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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Howard Jarvis Taxpayers Association; Silicon Valley Taxpayers Association; Silicon Valley Public Accountability Foundation; James Barry; and George Arrington,

Plaintiffs,

v.

City of San Jose, and all persons interested in the matter of San Jose Ordinance No. 30716, establishing an Annual Gun Harm Reduction Fee,

Defendants.

Case No. 5:22-cv-02365-BLF

DEFENDANT CITY OF SAN JOSE'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT UNDER RULES 12(b)(1) AND 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES

Date:	TBD
Time:	9:00 a.m.
Courtroom:	Via Zoom
Judge:	Hon. Beth Labson Freeman

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 4, 2022, or on a date and time to be set by the Court[1], in the courtroom of the Honorable Beth Labson Freeman, United States District Judge of the Northern District of California, located at 280 South 1st Street, San Jose, California 95113, Defendant City of San Jose ("City") will and hereby does move this Court to dismiss the Complaint in this matter in its entirety under Federal Rule of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6). Plaintiffs Howard Jarvis Tax Association, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation, James Barry, and George Arrington (collectively, "Plaintiffs") filed the Complaint in Santa Clara County Superior Court on March 7, 2022, and the City timely removed the case to the Northern District of California on April 15, 2022 (*see* ECF 1).

This motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the Declarations of Tamarah P. Prevost and Sarah Zarate and the exhibits thereto; the Proposed Order; the anticipated reply brief; the files and records in this action; and all other papers, pleadings, documents, arguments of counsel, and other materials provided to the Court at the hearing or before the motion is submitted for decision; and any other evidence and argument the Court may consider.

/ / /

[1] Pursuant to the Court's protocols, counsel for Defendant contacted the Clerk for this Court to reserve a hearing date for this Motion, but as of the time of this filing had not yet received one. Decl. of Tamarah P. Prevost ¶ 15. As such, in filing this Motion, Defendant selected August 4, 2022 in the ECF System, believing this may be convenient for the Court because it is the hearing date for Defendants' motion to dismiss plaintiffs' complaint in the recently related case captioned *National Association for Gun Rights, Inc., et al. v. City of San Jose, et al.,* Case No. 5:22-cv-00501-BLF, also pending before this Court. *Id.* Defendant awaits further notice from the Court if this date or time is not convenient or preferable and appreciates in advance the Court's time and assistance with this matter.

Respectfully submitted,

Dated: April 22, 2022

COTCHETT, PITRE & McCARTHY, LLP

By: */s/ Tamarah P. Prevost*
Joseph W. Cotchett
Tamarah P. Prevost
Andrew F. Kirtley
Melissa Montenegro

Attorneys for Defendant City of San Jose

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED

Under Civ. L. R. 7-4(a)(3), the City sets forth the following statement of issues to be decided:

1. Whether Plaintiffs' claims, all of which challenge the lawfulness of a 2022 San Jose ordinance provision requiring non-exempt San Jose gunowners to pay an annual Gun Harm Reduction Fee in an unspecified amount that still needs to be determined through future action by the San Jose City Council, should be dismissed under Rule 12(b)(1) because they are not ripe for review?

2. Whether Plaintiffs' Complaint should be dismissed under Rule 12(b)(6) as to all four causes of action for failure to state a claim on which relief may be granted?

II. INTRODUCTION

The San Jose Ordinance ("Ordinance") at issue in this action springs from the legitimate authority of Defendant City of San Jose ("City" or "San Jose") to enact legislation aimed at reducing gun deaths and injuries and compensating victims of accidental shootings. The City believes that smart, innovative policies informed by public health experts and gunowners alike can reduce firearm-related deaths and injuries, while fully respecting lawful gunowners' Second Amendment rights to keep and bear arms for self-defense. State and local governments must be afforded discretion to address the complex challenge of reducing the ever-increasing numbers of gun-related deaths and injuries.

The Ordinance requires non-exempted San Jose gunowners to obtain liability insurance for gun accidents and to pay a reasonable annual Gun Harm Reduction Fee ("Fee"), which a nonprofit organization will use to provide gunowners and their families with voluntary programming and services related to gun safety, mental health, and domestic violence. Notwithstanding the Ordinance's modest scope, Plaintiffs Howard Jarvis Tax Association, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation, James Barry, and George Arrington (collectively, "Plaintiffs") seek to strike it down under various federal and state constitutional provisions, all of which are based on the same handful of flawed legal theories. The Complaint is legally defective and should be dismissed without leave to amend on two grounds.

First, Plaintiffs' claims fail under Federal Rule of Civil Procedure ("Rule") 12(b)(1) for lack of standing and ripeness, because key components of the Ordinance, which bear directly on the validity of Plaintiffs' claims, have not yet been decided by the City. For example, Plaintiffs' Complaint is premised on the speculation about the nature of the nonprofit organization referenced in the Ordinance, which the City Manager has not yet designated. Similarly, the Complaint rests on the theory that the annual Fee infringes on the right to keep and bear arms—even though the amount of the Fee has not yet been set, and even though the criteria for the Ordinance's "financial hardship" exemption have not yet been established. Plaintiffs' abstract objections to these and other aspects of the law rest on speculation, contingent future events, and hypotheticals that would require this Court to issue an advisory opinion about an ordinance that is still incomplete and unfinished.

Second, under Rule 12(b)(6), all four of Plaintiffs' claims under the First and Second Amendment to the U.S. Constitution and the California Constitution are legally defective under binding precedent or otherwise collapse under scrutiny. Because there are no facts Plaintiffs could allege to cure those defects, all four claims should be dismissed without leave to amend.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. History of Ordinance and Procedural Posture

In June 2021, the City's Mayor and City Council directed the City Attorney to draft a gun safety ordinance designed to mitigate gun harms for the Council's consideration. *See* Decl. of Tamarah Prevost ("Prevost Decl.") ¶ 2, Ex. 1. Six months and seven detailed memoranda later, the Council, at its January 25, 2022 meeting, heard a first reading of the draft ordinance, directed that certain amendments be drafted, that it be published, and voted to re-consider the Ordinance at a later date. *Id.* ¶¶ 3-9, Exs. 2-8. On February 8, 2022, the City enacted the Ordinance. *Id.* ¶ 16, Ex. 15 (copy of the Ordinance). The Ordinance expressly leaves key aspects of the law unspecified and dependent on future action by the City Council and City Manager (§§ 10.32.215, 10.32.235(A), 10.32.240(B)) and the City Council and City Manager 180 days to take those actions before the Ordinance becomes effective on August 7, 2022. § 2.[1]

On March 7, 2022, Plaintiffs commenced this action in Santa Clara County Superior Court (Case No. 22CV395596) by filing their "Complaint to Invalidate §§ 10.32.215 and 10.32.230(B) of Chapter 10.32 of the Title 10 of the San Jose Municipal Code" ("Complaint") against the City and "all persons interested in the" Ordinance. *See* Compl., ECF 1, Ex. A. On March 24, the Superior Court issued an order approving publication of the summons. On April 15, the City timely removed the action to this Court. *See* ECF 1. Shortly thereafter, the Court entered an order relating this action to the earlier-filed action *National Association for Gun Rights, Inc., et al. v. City of San Jose, et al.*, Case No. 5:22-cv-00501-BLF ("*NAGR*" Action), as well as an Order to Show Cause why the two actions should not be consolidated. ECF 5-6. Both actions are pre-enforcement to the validity of the Ordinance under the First, Second, and Fourteenth Amendments to the U.S. Constitution, and various provisions of the California Constitution.

[1] "§_" on its own refers to a section of the Ordinance. *See* Prevost Decl., Ex. 13 (copy of the Ordinance).

B. Summary of the Ordinance

The Ordinance's basic purpose is to "reduce gun harm" "for the protection of the welfare, peace, and comfort of the residents of the City of San Jose." § 10.32.200(A). To "reduce the number of gun incidents," the Ordinance seeks to provide voluntary gun safety and other "[p]rograms and services to gun owners and their households" and to require gunowners to obtain liability insurance to compensate victims of accidental shootings, which is partly informed by an analogue to the success of car insurance mandates in helping reduce vehicle collision fatalities and injuries. § 10.32.200(B)(10)-(13); *see also* § 10.32.200(B)(11) (finding risk-based automobile liability insurance mandates were part of "a comprehensive public health approach to car safety" that helped reduce U.S. motor vehicle collision fatalities by 80%). The Ordinance is informed by public health research and data, such as findings that more than a third of all gun injuries are from unintentional shootings, that gunowners and those who live with them are at significantly higher risk of gun suicide and homicide than the rest of the population, and that gun-related deaths or serious bodily injuries cost San Jose residents $442 million per year. § 10.32.200(B)(4)-(10).

The Ordinance applies to all City residents who own a gun, with three exceptions: (1) peace officers, (2) those with a state concealed weapon license, and (3) those for whom compliance with the Ordinance would create a "financial hardship." § 10.32.255(A)-(C). With respect to the latter, the Ordinance authorizes the City Manager to "promulgate [] regulations" on "[t]he criteria by which a person can claim a financial hardship exemption" (§ 10.32.235(A)(4)), but the City Manager has not yet done so. *See* Decl. of Sarah Zarate, City Manager's Office ("CMO Decl.") ¶¶ 4-8.

For all non-exempt City resident gunowners, the Ordinance imposes three main requirements: (1) to obtain liability insurance "specifically covering losses or damages resulting from any accidental use of the Firearm, including but not limited to death, injury or property damage" (§ 10.32.210), (2) to pay an annual Fee (§ 10.32.215), and (3) to self-certify compliance with the insurance requirement and to have proof that they have paid the Fee (e.g., a receipt) (§ 10.32.230(A)-(B)). Whereas the plaintiffs in the related *NAGR* Action challenge the legality of all three requirements, Plaintiffs here expressly do *not*

challenge the liability insurance requirement. ¶ 10.[2] Instead, they challenge only the legality of the annual Fee requirement under § 10.32.215 and the related obligation to keep a receipt or other proof they have paid the Fee under § 10.32.230(B). *See* ¶ 11; *see also id.*, Prayer for Relief (seeking "an Order invalidating sections 10.32.215 and 10.32.230(B)" of the Ordinance). Those two provisions are summarized below.

1. Annual Gun Harm Reduction Fee (§ 10.32.215)

The Ordinance requires San Jose gunowners to pay an annual Fee to make available voluntary programming and services to gunowner residents, "to members of their household, or to those with whom they have a close familiar or intimate relationship" (§§10.32.215, 10.32.220(A)) with the goal of "encourag[ing] safer behavior" related to gun ownership and use (§ 10.32.200(B)(13)). The programs and services will focus on suicide prevention, violence reduction and gender-based violence, addiction intervention and substance abuse treatment, mental health services related to gun violence, and firearms safety education or training. § 10.32.220(A)(1)-(5). These programs and services will be provided to qualifying City residents by a nonprofit organization that will be, but has not yet been, designated by the City Manager. § 10.32.205(B); CMO Decl. ¶ 6. While the City may not "specifically direct" how the nonprofit spends monies from the Fee, the Ordinance is clear that "[n]o portion of the monies … shall be used for litigation, political advocacy, or lobbying activities." § 10.32.200(B)-(C).

The Ordinance does not set the amount of the Fee but leaves that to be "established by [separate] resolution of the City Council." § 10.32.215. To date, no such resolution has been passed. CMO Decl. ¶¶ 7-8. The Ordinance also authorizes the City Manager to "promulgate [] regulations" concerning the "[d]esignation of the nonprofit organization that will receive the [Fee], any processes and procedures related to the payment of the fee, and any additional guidelines or auditing of the use of the monies from the fee" (§ 10.32.235(A)(2)), as well as the annual due date for payment of the Fee (§ 10.32.215). The City Manager has not yet promulgated these regulations. CMO Decl. ¶¶ 7-8.

2. Proof of Payment of the Fee (§ 10.32.230(B))

Similar to the way car owners must have documentation in their car showing they have obtained

[2] "¶_" on its own refers to paragraphs in Plaintiffs' Complaint, a copy of which is at ECF 1, Ex. A.

required auto liability insurance and paid annual DMV fees, the Ordinance requires gunowners to complete a form attesting they have the required insurance and to "affix proof of payment of the annual [Fee] to the [] form and keep it with the Firearm or Firearms where they are being stored or transported," and to produce the form and proof of payment "when lawfully requested to do so by a peace officer." § 10.32.230(A)-(B). Plaintiffs do not challenge the requirement of completing a form attesting to having the required insurance but seek to invalidate only the requirement to keep proof of payment of the annual Fee under Section 10.32.230(B). *See* ¶¶ 10-11; *id.*, Prayer for Relief.

Violations of the Ordinance are punishable by an administrative citation and fine, subject to due process protections. § 10.32.240(A). Similar to the Fee, the Ordinance does not set the amount of the administrative fine but leaves that to be "established by [separate] resolution of the City Council." § 10.32.240(B). To date, no such resolution has been passed. CMO Decl. ¶¶ 7-8. Contrary to Plaintiffs' allegations that the Ordinance authorizes the "confiscation" of firearms of those who fail or refuse to comply with the Ordinance (¶ 16), the Ordinance only authorizes "impoundment" of firearms and only "to the extent allowed by law" (§ 10.32.245). There is currently no lawful basis to impound firearms under state or federal law, meaning this particular provision will not take effect until, for example, the passage of a state law permitting municipalities to impound firearms. The Ordinance also contains a severability clause. § 3.

IV. LEGAL STANDARDS

A. Rule 12(b)(1)

The plaintiff bears the burden of establishing the Court has jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).[3] The Court's proper role is "to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution," which means it lacks jurisdiction "to issue advisory opinions []or to declare rights in hypothetical cases." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). The doctrine of ripeness "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* Ripeness "is drawn from both Article III limitations on judicial

[3] Unless otherwise noted herein, internal citations, quotation marks, and alterations are omitted.

power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). "A Rule 12(b)(1) jurisdictional attack may be facial or factual," *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The City primarily makes a facial attack, that "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* To the extent the Court deems any part of the City's argument to represent a factual attack disputing the truth of Plaintiffs' allegations purporting to establish federal jurisdiction, the court "need not presume the truthfulness of the plaintiff's allegations" and "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.*

B. Rule 12(b)(6)

Defendants are entitled to dismissal under Rule 12(b)(6) if, accepting Plaintiffs' allegations as true, the complaint fails to state a claim. *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The Court should not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Plaintiffs' "obligation to provide the 'grounds' of [their] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The allegations must be "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

C. Facial Constitutional Challenges

In adjudicating facial challenges to laws, courts may not "resolve questions of constitutionality with respect to each potential situation that might develop" in litigation, especially when the moving party does not demonstrate that the law "would be unconstitutional in a large fraction of relevant cases." *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007). Because facial challenges "often rest on speculation" (*Jackson v. City and County of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014) ("*Jackson*")), "they raise the risk of premature interpretations of statutes on the basis of factually barebones records," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people

from being implemented in a manner inconsistent with the Constitution" (*Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008)). A facial challenge must show that there is "no set of circumstances exists under which the [law] would be valid, i.e., that the law is unconstitutional in all of its applications," or at least that it lacks a "plainly legitimate sweep." *Id.* at 449.

V. ARGUMENT

A. The Complaint Should Be Dismissed Under Rule 12(b)(1).

1. None of Plaintiffs' Claims are Ripe for Review

The Ordinance was enacted in February 2022, but it expressly provides a 180-day period before it becomes effective on August 7, 2022. § 2. During this time, the Council needs to pass resolutions setting the amount of the Fee and any administrative fine for noncompliance (§§ 10.32.215, 10.32.240(B)), and the City Manager needs to promulgate key regulations, such as those establishing the criteria for the financial hardship exemption and designating the nonprofit organization (§ 10.32.235(A)). *See generally* CMO Decl. Since the Ordinance is not yet effective, and since none of the required resolutions or regulations have yet been passed or promulgated, Plaintiffs' claims are not ripe for review and, thus, subject to dismissal under Rule 12(b)(1). *See Scholl v. Mnuchin*, 489 F. Supp. 3d 1008, 1024-27 (N.D. Cal. 2020).

Ripeness doctrine looks primarily at two considerations: "the hardship to the parties of withholding court consideration" and "the fitness of the issues for judicial decision." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The "basic rationale" of the ripeness requirement is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" (*id.* at 148), and to ensure that challenges to laws are "test[ed] … in a concrete situation" (*Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 165 (1967)). Pre-enforcement challenges to laws are not ripe if it is likely that the law will change before it goes into effect. *See, e.g.*, *Cramer v. Brown*, 2012 WL 13059699, at *3 (C.D. Cal. Sept. 12, 2012) (finding pre-enforcement claim justiciable, in part, because the legislature "ha[d] no power to amend the statute before its effective date" and there was "no reason to think the law will change"). Additionally, an issue "may not be ripe for review if further factual development would significantly advance [the court's] ability to deal with the legal issues presented."

Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 812 (2003); *see also Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122-23 (9th Cir. 2010) (case not ripe if it "involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all"); *Vieux v. Easy Bay Reg'l Park Dist.*, 906 F.3d 1330, 1344 (9th Cir. 1990) (federal courts may not issue advisory opinions based on a "hypothetical state of facts").

"The prudential considerations of ripeness are amplified when constitutional considerations are concerned." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) ("*Scott*"). Indeed, "[t]he Supreme Court has neatly instructed that the jurisdiction of federal courts to hear constitutional challenges should be exercised only when the underlying constitutional issues [are tendered] in clean-cut and concrete form." *Id.* (quoting *Rescue Army v. Mun. Ct. of Los Angeles*, 332 U.S. 549, 584 (1947)).

Here, Plaintiffs' claims are not ripe because material aspects of the Ordinance provision that Plaintiffs challenge have not yet been established (e.g., the non-profit itself), and because some aspects of Plaintiffs' claims require further factual development (e.g., how the nonprofit behaves in providing voluntary programming and services). Plaintiffs claim the Fee requirement violates their First Amendment "right to not speak and the right to not be forced by the government to support someone else's [i.e., the nonprofit's] speech, particularly when you disagree with their message." ¶ 18 (brackets added). This claim is clearly based on speculation. *See Sierra Club v. United States Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 31-32 (D.C. Cir. 2013) (grounds for preliminary injunction not ripe where the complained-of conduct "has not yet occurred and is still in the process of being addressed"). Plaintiffs' allegations also ignore that the nonprofit is prohibited from engaging in policy activity or advocacy. § 10.32.220(B) (expressly prohibiting nonprofit from spending any "portion of the monies from the [Fee]" on "litigation, political advocacy, or lobbying activities").

Similarly, Plaintiffs' Second Amendment challenge is based on allegations that the Fee places an unconstitutional burden on the keeping and bearing of arms (*see* ¶¶ 22-23), despite the fact that the amount of the Fee has not yet been determined so any such burden cannot even be ascertained. This claim turns on the *extent* to which the Ordinance burdens non-exempt San Jose gunowners' Second Amendment rights. It is "premature" to ask a federal court "to issue a binding interpretation of a local

ordinance based on what might happen in the future without first giving the City … the opportunity to interpret its own ordinance." *United States v. Power Co., Inc.*, 2008 WL 2626989, at *4 (D. Nev. June 26, 2008). Here, the City has not even finished the required legislative action. *See* § 10.32.215 (requiring the Fee amount be "established by [future] resolution of the City Council"); CMO Decl. ¶¶ 7-8 (no such resolution has been passed).

Moreover, important *regulations* bearing on the Fee have not yet been promulgated. *See, e.g.*, §§ 10.32.215, 10.32.235(A)(4) (authorizing City Manager to "promulgate [] regulations" concerning the "[d]esignation of the nonprofit organization … any processes and procedures related to the payment of the fee, and any additional guidelines or auditing of the use of the monies from the fee," as well as "[t]he financial hardship exemption"); CMO Decl. ¶¶ 4-8; *cf. United States v. Gila Valley Irr. Dist.*, 31 F.3d 1428, 1436 (9th Cir. 1994) (claims unripe when based on "mere speculation"). The allegations do not satisfy Plaintiffs' burden. *Twombly*, 550 U.S. at 555.

2. Plaintiffs Also Lack Article III Standing.

The foregoing argument also makes clear that Plaintiffs lack Article III standing to seek relief based on a "conjectural and hypothetical" future harm. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Plaintiffs have not alleged, as necessary, that any threatened injury is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("allegations of *possible* future injury are not sufficient" (emphasis in original)). Instead, Plaintiffs' own allegations demonstrate their lack of standing, such as their allegations implying that they might disagree with the views expressed by a yet-to-be-determined nonprofit and "may" be forced to surrender their firearms if they decline to pay the yet-to-be-determined Fee. *See, e.g.*, ¶¶ 18-19, 22. Such speculative fears that Plaintiffs (and, given this is a facial challenge, a large fraction of all persons subject to the Ordinance) might someday suffer such purported injuries fall well short of establishing the requisite Article III injury. *See, e.g.*, *Gilbert v. Chase Home Fin., LLC*, 2013 WL 2318890, at *11 (E.D. Cal. May 28, 2013) ("The prospect of [plaintiff] someday losing the property is speculative, and does not represent a concrete injury" because "there is no indication that the foreclosure process has either begun or concluded").

3. Plaintiffs Do Not State a Proper Facial Constitutional Challenge.

Even if Plaintiffs' claims were somehow ripe and they had standing, their facial challenge still fails because they allege no facts establishing that the Fee would be unconstitutional in a "large fraction" of cases—nor could they, since the amount of the Fee has not even been determined. *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007). Assuming the Council and City Manager establish constitutionally reasonable fees, fines, and regulations, the Ordinance's sweep is plainly legitimate because it furthers the City's legitimate efforts to reduce the harm caused by gun-related accidents and imposes only de minimus or marginal burdens on the constitutional right to obtain and keep a firearm in the home for self-defense, for reasons more fully explained below. *Cf. Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840 (2013) (rejecting facial challenge to ordinance that regulated gun shows "only minimally and only on county property," without even requiring empirical support justifying the regulation). Plaintiffs' Complaint is subject to dismissal for this reason alone.

B. The Court Should Dismiss the Complaint under Rule 12(b)(6) Because Each of Plaintiffs' Claims Fails

1. Plaintiffs Fail to State First Amendment or California Constitutional Claims Based on Compelled Speech or Association.

Plaintiffs' first cause of action, for compelled speech and association claims under the First Amendment and an analogous provision of the California Constitution (Cal. Const., Art. I, § 2(a)) are based largely on speculation that Plaintiffs and a large fraction of San Jose gunowners will "disagree with the [] message" of a yet-to-be-designated nonprofit with unknown leadership. ¶ 18. This is precisely the kind of speculative and conclusory allegation that need not be credited under Rule 12(b)(6), as Plaintiffs allege no facts to make plausible their fear that they and a large fraction of San Jose gunowners will disagree with the yet-to-be-designated nonprofit. *See Twombly*, 550 U.S. at 555. These claims should be dismissed as pure speculation, especially since the Ordinance expressly prohibits the nonprofit from engaging in political advocacy. *See id.*; § 10.32.220(B) (providing no portion of the Fee may be used "for litigation, political activity, or lobbying activities").

To the extent Plaintiffs allege the First Amendment bars a law from requiring them to pay *any* amount of money that ends up in the hands of a government-selected entity that expresses *any* view with

which they disagree, such an argument is contrary to binding precedent. *See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties."); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 917 (9th Cir. 2005). As the U.S. Supreme Court has aptly noted: "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the role of government as we know it radically transformed." *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990). Yet, that is precisely the non-existent "right" on which Plaintiffs appear to base their First Amendment claim.

Plaintiffs' related claims under the California Constitution's free speech and association provisions fare no better, for much the same reason. *See* Cal. Const., Art. I, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."); *id.*, § 3(a) ("The people have the right to ... assemble freely to consult for the common good."). Here, Plaintiffs vaguely allege that the Fee requirement violates this provision because it "forces San Jose gun owners to associate with or support private group [i.e., the yet-to-be-determined nonprofit] and to fund their message." ¶ 19 (brackets added). Although Plaintiffs fail to specify what the nonprofit's "message" might be or what might be objectionable about it, Plaintiffs appear to fear that the nonprofit will express unspecified anti-gun views in providing entirely voluntary services and programming to gunowners and their families. Given the conclusory and unsupported nature of Plaintiffs' allegations, such a vague and speculative fear fails to plausibly allege a violation of the California Constitution's guarantees of free speech and association.

Ultimately, Plaintiffs have not plausibly alleged the Fee requirement will compel them and a large fraction of San Jose gunowners to engage in speech and association with which they do not agree in violation of the First Amendment and related state constitutional guarantees. This is especially so in view of federalism-based concerns that federal courts should not invalidate state laws on the grounds that they

violate the right of association based only on "factual assumptions." *Wash. State Grange*, 552 U.S. at 457; *accord Cal. Democratic Party v. Jones*, 530 U.S. 567, 600 (2000) (Stevens, J., dissenting) ("[A]n empirically debatable assumption … is too thin a reed to support a credible First Amendment distinction" with respect to burdens on association). Plaintiffs' First Amendment and related state law claims should be dismissed.

2. Plaintiffs Fail to State Second Amendment and Related California Constitutional Claims.

As their second cause of action, Plaintiffs contend the Ordinance's Fee requirement impermissibly burdens their and other San Jose gunowners' Second Amendment rights. ¶¶ 20-22. The Ninth Circuit adjudicates Second Amendment challenges using a two-step test, which "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). For purposes of this Motion, the City concedes the Fee requirement imposes some minimal or slight burden, and so proceed to the second step of the test. *See e.g., Heller*, 554 U.S. at 625; *Jackson*, 746 F.3d at 959.

a. Under the Second Amendment, the Appropriate Level of Scrutiny Is Intermediate Scrutiny.

To determine the appropriate level of scrutiny, Courts look to two factors. First, Courts assess how close the law comes to the core of the Second Amendment right, which is the right to keep firearms in the home for purposes of self-defense. *Heller*, 554 U.S. at 629; *Jackson*, 746 F.3d at 963. Unless the challenged law "implicates the core of the Second Amendment right and severely burdens that right," courts in the Ninth Circuit generally apply intermediate scrutiny. *Young*, F.3d 765 at 784; *see also Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) ("*Heller II*") ("[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify."). Here, intermediate scrutiny applies because the Fee requirement does not "impos[e] restrictions on the use of handguns within the home" or otherwise come close to regulating

the core Second Amendment right of keeping firearms in the home for self-defense. *Jackson*, 746 F.3d at 963. As relevant here, the Ordinance merely requires resident gunowners to pay a reasonable Fee to fund services aimed at reducing well-established harms that result from guns being present in the home. §§ 10.32.215, 10.32.220.

The second factor of the scrutiny evaluation requires the Court to assess the "severity of the law's burden" on the core Second Amendment right. *Jackson*, 746 F.3d at 963. A law that "severely burdens that right receives strict scrutiny," but in all "other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny." *Young v. Hawai'i*, 992 F.3d 765, 784 (9th Cir. 2021) (en banc). Laws that regulate only the "manner in which persons may exercise their Second Amendment rights" are obviously less burdensome than those which ban firearm possession completely. *Jackson*, 746 F.3d at 961 (citing *Chovan*, 735 F.3d at 1138). Similarly, "firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not. *Jackson*, 746 F.3d at 961; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that laws placing "reasonable restrictions on the time, place, or manner of protected speech" and that "leave open alternative channels" for communication pose less burden to a First Amendment right and are reviewed under intermediate scrutiny).

Here, the burden identified by Plaintiffs that the Ordinance imposes (related to the Fee) is minimal: it neither regulates the use of firearms, how or where they are stored, nor any other factors evaluated by courts as directly affecting residents' ability to keep and bear arms for self-defense. *See e.g.*, *Heller*, 554 U.S. at 629. Instead, it merely requires gunowners to pay a reasonable annual Fee and keep proof that they have paid the fee with their firearm when it is being stored or transported. §§ 10.32.215, 10.32.230(B). The Ordinance neither seeks to ban guns nor threatens to seize them. Indeed, the Ninth Circuit (in line with the other Circuits) has long applied intermediate scrutiny to uphold similar laws. *See, e.g., Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (upholding DOJ's use of gun sale fee for enforcement efforts targeting illegal firearm possession after point of sale under intermediate scrutiny); *Heller v. District of Columbia*, 801 F.3d 264, 278 (D.C. Cir. 2015) ("*Heller III*") (upholding $48 in gun licensing fees under intermediate scrutiny); *Kwong v. Bloomberg*, 723 F.3d 160, 161, 167 (2d

Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) (upholding $340 gun licensing fee under intermediate scrutiny); *O'Connell v. Gross*, No. CV 19-11654-FDS, 2020 WL 1821832 (D. Mass. Apr. 10, 2020) (upholding law requiring mandatory safety courses and $300 in fees under intermediate scrutiny). Intermediate scrutiny is therefore appropriate.

b. The Ordinance Easily Survives Intermediate Scrutiny.

To withstand intermediate scrutiny, the City need only show (1) that their stated objective is significant, substantial, or important; and (2) a reasonable fit between the Ordinance and that objective. *Chovan*, 735 F.3d at 1139.

First, the City's objective of promoting public safety and addressing gun injuries is an "important" government interest. *Chovan*, 735 F.3d at 1139; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (it is "self-evident" that government's interest in promoting public safety and reducing violent crime are substantial and important government interests"); *Stimmel v. Sessions*, 879 F.3d 198, 201 (6th Cir. 2018) (referring to "government's compelling interest of preventing gun violence"); *Torcivia v. Suffolk Cty., New York*, 17 F.4th 342, 359 (2d Cir. 2021) (finding a "substantial governmental interest in preventing suicide and domestic violence"). The Ordinance's other stated purpose of reducing the social and financial costs caused by guns (§ 10.32.200(B)) is also an important interest. *See, e.g., Bauer*, 858 F.3d at 1226; *Kwong*, 723 F.3d at 168 (city permitted to recover costs as part of scheme "designed to promote public safety and prevent gun violence"). There can be no serious doubt that gun violence is a major public health crisis. *See* U.S. Centers for Disease Control and Prevention, *Firearm Violence Prevention*, *available at* https://www.cdc.gov/violenceprevention/firearms/fastfact.html (accessed Apr. 22, 2022) ("Firearm injuries are a serious public health problem."). Thus, the Ordinance clearly meets the first prong under intermediate scrutiny.

Second, there is a reasonable fit between the challenged regulation and the City's objective. *See Chovan*, 735 F.3d at 1139. When assessing the reasonableness of fit under immediate scrutiny, courts must give "substantial deference to the predictive judgments" of the legislature on public policy questions that fall outside the courts' competence. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*"). This is because "the legislature is far better equipped than the judiciary to make sensitive

public policy judgments (within constitutional limits)" on complex empirical questions like "the dangers in carrying firearms and the manner to combat those risks." *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("*Turner I*")). This Court's "sole obligation" is simply "to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 181. That standard is easily met here.

The City's reasonable legislative judgments are entitled to deference. The City relied on several studies and findings to form its reasonable judgment that an insurance mandate combined with voluntary gun-safety and other programming and services for gunowners and their household members will deter, prevent, or reduce accidental gun harm. *See e.g.*, Prevost Decl. ¶ 12, Ex. 11 (*The New England Journal of Medicine*, "Handgun Ownership and Suicide in California," cited in Ordinance findings at § 10.32.200(B)(6)). The City also evaluated and reviewed materials concerning financial and other harms arising from gun violence. *See, e.g.*, *id.* ¶ 13, Ex. 12 (The Educational Fund to Stop Gun Violence, "Unintentional Shootings"); *id.* ¶ 8, Ex. 7 (compendium of materials provided to City Council in advance its January 25, 2022 meeting).

The multitude of studies reviewed by the City Council supports its view that the Ordinance's annual Fee requirement and related education programming and services will positively improve public health, safety, and well-being. Indeed, a city is allowed "a reasonable opportunity to experiment with solutions to admittedly serious problems," such as harm caused by firearms. *Jackson*, 746 F.3d at 966 (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 52 (1986)). The Ordinance findings and legislative record more than sufficiently support the reasonableness of the fit between City's important interests in deterring gun-related deaths and injuries and the imposition of a reasonable annual Fee to fund programs aimed at advancing those exact interests. *See City of Renton*, 475 U.S. at 51-52; *Jackson*, 746 F.3d at 969. Additionally, it is widely known that the Mayor has publicly proposed a mere $25 fee in a Memorandum provided for Council's review. *See* Prevost Decl. ¶ 5, Ex. 4. Yet the Complaint contains no non-conclusory allegations as to why such a minimal Fee would be an unconstitutional burden on Second Amendment rights, especially when binding Ninth Circuit law is directly to the

contrary. *See Bauer*, 858 F.3d at 1225 (upholding constitutionality of California law imposing $19 fee on all gun sales). Nor do Plaintiffs' claims account for the Ordinance's "financial hardship" exemption, which would exempt from the Ordinance's requirements any person who meets its yet-to-be-promulgated criteria. §§ 10.32.225(C), 10.32.235(A)(4).

In sum, intermediate scrutiny applies, and the Ordinance clearly passes muster under that tier of scrutiny. Plaintiffs fail to state a claim under the Second Amendment.

c. Plaintiffs' Related State Law Claim Fails Because There Is No "Inalienable" Right to Bear Arms under the California Constitution.

Because the California Constitution has no provision expressly guaranteeing a right to keep or bear arms, Plaintiffs rely on the state constitution's general guarantee of certain "inalienable rights," including "the rights of 'protecting property, and pursuing and obtaining safety." ¶ 21 (quoting Cal. Const., Art. I, § 1). Plaintiffs further allege that, because these rights are "inalienable," they cannot "be withheld or revoked by the City if gun owners do not comply with the conditions [i.e., payment of the annual Fee and keeping proof of payment with their firearm when it is being stored or transported] contrived by the City." ¶ 23.

Plaintiffs' attempt to shoehorn a right to keep and bear arms into the California Constitution is directly contrary to California law. "If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution's declaration of rights, they are simply wrong." *Kasler v. Lockyer*, 23 Cal.4th 472, 481 (2000) (citing to *In Re Ramirez*, 193 Cal. 633, 651 (1924) ["The constitution of this state contains no provision on the subject."]); *see also People v. Camperlingo*, 69 Cal.App. 466, 473 (1924) ("the right of a citizen to bear arms is not acquired from any constitutional provision."). Moreover, under California law, "[i]t has long been established that regulation of firearms is a proper police function." *People v. Evans*, 40 Cal.App.3d 582, 586-87 (1974), *disapproved of on other grounds by People v. King*, 22 Cal.3d 12 (1978). Plaintiffs' claim should be dismissed.

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3. Plaintiffs Fail to State a Claim that the Ordinance Imposes a Tax in Violation of the California Constitution.

Plaintiffs third cause of action argues that the Ordinance's annual Fee requirements is a "tax" that may not be imposed without voter approval under Article XIII C of the California Constitution, as amended by Proposition 26 ("Proposition 26"). *See* ¶¶ 26-31. Proposition 26 defines a "tax" as "any levy, charge, or exaction of any kind imposed by a local government," subject to seven specific exceptions. Cal. Const., Art. XIII C, § 1(e); *see also Schmeer v. County of Los Angeles*, 213 Cal.App.4th 1310, 1329 (2013), *as modified* (Mar. 11, 2013) ("*Schmeer*") (interpreting Proposition 26's definition of a "tax" as "limited to charges payable to, or for the benefit of, a local government"). Plaintiffs fail to state a claim for two reasons.

First, the Ordinance's annual Fee is not a "tax" under Proposition 26 because it is not paid or remitted to the local government, but rather paid directly to and used by the private nonprofit organization to provide gun-safety and other programming and services. § 10.32.215 (providing gunowners "shall pay" the Fee "to the to the Designated Nonprofit Organization"); *see Schmeer*, 213 Cal.App.4th 1310 (2013) (legally mandated charge paid to and retained by retail stores is not a "tax" for purposes of Proposition 26). In *Schmeer*, Los Angeles County enacted an ordinance that prohibited retail stores from providing disposable plastic carryout bags to customers. *Id.* at 1314. The stores could provide paper carryout bags but were required to charge customers ten cents per bag. *Id.* Critically, the proceeds of the paper bag sales were retained by the store to be used for prescribed purposes, including to cover the actual costs of the paper bags. *Id.* The *Schmeer* plaintiffs sued on the same theory advanced by Plaintiffs here: that the bag charge is a tax subject to Proposition 26. The court disagreed, ruling that because the proceeds of the bag charge are retained by the retail store and not remitted to the county, "the voter approval requirements of article XIII C, section 2 therefore are inapplicable." *Id.* at 1326, 1329-30. *Schmeer* is fatal to Plaintiffs' claim.

Second, Plaintiffs' claim also fails because, even if the Fee were a "tax," it would fall under Proposition 26's "specific benefits exception." *See* Cal. Const., Art. XIII C, § 1(e)(1). Under that exception, fees are not subject to Proposition 26 if they are "imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not

exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." *Id.*; *see, e.g.*, *S. Cal. Edison Co. v. Pub. Util. Comm'n*, 227 Cal.App.4th 172, 200 (2014) (finding this exception applied to a public utility fee "designed to benefit … ratepayers"). That exception clearly applies here, where the Fee is paid only by San Jose gunowners for the sole purpose of providing gun-safety and other programming and services to San Jose gunowners, "members of their household, or [] those with whom they have a close familial or intimate relationship." § 10.32.220(A).

In sum, the Fee is not a tax under Proposition 26, and Plaintiffs' claim should be dismissed.

C. Plaintiffs Fail to State a Claim that the Ordinance Is an Unconstitutional Delegation of the Power the Tax.

Plaintiffs allege in their fourth claim that the Fee requirement violates two California Constitutional provisions (1) providing that "[t]he power to tax may not be surrendered or suspended by grant or contract" (Cal. Const., Art. XIII, § 31), and (2) prohibiting "delegat[ing] to a private person or body power to [] control, appropriate, supervise, or interfere with county or municipal corporation [] money, or property, or to levy taxes or assessments …." (*id.*, Art. XI, § 11). ¶¶ 36-37. Plaintiffs vaguely claim that the Ordinance violates these provisions by "unconstitutionally delegat[ing] some of the City's power to tax and appropriate tax revenues" to a nonprofit organization. ¶ 37. These claims also fail.

First, the Fee is not a "tax" under Article XIII of the Constitution for the reasons argued above, and therefore does not implicate Section 31 of that same Article. But even if that were not the case, Section 31 still would not apply because the Ordinance does not "surrender[] or suspend[]" the City's power to tax "by grant or contract." Cal. Const., Art. XIII, § 31. The Ordinance itself is clearly not a "grant" or a "contract," and Plaintiffs' Complaint does not plausibly allege the existence of any such grant or contract. *Cf.* ¶ 37 (vaguely alleging "[t]he Ordinance" itself somehow violates Section 31); ¶ 8 (speculating, without any factual support, that "defendant City may have already entered into a contract with a designated nonprofit organization"). Nor has there been any surrender or suspension of the City's power to tax because "the controlling consideration" under Section 31 is "whether a disputed contract amounts to a local entity's 'surrender'… of its control of a [taxing] power or municipal function," which "turns on whether this crucial control element has been lost." *Russell City Energy Co.,*

LLC v. City of Hayward, 14 Cal.App.5th 54, 64 (2017). Here, no such control has been lost because the imposition of the Fee and the Fee amount are both controlled entirely by the City Council, per the express terms of the Ordinance. § 10.32.215. The nonprofit organization's only power is to receive and spend Fee monies in accordance with its limited mandate under the Ordinance. § 10.32.220.

Second, the Ordinance also does not violate Article XI, Section 11(a), because that provision only applies to the *state* Legislature, not municipal governments. *See* Cal. Const., Art. XI, § 11(a) ("*The Legislature* may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessment, or perform municipal functions") (emphasis added)); *see* also *County of Riverside v. Superior Court*, 30 Cal.4th 278, 284 (2003), *quoting Adams v. Wolff*, 84 Cal.App.2d 435, 442 (1948) (Section 11(a) "is a restraint on the state Legislature's right to interfere with municipal affairs and in no way regulates what may be done by a municipal corporation by charter provision"). Plaintiffs' claim thus fails because Section 11(a) does not apply to the City.

D. The Complaint Should Be Dismissed Without Leave to Amend.

The City respectfully requests the Complaint be dismissed without leave to amend, in light of futility and serious federalism concerns. The Ninth Circuit's permissive standards for granting leave to amend do not apply here. Rule 15(a) only allows parties to amend pleadings to "assert matters that were overlooked or were unknown *at the time the party interposed the original complaint*." 6 Wright & Miller, FED. PRAC. & PROC. § 1473 (3d ed. 2021). "If jurisdiction is lacking at the outset [of a litigation], the district court has no power to do anything with the case except dismiss." *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Lopez v. Turnage*, 2021 WL 5142070, at *1 (N.D. Cal. Oct. 15, 2021). Moreover, the Ordinance is what it is. The legal defects described in this Motion cannot be cured by adding different factual allegations to the Complaint. "Any amendment would be futile." *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

A practice of allowing plaintiffs to sue legislators before a bill is effective so that the plaintiffs could amend or supplement their pleadings when the bill becomes effective is inappropriate. *Rizzo v.*

Goode, 423 U.S. 362, 380 (1976); *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1275 n.3 (9th Cir. 1981) (citing "federalism concerns" as reason for declining to exercise jurisdiction in litigation involving municipal police department policies); *Westlands Water Distrib. Dist. v. Nat. Res. Defense Council*, 276 F. Supp. 2d 1046, 1051 (E.D. Cal. 2003). The Court should dismiss the Complaint without leave to amend.

VI. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court dismiss Plaintiffs' Complaint under Rules 12(b)(1) and 12(b)(6). Since the Complaint's defects cannot be cured, the City requests that the dismissal be without leave to amend.

Respectfully submitted,

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