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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 REPLY IN SUPPORT OF TO MOTION TO DISMISS COMPLAINT

Date: August 18, 2022
Time: 9:00 a.m.
Courtroom: 3
Judge: Hon. Beth Labson Freeman

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I. INTRODUCTION

The City's elected leaders have discretion to enact reasonable legislation to address the widespread local public health crisis caused by gun-related deaths and injuries. Plaintiffs' criticisms of the Ordinance do nothing to detract from this discretion. In their opposition to the City's Motion to Dismiss ("Motion"), Plaintiffs rely heavily on fifty-year-old, out-of-circuit cases, cite no legal authority to support their arguments, and make arguments based on claims that appear nowhere in their Complaint. *See, e.g.*, Opp'n at 8 (making arguments based on the Declaratory Judgment Act, 28 U.S.C. § 2201(a), which is not part of their Complaint). Ultimately, Plaintiffs fail to show that that their claims are ripe, that they have standing, or that they have plausibly alleged entitlement to relief under any of their four causes of action. Plaintiffs' scattershot attacks on the Ordinance should be rejected. Because there are no facts they could allege to cure their defective claims, the Court should grant the City's Motion without leave to amend.

II. ARGUMENT

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

1. Plaintiffs' Claims Are Not Ripe for Review.

Plaintiffs' claims are unripe for review and subject to dismissal under Rule 12(b)(1) because the Ordinance provides only a framework of a legal regime and defers deciding key aspects of that regime to future legislative action and rulemaking, none of which has yet occurred. Mot. at 8-10; *see also Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (ripeness concerns "are amplified when constitutional considerations are concerned" and require that federal courts only decide "constitutional issues [presented] in clean-cut and concrete form").

Plaintiffs make three arguments in their opposition.

First, they argue their claims *will be* ripe for review by the August 18, 2022 hearing date on this motion based on predictions—which are not alleged in their Complaint—that, by that date, "the City will have filled in the missing dollar amount [i.e., passed a Council resolution setting the amount of the Fee] and payee identity [i.e., designated the nonprofit organization]." Opp'n at 6:23-7:2 (noting the Ordinance establishes as effective date of August 7, 2022). But this runs afoul of the well-settled rule that "[r]ipeness is determined at the time of the filing of the complaint." *See, e.g., Doe v. Aetna, Inc.*, 2016

WL 1028363, at *3 (S.D. Cal. Mar. 15, 2016) (quoting *Forest Glade Homeowners Ass'n v. Allied Mut. Ins. Co.*, 2009 WL 927750, at *2 (W.D. Wash. Mar. 31, 2009)); *accord Brown v. Jacobsen*, 2022 WL 122777, at *2 (D. Mont. Jan. 13, 2022); *Democratic Nat'l Comm. v. Watada*, 198 F. Supp. 2d 1193, 1197 (D. Haw. 2002); *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1062 (D. Ariz. 2001). Moreover, in addition to being unmoored from their Complaint and legally irrelevant, Plaintiffs' predictions are based on nothing more than self-serving assumptions. While the City is working diligently to take these necessary actions before the first possible enforcement date of August 7, 2022, the necessary processes are complex, City officials have limited time and myriad other responsibilities, and ultimately there is no guarantee the required actions will be completed by August 18, 2022.

Second, Plaintiffs seem to argue their claims are ripe just because their suit is brought as a validation action under California Code of Civil Procedure § 860 *et seq.* Opp'n at 7:3-20 (citing two state court actions, neither of which concern ripeness or standing: *Friedland v. City of Long Beach*, 62 Cal. App. 4th 835 (1998), and *United Pac.-Reliance Ins. Co. v. Didomenico*, 173 Cal. App. 3d 673 (1985)). But, as Plaintiffs' briefing indicates, the validation statute is merely a set of procedures that allows an agency to receive a conclusive determination of the legal validity of a regulation or contemplated action that "forever insulates [it] from further attack." Opp'n at 7:5-6. The statute, of course, has no effect on whether the underlying claims are or are not constitutionally or prudentially ripe for purposes of federal jurisdiction.

Careening from that argument to the next, Plaintiffs note that pre-enforcement challenges to certain (criminal) laws are ripe "[1] [w]hen the plaintiff has alleged an intention to engage in a course of conduct … proscribed by a statute, and [2] there exists a credible threat of prosecution thereunder …." *Id.* at 7:21-23 (quoting *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), which notes this standard applies only when "contesting the constitutionality of a criminal statute") (brackets added). Plaintiffs fail to support their view that the legal analysis for a pre-enforcement challenge to a criminal law is applicable here (and there is no indication it should be). Plaintiffs have simply recited the standard for challenging a criminal law (inapplicable here), which requires pre-enforcement challenger to allege they intend to violate the law. Without that alleged intent, Plaintiffs lack standing to challenge the law, since there wouldn't be much likelihood of harm (i.e., arrest/prosecution).

But even assuming *arguendo* that Plaintiffs state the appropriate standard, Plaintiffs fail to satisfy either prong. They have not alleged an intention to engage in a course of conduct proscribed by the Ordinance. *See* ¶¶ 1-3 [alleging only that organizational Plaintiffs' members' "legally own firearms" and "are subject to the [Fee]"]; ¶¶ 4-5 [alleging only that each individual Plaintiff "legally owns a firearm and is subject to the [Fee]"). Nor do they face a "credible threat of prosecution" for violating the Ordinance because the Ordinance does not authorize prosecution. *See* §§ 10.32.240, 10.32.245 (authorizing only civil administrative remedies and impoundment if "allowed by law"). And even if did, a mere "generalized threat of prosecution" does not satisfy Article III's case or controversy requirement; rather, there must be a "genuine threat of imminent prosecution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (cleaned up). Plaintiffs' Complaint contains no allegations pointing to any threat of prosecution whatsoever. In other words, Plaintiffs' own chosen standard for ripeness makes clear their claims are unripe for review.

Third, Plaintiffs argue their claims are ripe because they claim the Fee is unlawful regardless of the amount, and regardless of the nonprofit organization to which it is paid. Opp'n at 8:3-11. This argument ignores certain prudential components of ripeness requiring courts to evaluate, among other things, "the fitness of the issues for judicial decision." *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 1123 (9th Cir. 2022). This requires courts to look at a handful of factors, including whether "the challenged action is final" and whether the claim raises issues that "do not require further factual development." *Id.* "Relevant considerations" include whether the challenged law or action is a "definitive statement" of the relevant government body's position, "whether the action has a direct and immediate effect on the complaining parties," and "whether the action requires immediate compliance with its terms." *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 968 F.3d 738, 752 (9th Cir. 2020) (cleaned up).

Here, even though the Ordinance is scheduled to become effective on August 7, 2022, the Ordinance is in many ways not truly "final" or a "definitive statement" of what the law will be. *Id.* There is still significant work that remains to be done before key aspects of the Ordinance's framework are sufficiently fleshed out to be enforceable. *See* §§ 10.32.215, 10.32.240(B), 10.32.235(A); *see also* Mot. at 7-9. For this reason, the Ordinance cannot also not be said to have "a direct and immediate effect on

the complaining parties" or to "require[] immediate compliance with its terms." *Skyline Wesleyan Church*, 968 F.3d at 752. Plaintiffs' claims are based on speculation about hypothetical future facts and events, rather than the kind of concrete case or controversy needed for Article III jurisdiction.

2. Plaintiffs Lack Article III Standing.

Similarly, the City showed in its Motion (at 10) that Plaintiffs have not alleged that any threatened injury is "certainly impending," as necessary to establish Article III standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("allegations of *possible* future injury are not sufficient" (emphasis in original)). In response, Plaintiffs argue that, under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), they need not wait until they are required to pay the challenged fee, or subject to enforcement for nonpayment, to seek a declaration of their rights. *See* Opp'n at 8:18-24. But Plaintiffs make no claim for relief under—or, indeed, ever mention—the Declaratory Judgment Act in their. Thus, it would be "inappropriate to consider" the Declaratory Judgment Act in ruling on the Motion. *Stallcop v. Kaiser Found. Hosp.*, 820 F.2d 1044, 1050 n.5 (9th Cir. 1987) ("inappropriate to consider" claim raised for first time in response to dispositive motion); *Webb v. Cahlander*, 2015 WL 6531642, at *4 (E.D. Cal. Oct. 28, 2015) (same) (collecting cases).

Plaintiffs also seem to argue that a plaintiff seeking declaratory relief from a federal court need not show any Article III injury. *See* Opp'n at 9:4-6 (arguing it is "not necessary … for plaintiff to have proven that defendants [caused injury]" (quoting *United States v. Fisher Otis Co.*, 496 F.2d 1146, 1151 (10th Cir. 1974) (brackets in Plaintiffs' brief).[1] Plaintiffs are mistaken. "A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III …." *Knapp v. Depuy Synthes Sales Inc.*, 983 F. Supp. 2d 1171, 1176 (E.D. Cal. 2013) (citing *Staacke v. U.S. Sec'y of Labor*, 841 F.2d 278, 280 (9th Cir. 1988)). "The Declaratory Judgement Act does not itself confer federal subject matter jurisdiction, but rather there must be an independent basis for such jurisdiction." *Id.* This requirement is written into the Act itself. 28 U.S.C. § 2201(a). In their opposition, Plaintiffs fail to establish this requisite "independent basis" for Article III jurisdiction, instead arguing

[1] The bracketed "[caused injury]" in Plaintiffs' brief replaces the text "placed landfill or structures within the flowage easement area in the past." *Fisher Otis*, 496 F.2d at 1151.

they have standing under a Declaratory Judgment Act claim they have not made. Opp'n at 8:25-9:12 (citing six cases, all of which arise under the Declaratory Judgment Act and were decided approximately 50 to 80 years ago).

"Plaintiffs have the burden of proof to establish standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Cain v. Porch.com Inc.*, 2020 WL 11571514, at *2 (N.D. Cal. July 23, 2020) (Freeman, J.) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "[S]hould a plaintiff fail to meet his standing burden, the lawsuit must be dismissed under Rule 12(b)(1)." *Id.* (quoting *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1033 (N.D. Cal. 2019)). In their opposition, Plaintiffs fail to meet their burden at the pleading stage. They offer no viable theory of standing, and indeed rely entirely on a Declaratory Judgment Act claim they have not made.

Moreover, in the summation of their argument, Plaintiffs argue they have standing based on the fact that "Plaintiffs ***believe*** the ordinance violates their rights," whereas "[t]he City ***believes***" the opposite. Opp'n at 9:15-20 (emphases added). Plaintiffs cite no legal authority for this novel "competing beliefs" theory of Article III jurisdiction, nor could they. If this is all that were required, Article III standing would be present in *every federal case*. This is precisely the kind of bare, "conclusory allegation[] of law" that the Ninth Circuit has held is "not sufficient to defeat a motion to dismiss." *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998) (citing *In Re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996)).

Plaintiffs' claims should be dismissed for lack of standing under Rule 12(b)(1).

B. Each of Plaintiffs' Claims Should Also Be Dismissed under Rule 12(b)(6).

1. Plaintiffs' Fail to State Compelled Speech or Association Claims under the U.S. or California Constitutions.

In its Motion (at 11-13), the City showed that Plaintiffs' claims under the First Amendment and an analogous state constitutional provision (Cal. Const., Art. I, § 2(a)) fail because those claims are based largely on speculation and conclusory allegations, and fail to satisfy the applicable standard for facial challenges. In response, Plaintiffs appear to abandon their state constitutional claim. *See* Opp'n at 10:14-16 (mentioning it only once and only in the context of arguing that the City misstated the standard applicable to facial challenges under that provision).

Plaintiffs' compelled association claim also receives little mention in their briefing (*see* Opp'n at 10:23-25), and what little mention is there ignores that Plaintiffs will not be forced to support the speech of the designated nonprofit. Whatever message ultimately comes from the nonprofit, Plaintiffs will never lose their ability to "expressly disavow any connection with the message." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (rejecting shopping center's First Amendment challenge to state law requiring it to allow certain expressive activity on its property); *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 65, 69-70 (2006) (rejecting First Amendment compelled-speech and compelled-association challenge to federal law conditioning member law schools' receipt of federal funds on schools allowing military recruiters on campus during "Don't Ask, Don't Tell" policy, reasoning that law did "not sufficiently interfere with any message of the school[s]," did not prevent schools from voicing disapproval of the policy, and ultimately did not violate schools' First Amendment rights "regardless of how repugnant" they considered the recruiters' message).

As for the rest of their First Amendment claim, Plaintiffs rely virtually exclusively on a single case ripped from an entirely different context—i.e., the Supreme Court's public union dues decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). *See* Opp'n at 10-12 (quoting and citing *Janus* nine times). *Janus* concerns whether non-union public employees can be compelled to pay union dues to fund the unions' political lobbying, advertising, litigation, and social and recreational activities, and other activities. *Janus*, 138 S. Ct. at 2459-61, 2480. *Janus*'s holding and reasoning are deeply rooted in the union context. *See, e.g.*, *id*. at 2468 ("State and public section unions may [not] extract agency fees from nonconsenting employees … [u]nless employees clearly and affirmatively consent[.]"). Plaintiffs ignore this and, indeed, fail to cite a single case that has applied *Janus* outside the union context, much less applied *Janus* to strike down a law that is in any way like the Ordinance here.

Plaintiffs' argument culminates with their view that the primary takeaway from *Janus* is that laws "cannot require people to financially subsidize a **private** organization." Opp'n at 12:4-5 (emphasis added); *see also id.* at 12:16-17 ("As *Janus* held, 'Compelling a person to subsidize the speech of other *private* speakers' violates the First Amendment" (quoting 138 S. Ct. at 2464)). But this ignores the City's argument that the purpose of the Fee is not to support private speech but to fund government speech and policy as set forth in the Ordinance. *See* Mot. at 12:1-5, quoting *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 … [that] 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 … exactions binding on protesting parties.").

After the City filed its Motion but before Plaintiffs filed their opposition brief on May 6, the U.S. Supreme Court issued an important decision clarifying its First Amendment government speech doctrine. *See Shurtleff v. City of Boston*, --- S. Ct. ----, 2022 WL 1295700 (May 2, 2022) (commonly referred to as the "Boston flag case"). The Court noted that the key question is "**whether the government intends to speak for itself or to regulate private expression**." *Id.* at *4 (emphasis added). Answering this question requires a "holistic inquiry" that "is driven by a case's context" and "several types of evidence … including: [1] the history of the expression at issue; [2] the public's likely perception as to who (the government or a private person) is speaking; and [3] the extent to which the government has actively shaped or controlled the expression." *Id.* (brackets added). In the context of Boston's "come-one-come-all" program of allowing private organizations to hold events at City Hall plaza and, as part of the event, to hoist their organization's flag on one of the plaza's flag poles, the Court went through the above analysis and held that the private flags hoisted during such events were not government speech, and therefore the City could not engage in viewpoint discrimination regarding what flags could and could not be hoisted. *Id.* at *5-7; *see also id.* at *6 (noting "it is Boston's control over the flags' content and meaning that here is key" and whether "that type of control would indicate that Boston meant to convey the flags' messages").

Here, this analysis indicates that First Amendment government speech is present here. As to the first factor, there is little history in this country, especially at the time of the Founding or passage of the Fourteenth Amendment, of governments or organizations providing gun harm reduction programming and services to private citizens. However, the second and third factors weigh heavily in favor of finding permissible government speech. With respect to the second factor, the public is likely to perceive the programming and services provided by the nonprofit more as government speech by the City than purely private speech by the nonprofit because the programs itself are wholly intended to effectuate the purposes of Ordinance. § 10.32.200; *see also* § 10.32.200 (the programming and services are prescribed by

Ordinance the topics of the programming and services are likewise prescribed by Ordinance), § 10.32.220 (the nonprofit providing the programs and services is selected and subject to removal by the City Manager), § 10.32.235(A) (the nonprofit's funding for the programming and services will come entirely from payments that are required by the City and in an amount set and subject to change by the City). In other words, the nonprofit will be (and widely perceived to be) effectuating the City-mandated Ordinance.

As for the third factor in *Shurtleff*'s government speech analysis, the City actively controls and shapes the expression to a significant extent by prescribing the purposes of the nonprofit's activities (§ 10.32.200), prescribing the precise topics of the nonprofit's programming and services (§ 10.32.220), and by subjecting the nonprofit to regular required reporting, auditing, and a variety of other oversight set forth in the Ordinance (§§ 10.32.220(D), 10.32.235(A)). This is far more than the minimal control exerted by Boston in the *Shurtleff* case, where the Court noted that the only things Boston "maintained control over [was] an event's date and time to avoid conflicts," "the plaza's physical premises, presumably to avoid chaos," and "provid[ing] a hand crank so that groups could rig and raise their chosen flags." 2022 WL 1295700, at *6.

Given the above analysis—and the City's starkly greater control over the nonprofit's activities than Boston's degree of control over the private flag-raising at issue in *Shurtleff*—the Ordinance clearly does not seek to "regulate private expression," but to provide a way for the City to "speak for itself." *Id.* at *4. The City is engaged in government speech, thereby insulating the Ordinance from challenge under the First Amendment. Plaintiffs' argument that the government speech doctrine is "inapposite because San Jose's fee does not go to the government" misses the point entirely. Opp'n at 12:11.

Finally, the City's Motion argued that Plaintiffs' First Amendment facial challenge does not allege the Ordinance would violate the rights of persons subject to the Ordinance in a "large fraction" of cases. *See, e.g.*, Mot. at 11:2-5, 11:16-22. Plaintiffs take issue with that standard (Opp'n at 10:11-18) and are correct that many decisions apply a different standard, requiring a plaintiff to "establish no set of circumstances [] under which the law would be valid show that the law lacks a plainly legitimate sweep," or (in the First Amendment context) that "a substantial number of its applications are unconstitutional, judged in relation to the [law]'s plainly legitimate sweep." *Americans for Prosperity Found. v. Bonta*,

141 S. Ct. 2373, 2387 (2021) (cleaned up and citations omitted); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 455 (2008) (explaining "several reasons" why facial challenges are "disfavored"). But the critical point here is that Plaintiffs do not engage meaningfully with any of these standards, nor do they argue their allegations satisfy any of them.

In sum, Plaintiffs fail to plausibly allege the Fee requirement will compel them to engage in speech or association with which they disagree in violation of the First Amendment or the California Constitution's free speech clause. These claims should be dismissed.

2. Plaintiffs Fail to State an "Unconstitutional Conditions" Claim.

Plaintiffs' second cause of action fails because the Ordinance does not impermissibly burden their Second Amendment rights, and because California Constitution's "fundamental rights" clause (art. I, § 1) does not protect a right to keep and bear arms. The City has set forth significant authority and analysis in support of its Motion to dismiss this claim. *See* Mot. at 13-17.

In their opposition, Plaintiffs withhold any substantive Second Amendment analysis, including failing to discuss their position on the burden the Ordinance imposes on the right to keep and bear arms, the appropriate level of scrutiny, or any of the other required aspects of this constitutional inquiry. Plaintiffs make only a passing reference to the state constitutional component of their claim. *See* Opp'n at 13:24-26 (quoting a reference in the Complaint to Plaintiffs' "rights under the United States and California constitutions"). The apparent suggestion is that bringing their case as a validation action somehow exempts it from constitutional scrutiny is nonsense.

Rather than engage in the required analysis, Plaintiffs obscure it, arguing the City misunderstands its "unconstitutional conditions" cause of action. Plaintiffs contend they seek to invalidate the Ordinance's Fee requirement not because it impermissibly burdens Second Amendment rights, but because the Fee is (according to Plaintiffs) nothing more than "a fee for the exercise of a fundamental constitutional right." Opp'n at 13:21-22; *see also id.* at 15:3-4 (calling the Fee "a naked city-charged price for exercising a federal constitutional right"). This circular reasoning is difficult to follow. Plaintiffs admit they are seeking an order from the Court invalidating the Ordinance under the Second Amendment (Opp'n at 8-9), yet Plaintiffs present nothing to the Court justifying their position that the Ordinance imposes an unconstitutional burden on their Second Amendment right to bear arms.

The case law cited by Plaintiffs derives primarily from one takings case, and Plaintiffs fail to cite a single case where the unconstitutional conditions doctrine has been applied to strike down a gun-related law. *See id.* at 14:3-26 (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013); *Robbins v. Superior Court*, 38 Cal.3d 199 (1985); *Comm. to Def. Reprod. Rights v. Myers*, 29 Cal.3d 252 (1981); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Frost v. R.R. Comm'n. of Cal.*, 271 U.S. 583 (1926)). More importantly, Plaintiffs flatly mischaracterize the Fee as a charge for nothing in return, ignoring that the Fee **provides those who pay it with access to programming and services** that would not otherwise exist. The City Council determined, in its reasonable legislative judgment, that these services should be provided to help address the deadly serious issue of gun-related harm in the City of San Jose. § 10.32.220.

The Court should dismiss Plaintiffs' second claim for the dearth of necessary legal analysis alone. As the City has already laid out, the Ordinance does not impermissibly burden the Second Amendment. *See* Mot. at 13-17 (citing *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017); *Heller v. District of Columbia*, 801 F.3d 264, 278 (D.C. Cir. 2015) ("*Heller II*"); *Kwong v. Bloomberg*, 723 F.3d 160, 161, 167 (2d Cir. 2013), *cert denied*, 134 S. Ct. 2696 (2014)).

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

In its Motion (at 18-19), the City showed Plaintiffs' third cause of action fails for two reasons. First, that the Fee is not a "tax" under article XIII C of the California Constitution, as amended by Proposition 26 ("Proposition 26"), relying for part of its reasoning on *Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310 (2013), which held that a required fee is not a "tax" under the state constitution if it is never paid or remitted to the government. Second, even if the Fee were a "tax," it still is not subject to Proposition 26 because it falls under the "specific benefits" exception at article XIII C, § 1(e)(1).

Taking each of those arguments in turn, Plaintiffs first attack *Schmeer*, arguing it reached the wrong result, but without citing any legal authority supporting their position. *See* Opp'n at 15:14-16:8 (asserting weakly that *Schmeer* "cited no precedent" for its interpretation of article XIII C and that it might one day "be taken up by the California Supreme Court"). Plaintiffs' vague insinuation that the Court of Appeals' unanimous decision in *Schmeer* was a rogue exercise of judicial power is belied by

even a cursory review of the panel's published opinion, which contains a thorough legal analysis of Proposition 26's historical context and plain language. *See* 213 Cal.App.4th at 1317-26. Moreover, Plaintiffs' negative view of *Schmeer* is not shared by California courts, which have repeatedly cited and reaffirmed *Schmeer*'s core holding—a fact that should come as no surprise to lead Plaintiff HJTA, who were on the losing end of one such recent decision. *See Howard Jarvis Taxpayers Ass'n v. Bay Area Toll Auth.*, 51 Cal. App. 5th 435, 452 (2020) (rejecting HJTA's argument regarding *Schmeer*).

Plaintiffs next attempt to distinguish *Schmeer* as limited to government-mandated fees paid by consumers as part of a transaction with a retailer or other entity with no connection to the government. *See* Opp'n at 16. But the *Schmeer* court never makes this distinction, and Plaintiffs point to no case that does. Plaintiffs' attempt to distinguish *Schmeer* on this basis is also unpersuasive in light of *Schmeer's* straight-forward reasoning, which is grounded in the plain meaning of the word "tax." *See* 213 Cal.App.4th at 1326. Additionally, Plaintiffs' improper discussion of the contents of a *Slate* article purporting to quote San Jose May Sam Licardo, which is entirely outside their Complaint, and cites statements made before the Ordinance was even in final form, does nothing to advance their argument on this motion to dismiss. *See* Opp'n at 16:17-27.

Finally, Plaintiffs argue that the "specific benefits" exception under article XIII C, § 1(e)(1), does not apply to the Fee. *Id.* at 17:6-18. Putting aside that Plaintiffs misunderstand the Ordinance's plain terms (i.e., services are not being provided to only those who "request" them), that exception provides that a "tax" under Proposition 26 does not include: "A charge 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**." Cal. Const., Art. XIII C, § 1(e)(1) (emphases added). Plaintiffs argue that this exception does not apply if a single person who pays the Fee chooses not to use the nonprofit's voluntary services because (according to Plaintiffs) the exception "exempts a fee only if **everyone** not 'directly' receiving the 'specific benefit' is 'not charged.'" Opp'n at 17:15-18 (quoting § 1(e)(1)) (emphasis added). In other words, Plaintiffs argue that the Fee does not satisfy the "benefit conferred" prong of the exception.

This is wrong for two reasons. First, being conferred *access* to the designated nonprofit's services is a "benefit." Second, Plaintiffs entirely ignore the "privilege granted" prong of the exception, which is

precisely what the Fee does—it grants gunowners the privilege of using the designated nonprofit's programming and services if they choose to do so. *Cf. City of Buenaventura v. United Water Conservation Dist.*, 3 Cal.5th 1191, 1211 (2017) ("In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted") (quoting *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal.4th 866, 874 (1997)). In short, Plaintiffs' conclusory assertions are unsupported and should be rejected.

Plaintiffs have failed articulate a plausible claim that the Fee is a "tax" in violation of the California Constitution.

4. Plaintiffs Fail to State a Claim that the Ordinance Delegates the City's Power to Tax in Violation of Articles XI or XIII of the California Constitution.

Finally, with respect to Plaintiffs' last cause of action, the City showed in its Motion (at 19-20) that Plaintiffs fail to state a claim that the Ordinance is an unconstitutional delegation of the City's power to tax under the California Constitution, article XI, § 11, and article XIII, § 31. In response, Plaintiffs concede that they have no claim with respect to the first basis for their claim under article XI, § 11. *See* Opp'n at 18, fn.3 ("The City correctly notes that article XI, section 11 applies only to the State Legislature, not the City."). The parties therefore agree that this aspect of the claim must be dismissed.

As for the claim's other basis—article XIII, § 31—Plaintiffs begin by agreeing with the City that this claim necessarily fails if their third cause of action (i.e., whether the Fee is a "tax") fails. *See* Opp'n at 17:26-27 ("The City is correct that plaintiffs' fourth cause of action hinges on the success of their third cause of action."). If, however, Plaintiffs' third cause of action survives the City's motion to dismiss under Rules 12(b)(1) *and* 12(b)(6), then their fourth cause of action only survives if Plaintiffs make the further, plausible allegation that the Ordinance unconstitutionally delegates the City's power to tax. According to Plaintiffs, the City's power to tax under article XIII, § 31, includes two subsidiary powers that the Ordinance unconstitutionally delegates: (1) the power "to collect taxes" and (2) the power to "appropriate tax revenues." Opp'n at 18 (quoting ¶¶ 34, 37).[2] Neither of these claims have merit.

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[2] Plaintiffs also fleetingly assert in their opposition that the Ordinance unconstitutionally "surrender[s]" the City's "power to … *spend* its revenue" (Opp'n at 20:1-2), but this claim appears

First, Plaintiffs cite **no legal authority** for their assertions that the two above categories are part of the power to tax under article XIII, § 31. Bald, unsupported assertions of law are insufficient for a plaintiff to carry its burden on a motion to dismiss. *See Pareto v. F.D.I.C.*, 139 F.3d at 699 ("conclusory allegations of law … are not sufficient to defeat a motion to dismiss"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (plaintiff has an "obligation to provide the grounds of his entitlement to relief" (cleaned up)).

Second, while the power to tax presumably includes the power to "collect" unpaid taxes, the Ordinance delegates no such a power to the nonprofit organization. Rather, the Ordinance expressly authorizes the nonprofit only to "expend" or "spend" Fee monies that it receives (§ 10.32.215), not to collect unpaid monies. Instead, the Ordinance expressly leaves all "enforcement" for noncompliance and the "collect[ion]" of unpaid fees to the City. §§ 10.32.240, 10.32.250. The City has also not delegated the power to appropriate tax revenues to the nonprofit for substantially the same reasons. *Id*.

Last, and most importantly, the City has not lost control of its "taxing power or municipal function" because the imposition of the Fee and the Fee amount are both controlled entirely by the City Council, which reasonably decided to exercise its legislative powers by making the Fee payable to the designated nonprofit. *See Russell*, 14 Cal. App. 5th at 64; *see also, Schmeer*, 213 Cal. App. 4th at 1328. In a failed attempt to find another basis for arguing the Ordinance violates § 31, Plaintiffs also conflate "delegation" with "surrendered." *Compare* Opp'n at 17:25, 18:3, 20:3 (use of "delegate"), *with id.* at 19:19, 19:22-24 (use of "surrender"). Because "Section 31 does not define the terms 'surrendered' or 'suspended,'" courts have defined them based on their respective common meanings of "to give up completely or agree to forgo especially in favor of another" and "temporarily debarred, inactive, inoperative and held in abeyance." *Russell City Energy Co., LLC v. City of Hayward*, 14 Cal.App.5th 54, 64 (2017). The terms, as used in Section 31, simply do not contemplate a charge imposed by a local government and required to be to paid to another entity, which is the issue at hand. *See Schmeer*, 213

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nowhere in their Complaint (*see* ¶¶ 32-27). Nor is it plausible that merely *spending* tax revenues—an activity engaged in daily by every administrative agency and state contractor and grantee—is an exercise of the nondelegable power to tax.

Cal. App. 4th at 1328. Accordingly, Plaintiffs' claim falls flat for failure to plausibly allege that the City has surrendered or suspended any of its power.

Accordingly, Plaintiffs' fourth claim should also be dismissed.

III. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court grant its Motion to Dismiss the 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.

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Respectfully submitted,

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