nor is
 22 imposed on just those persons who obtain something from the nonprofit.

23 **E. The Ordinance violates the City Charter.**

24 Defendants’ proposed interpretation of the City’s Charter, Opp. at 20-21, is based on a
 25 selective, self-serving reading of its plain terms. City officials’ compliance with the City Charter is
 26 neither aspirational nor a mere technicality. A charter city’s Charter has the force of law, Cal.
 27 Const. Art. XI, § 3(a). In its entirety, Section 1211 states:

28 All monies paid into the City Treasury shall be credited to and kept in separate
 funds in accordance with provisions of this Charter or ordinance. A fund, to be

1 known as the “General Fund,” is hereby created as a medium of control and
2 accounting for all City activities excepting activities for which special funds are
3 established and maintained. All revenues and receipts which are not required by
4 this Charter, State law or ordinances to be placed in special funds shall be credited
5 to the General Fund.

6 Read together, the Charter could not be plainer: (1) City revenues must be placed in either
7 the General Fund or special funds; (2) the General Fund serves “as a medium of control and
8 accounting for all City activities,” except for those activities for which the City creates a special
9 fund; and (3) if the law does not require city revenues and receipts to be placed in special funds,
10 they must go to the General Fund. Here, neither the Ordinance nor any other law requires the City
11 to place the Gun Harm Reduction Fee into a special fund. Accordingly, pursuant to section 1211’s
12 third sentence, the fee’s revenues must be placed into the City’s General Fund.

13 Defendants instead argue that the reference in the first sentence of section 1211 to “monies
14 paid into the City’s Treasury” bars the application of section 1211 to the Ordinance because it
15 requires the fee to be paid to the City’s designated nonprofit. Opp. at 21. But this violates the very
16 maxim Defendants cite: “The language of the Charter and the Ordinance must be read in the context
17 of the respective statutes as a whole. . . the court must ‘avoid a construction that would lead to
18 impractical or unworkable results.’” Opp. at 21 (Citations omitted). Defendants’ interpretation would
19 create an exception that swallows the rule. To allow city fees to bypass the General Fund, diverted
20 into city officials’ favored nonprofit beyond the City’s control and accounting, would turn section
21 1211 on its head. It would subvert this fundamental control on the City government’s ability to
22 hide, or avoid oversight of, how City fee revenues are spent.

23 The City’s interpretation, if accepted, contradicts treatment of the Ordinance’s Gun Harm
24 Reduction Fee as a City fee in the first instance, corroborating the tax analysis above (for an
25 exaction to qualify as a city fee, it must pay for city services). Combined with the Defendants’
26 further argument that the fee is not subject to the City’s budgetary or appropriations authority, Opp.
27 at 21-23, the Defendants further distinguish the Gun Harm Reduction Fee and the activities of the
28 designated nonprofit from government functions. Specifically, Defendants acknowledge:

The nonprofit is not a City department, office, or agency. Indeed, “[n]o City official
or employee shall sit on the board of directors of the Designated Nonprofit
Organization”, and the City “shall not specifically direct how the monies from the

1 [Fee] are expended”

2 The Ordinance does not provide for or contemplate using the Fee for the
3 operation of City departments. Rather, the Ordinance requires the designated nonprofit
4 to “spend every dollar generated from the [Fee]” on programs and initiatives within a
5 particular category – none of which include the operation of offices, departments, or
6 agencies of the City.

7 Opp. at 21-22 (citations omitted).

8 Thus, to the diversion of the Fee to a third party nonprofit instead of the City’s General
9 Fund, the City further acknowledges the fee will not fund a city department, city officials are
10 prohibited from serving on the nonprofit’s board, and “the City ‘shall not specifically direct how the
11 monies from the [Fee] are expended.’” Opp. at 22. But this collides with the Charter’s delegation to
12 the City Manager of responsibility “for the faithful execution of all laws, provisions of [the] Charter,
13 and acts of the Council which are subject to enforcement by the City Manager or by officers who are
14 under the City Manager’s direction and supervision.” *Id.* (quoting Charter § 701(d)). Reversing
15 themselves, the Defendants immediately pivot to asserting the City Manager indeed *will* “‘implement
16 the requirements and fulfill the policies of [the Ordinance] relating to the reduction of gun harm,’
17 including by designating the nonprofit receiving the Fee and setting forth ‘processes and procedures
18 relating to the payment of the fee, and **any additional guidelines or auditing of the use of the monies
19 from the fee.**’” *Id.* (quoting 10.32.235.A, *et seq.*) (emphasis in original). In sum, Defendants state “San
20 Jose maintains authority over how the designated nonprofit expends the fee through the administrative
21 oversight of the City Manager.” *Id.*

22 Accordingly, Defendants claim the City is simultaneously prohibited from directing how the
23 nonprofit will spend the City’s fee, which is not deposited into city accounts, and yet the City maintains
24 authority over how the nonprofit spends the City’s fee. The fee is also simultaneously not paying for
25 City operations, and yet City’s chief administrative officer “maintains authority” over the nonprofits
26 spending.

27 Returning to the Defendants’ proposed interpretation of Charter section 1211: the Defendants’
28 conflicting arguments either mean that: (A) the City Charter is not violated by City fee revenues funding
activities under the City Manager’s control but kept outside City accounts (‘off the books’); or (B) the
City Charter is not violated by a City fee being diverted to an entity over which the City has no

1 immediate control. This are impractical and unworkable results, indicating the Defendants'
2 interpretations are wrong.

3 **F. Irreparable harm, balance of the equities, and the public interest each tip**
4 **in Plaintiffs' favor.**

5 Defendants' arguments about the alleged lack of irreparable harm merely echo their ripeness
6 and merits arguments. As already explained above, citizens do not need to wait until the
7 government has already trampled their rights to sue to prevent the violation. Further, Defendants'
8 Ordinance will unconstitutionally infringe upon their core Second Amendment rights, violates the
9 First Amendment, constitutes a tax that violates the state constitution, is preempted by state law,
10 and violates the City Charter.

11 By contrast, the status quo injures nobody. If a gun owner wants to, they can purchase
12 insurance. As shown above, the Fee will do nothing to actually compensate society or the city for
13 the alleged costs of gun ownership. If the city wants to use its general treasury funds to donate to a
14 nonprofit to advocate about guns or provide service to gun households, it can.

15 The balance of equities, therefore, tips decidedly in Plaintiffs' favor.

16 **III. Newspaper Articles Are Subject to Judicial Notice**

17 "The court may judicially notice a fact that is not subject to reasonable dispute because it:
18 (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and
19 readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Ev.
20 201(b). Exhibit C is an OpEd written by Defendant Mayor Liccardo and published in the Los
21 Angeles Times. Though their argument is not entirely clear, Plaintiffs appear to concede the Court
22 may take judicial notice of the Op-ed, but indicate that some of the Mayor's statements are not
23 accurate. The Mayor's statements, as those of a party opponent, are otherwise admissible, and
24 Defendants have offered no suggestion of what in the Op Ed is unreliable. Fed. R. Ev. 801(d)(2).

25 Exhibits F and G are San Francisco Chronicle and Los Angeles Times articles, respectively.
26 Defendants concede their authenticity, but balk at Plaintiffs' use of the articles to determine the
27 public perception of the Ordinance's enactment. Opp. at 25. As the Court already denied

28 //

1 Defendants’ Motion to Dismiss as moot and Plaintiffs filed a First Amended Complaint, this is no
2 longer in controversy.

3 Accordingly, the Court should grant Defendants’ Request for Judicial Notice.

4 **IV. This Court should not require Plaintiffs to post a bond.**

5 When a “preliminary injunction will require defendant to incur little or no monetary costs
6 and that the injunction is sought to vindicate constitutional rights and the public interest, [] no bond
7 or security will be imposed under Fed. R. Civ. Pro. 65(c).” *Mercer, Fraser Co. v. County of*
8 *Humboldt, Cal.*, 2008 WL 4344524, *2 (N.D. Cal. 2008). “[T]o require a bond would have a
9 negative impact on plaintiff’s constitutional rights, as well as the constitutional rights of other
10 members of the public affected by the policy.” *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F.
11 Supp. 719, 738 (C.D. Cal. 1996). Here, Defendants make no mention at all of how it would be
12 harmed, financially, by the issuance of a preliminary injunction. A bond would have a negative
13 impact on Plaintiffs subject to this unconstitutional Ordinance and should be waived.

14
15 Respectfully submitted,

16 Date: March 29, 2022

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