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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

11 NATIONAL ASSN. FOR GUN RIGHTS,
12 *et al.*,

13 Plaintiffs

14 v.

15 CITY OF SAN JOSE, *et al.*,

16 Defendants

No. 22-cv-00501-BLF

17 HOWARD JARVIS TAXPAYERS ASSN.,
18 *et al.*,

19 Plaintiffs

20 v.

21 CITY OF SAN JOSE,

22 Defendant

No. 22-cv-02365-BLF

**OPPOSITION OF PLAINTIFFS HOWARD
JARVIS TAXPAYERS ASSN., *et al.* TO
MOTION TO DISMISS COMPLAINT**

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 20 [https://slate.com/news-and-politics/2022/02/san-jose-
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1 STATEMENT OF FACTS

2 Plaintiffs adopt the Factual Background contained in Plaintiff’s Response to Defen-
3 dants’ Motion to Dismiss Plaintiffs’ First Amended Complaint, filed by National Association
4 for Gun Rights on April 22, 2022 in Case No. 22-cv-00501-BLF, at pages 8-15.¹

5 STATEMENT OF ISSUES

6 (1) Whether this case is ripe for review; (2) Whether plaintiffs have standing to sue;
7 (3) Whether plaintiffs’ complaint adequately pleads claims that San Jose Ordinance No.
8 30716 (“Ordinance”), which requires gun owners in the city to pay an annual fee to a
9 private nonprofit organization designated by the City Manager: (a) violates plaintiffs’ rights
10 of free speech and association; (b) imposes an unconstitutional local condition on the
11 exercise of a federal constitutional right; (c) imposes a tax without the voter approval
12 required by the California Constitution; and (d) impermissibly delegates to a private entity
13 some of the government’s power to tax.

14 ARGUMENT

15 I

16 THIS CONTROVERSY IS RIPE FOR REVIEW

17 Defendant City of San Jose (“City”) asks this Court to dismiss plaintiffs’ complaint
18 because, although “[t]he Ordinance was enacted in February 2022” (City’s Motion to
19 Dismiss Plaintiffs’ Complaint (“Motion”) at 18:8), the effective date when the City will begin
20 enforcement is not until August 7, 2022, and the City still needs to set the exact amount
21 of the challenged Gun Harm Reduction Fee and designate the private nonprofit organiza-
22 tion to which the fee must be paid. (Motion at 18:9-12.)

23 The August 7th date on which enforcement begins, and by which the City will have
24 filled in the missing dollar amount and payee identity, is a date that will have passed by the
25 time the City’s motion is heard. In other words, the City admits that, even under its theory

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27 ¹ For convenience, all pleading citations refer to the PDF page number.

1 of ripeness, this controversy will be ripe by the time its motion to dismiss for unripeness is
2 heard. That alone is grounds for denying the motion.

3 However, the City’s theory is also unsound. As the Court knows, this case was
4 removed from state court. Plaintiffs framed their state court lawsuit as a validation action,
5 a type of declaratory relief action which, if the government prevails, forever insulates the
6 government’s legislation from further attack. (Cal. Code of Civ. Proc. § 870.) Validation
7 actions and declaratory relief actions are commonly used to determine the validity of
8 legislation *before* it takes effect or is enforced. (*United Pacific-Reliance Ins. Co. v.*
9 *Didomenico* (1985) 173 Cal.App.3d 673, 677 [“The cause of action for declaratory relief
10 may accrue, in the sense that an action may be maintained, before any breach occurs.
11 *This is the very purpose of the remedy.*”].)²

12 In fact, the most common use of the validation statute is to obtain a judicial
13 declaration of the validity of an agency’s resolution to issue bonds, *before* the bonds are
14 actually issued. (Cal. Code of Civ. Proc. § 864; *Friedland v. City of Long Beach* (1998) 62
15 Cal.App.4th 835, 842 [“In its most common and practical application, the validating
16 proceeding is used to secure a judicial determination that proceedings by a local
17 government entity, such as the issuance of municipal bonds and the resolution or
18 ordinance authorizing the bonds, are valid, legal, and binding. Assurance as to the legality
19 of the proceedings surrounding the issuance of municipal bonds is essential *before*
20 underwriters will purchase bonds for resale to the public.”].)

21 The same is true in federal court. “When the plaintiff has alleged an intention to
22 engage in a course of conduct arguably affected with a constitutional interest, but pro-
23 scribed by a statute, and there exists a credible threat of prosecution thereunder, he should
24 not be required to await and undergo...prosecution as a sole means of seeking relief.”
25 (*Babbitt v. United Farm Workers Nat’l Union* (1979) 442 U.S. 289, 298.) It is enough that

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27 ² Unless noted otherwise, all emphasis is added.

1 plaintiffs face “an actual and well-founded fear that the challenged statute will be enforced.”
2 (*Libertarian Party of L.A. County v. Bowen* (9th Cir. 2013) 709 F.3d 867, 870.)

3 The City, in its motion to dismiss, has not asserted that the challenged ordinance
4 might be repealed, but only that the dollar amount of the fee and the identity of the private
5 payee have not been finalized. Under the theories pled in plaintiffs’ complaint, however,
6 it won’t matter whether the fee is \$25 or \$125. It won’t matter whether the private payee
7 is Moms For Gun Sense or the National Rifle Association. Plaintiffs have alleged that an
8 unvoted, government-compelled contribution of any amount to a private organization
9 designated by the government violates plaintiffs’ rights of free speech and association, their
10 right against conditioning constitutional guarantees, their right to vote on taxes, and the
11 prohibition against government delegating its taxing power.

12 II

13 PLAINTIFFS HAVE STANDING

14 The City argues that plaintiffs lack Article III standing because they have not yet
15 been harmed by the challenged ordinance, and until they are harmed, their suit seeks an
16 impermissible advisory opinion based on “conjectural and hypothetical’ future harm.”
17 (Motion at 20:15.)

18 Plaintiffs need not wait until they are required to pay the challenged fee, or punished
19 for nonpayment, to seek a declaration of their rights when, as here, they allege an
20 imminent denial of their constitutional rights by a governmental agency that claims they
21 have no such rights. “In a case of actual controversy within its jurisdiction ... any court of
22 the United States, upon the filing of an appropriate pleading, may declare the rights and
23 other legal relations of any interested party seeking such declaration, whether or not further
24 relief is or could be sought.” (28 U.S.C. § 2201(a).)

25 “The essential distinction between a declaratory judgment action and an action
26 seeking other relief is that in the former no actual wrong need have been committed or loss
27 have occurred in order to sustain the action.” (*United States v. Fisher-Otis Co.* (10th Cir.

1 1974) 496 F.2d 1146, 1151; *Johnson v. Interstate Transit Lines* (10th Cir. 1947) 163 F.2d
2 125.) “The purpose of the Declaratory Judgment Act is to settle actual controversies
3 *before* they ripen into violations of law or a breach of duty.” (*Fisher-Otis*, 496 F.2d at 1151;
4 *Scott-Burr Stores Corp. v. Wilcox* (5th Cir. 1952) 194 F.2d 989.) “It is not necessary for the
5 maintenance of this action, therefore, for plaintiff to have proven that defendants [caused
6 injury].” (*Fisher-Otis*, 496 F.2d at 1151.)

7 The test for determining whether there is an actual controversy was stated in
8 *Maryland Casualty Co. v. Pacific Coal & Oil Co.* (1941) 312 U.S. 270, 273: “Basically, the
9 question in each case is whether ... there is a substantial controversy, between parties
10 having adverse legal interests, of sufficient immediacy and reality to warrant the issuance
11 of a declaratory judgment.” (Accord, *Golden v. Zwickler* (1969) 394 U.S. 103, 108; *Lake*
12 *Carriers’ Assn. v. MacMullan* (1972) 406 U.S. 498, 506.) Such a controversy is presented
13 here where the City has enacted an ordinance that, beginning August 7th, will require gun
14 owners to pay an unvoted fee of some amount to a private nonprofit organization that the
15 City designates, or else face a fine and confiscation of their firearms. Plaintiffs believe the
16 ordinance violates their rights of free speech and association, their right against
17 conditioning constitutional guarantees, their right to vote on taxes, and the prohibition
18 against government delegating its taxing power. The City believes that plaintiffs have no
19 such rights as against its ordinance. An actual controversy exists, giving plaintiffs standing
20 to seek relief.

21 III

22 THE COMPLAINT ADEQUATELY PLEADS 23 A VIOLATION OF PLAINTIFFS’ RIGHTS AGAINST 24 COMPELLED SPEECH AND ASSOCIATION

25 The City’s attack on plaintiffs’ First Amendment claim, like its first two theories, is
26 based on the fact that the private nonprofit organization has yet to be designated. Until
27 that happens, the City argues, plaintiffs are merely speculating that they will disagree with
the organization’s message. In the City’s words, “Plaintiffs’ first cause of action ... are [sic]

1 based largely on speculation that Plaintiffs and a large fraction of San Jose gunowners will
2 'disagree with the message' of a yet-to-be-designated nonprofit with unknown leadership."
3 (Motion at 21:16.) "Plaintiffs allege no facts to make plausible their fear that they and a
4 large fraction of San Jose gunowners will disagree with the yet-to-be-designated nonprofit."
5 (Motion at 21:21.) "Plaintiffs fail to specify what the nonprofit's 'message' might be or what
6 might be objectionable about it." (Motion at 22:19.) "Plaintiffs appear to fear that the
7 nonprofit will express unspecified anti-gun views." (Motion at 22:20.) "Ultimately, Plaintiffs
8 have not plausibly alleged the Fee requirement will compel them and a large fraction of
9 San Jose gunowners to engage in speech and association with which they do not agree."
10 (Motion at 22:24.)

11 First, the City is mistaken in its belief that the First Amendment cannot be violated
12 unless "a large fraction" of the population is affected. While free speech and association
13 are rights that a group can possess, they are mainly personal, individual rights. (*De Jonge*
14 *v. Oregon* (1937) 299 U.S. 353, 365-66.) California's counterpart is even clearer on this
15 point because it guarantees the right of "every person" to freely speak, rather than phrasing
16 it as a constraint on government as does the First Amendment. (Cal. Const., art. I, § 2.)
17 The City therefore is not free to take away the free speech and association rights of a few
18 citizens so long as "a large fraction" of the population is not affected.

19 Second, the City is mistaken in its belief that the First Amendment cannot be
20 violated unless the speech and association compelled by the City turns out to be
21 objectionable to plaintiffs. "We have held time and again that freedom of speech 'includes
22 both the right to speak freely *and the right to refrain from speaking at all.*' [Citations.]"
23 (*Janus v. AFSCME Council 31* (2018) 138 S.Ct. 2448, 2463.) Likewise, "[f]reedom of
24 association ... plainly presupposes a *freedom not to associate.*" (*Roberts v. United States*
25 *Jaycees* (1984) 468 U.S. 609, 623.) The right to refrain from speaking or associating
26 includes the right against compelled financial support of someone else's message or
27

1 group. (*Janus*, 138 S.Ct. at 2464 [“Compelling a person to subsidize the speech of other
2 private speakers raises similar First Amendment concerns”].)

3 In *Janus v. AFSCME Council 31*, a state law required employees in a collective
4 bargaining unit who opted out of union membership to nonetheless pay an “agency fee”
5 to the union, *i.e.*, a percentage of full union dues, to support the union’s existence and
6 collective bargaining activities, but not its political or ideological advocacy. (*Janus*, 138
7 S.Ct. at 2456.) The plaintiff, a state employee, objected in general to subsidizing the
8 union, and objected to the union engaging in collective bargaining when the state was
9 facing a budget shortfall. (*Id.* at 2461.) The state attorney general and the lawyers for the
10 union argued that “agency fees are needed to prevent nonmembers from enjoying the
11 benefits of union representation without shouldering the costs.” (*Id.* at 2466.) The plaintiff
12 argued that “he is not a free rider on a bus headed for a destination that he wishes to reach
13 but is more like a person shanghaied for an unwanted voyage.” (*Id.*) The Court reasoned,
14 “[w]hichever description fits the majority of public employees who would not subsidize a
15 union if given the option, avoiding free riders is not a compelling interest” that would justify
16 the mandatory fee. (*Id.*) The Court found the fee unconstitutional, adding an observation
17 that exactly fits the case at bar:

18 “To hold otherwise ... would have startling consequences. Many private
19 groups speak out with the objective of obtaining government action that will
20 have the effect of benefitting nonmembers. May all those who are thought
21 to benefit from such efforts be compelled to subsidize this speech? ... In
22 simple terms, the First Amendment does not permit the government to
23 compel a person to pay for another party’s speech just because the
24 government thinks that the speech furthers the interests of the person who
25 does not want to pay.” (*Janus*, 138 S.Ct. at 2467.)

26 Here, the City of San Jose plans to find or form a private nonprofit organization that
27 will offer education, training, counseling, intervention or treatment services that it believes

1 will benefit or further the interests of city gun owners. (S.J. Muni. Code § 10.32.220(A).)
2 Aside from the unfairness of forcing many properly trained, mentally stable gun owners to
3 pay for services that they do not need and will not use, the Supreme Court in *Janus* held
4 such fees unconstitutional. The City cannot require people to financially subsidize a private
5 organization.

6 The City attempts to defend its fee by citing cases that uphold the compelled
7 exaction of taxes to fund government operations even though governing authorities often
8 take actions, adopt policies, or make statements that some taxpayers find objectionable.
9 (E.g., *Bd. of Regents of the Univ. of Wis. v. Southworth* (2000) 529 U.S. 217; *R.J.*
10 *Reynolds Tobacco Co. v. Shewry* (9th Cir. 2005) 423 F.3d 906.)

11 These cases are inapposite because San Jose’s fee does not go to the government.
12 Rather, San Jose gun owners must pay the fee directly to the designated private
13 organization (S.J. Muni. Code § 10.32.215), whose expenditure of fee revenue is not
14 government-controlled. (*Id.*, §§ 10.32.205 [“No City official or employee shall sit on the
15 board”], 10.32.220(C) [“the City shall not specifically direct how the monies from the Gun
16 Harm Reduction Fee are expended”].) As *Janus* held, “Compelling a person to subsidize
17 the speech of other *private* speakers” violates the First Amendment. (138 S.Ct. at 2464.)

18 The complaint adequately pleads a violation of plaintiffs’ individual rights against
19 compelled speech and association through San Jose’s ordinance requiring them to
20 financially subsidize the mission of a government-designated private organization or else
21 suffer fines and the confiscation of their firearms. The City’s motion to dismiss plaintiffs’
22 complaint should be denied.

23 IV

24 THE CITY MISREPRESENTS PLAINTIFFS’ 25 SECOND CAUSE OF ACTION, AND PRESENTS 26 NO GROUNDS FOR DISMISSING THEIR TRUE CLAIM

27 A “straw man” is a fictitious argument erected for the purpose of defeating *it* and
claiming victory, while sidestepping your opponent’s true position. Whether deliberately

1 or not, the City has erected a straw man by attributing to plaintiffs a legal theory they have
2 not asserted.

3 Plaintiffs in this case (Case No. 22-cv-02365-BLF) are three taxpayer organizations.
4 Unlike the gun rights groups represented in the other two lawsuits, the plaintiff
5 organizations here are not advocates for the Second Amendment, and their membership
6 presumably includes many people who support stricter gun control. That is one of the
7 reasons that plaintiffs' complaint does *not* attack the provisions in San Jose's ordinance
8 requiring gun owners to secure and maintain liability insurance. (See Complaint, par. 10.)
9 Plaintiffs here challenge only the City's novel "fee," which is made payable directly to a
10 nonprofit organization in hopes of evading California's "Right to Vote on Taxes Act." (Cal.
11 Const., art. XIII C.)

12 One of the things plaintiffs find detestable about the City's fee is that the City
13 justifies it as a *regulatory* fee, exempt from California's constitutional definition of a "tax"
14 requiring voter approval (art. XIII C, § 1(e)). (S.J. Muni. Code §§ 10.32.200(A) ["This Part
15 is passed and adopted in the exercise of the *police power* of the City"], 10.32.235(A) ["The
16 City Manager is authorized to promulgate all *regulations* necessary to implement the
17 requirements and fulfill the policies of this Part"].) *Yet the only thing the fee provision*
18 *requires from gun owners is payment of the fee.*

19 Plaintiffs do not contend that firearms cannot be regulated, which is the straw man
20 argument that the City attributes to plaintiffs. Rather, plaintiffs contend that the City
21 cannot, under the guise of regulating firearms, simply charge a fee for the exercise of a
22 fundamental constitutional right.

23 Plaintiffs' second cause of action is titled "Unconstitutional Condition." (Complaint
24 at 5:25.) It alleges that gun-owning members of the plaintiff organizations "wish to continue
25 exercising their rights under the United States and California constitutions to protect their
26 property and personal safety by keeping and bearing arms. However, the Ordinance has
27 placed a condition on the continued exercise of those rights: any gun owner who fails to

1 pay the required fee to the designated private organization may be forced to surrender his
2 firearms to the City.” (Complaint at 6:5.)

3 The gist of the unconstitutional conditions doctrine is that, where the constitution
4 prohibits government from directly ordering people to do something, the government may
5 not indirectly coerce them to do it by threatening the loss of some other right. (*Koontz v.*
6 *St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595, 612 [“A predicate for any unconsti-
7 tutional conditions claim is that the government could not have constitutionally ordered the
8 person asserting the claim to do what it attempted to pressure that person into doing”].)

9 In *Koontz*, a property owner applied for a permit to develop part of a 15-acre
10 undeveloped parcel, much of which was wetlands. The owner offered to build on only the
11 3.7 acres that were not wetlands, and to dedicate the rest to the local management district
12 as a conservation easement. The district, however, demanded that the owner dedicate 14
13 acres and build on only 1 acre, or instead pay for improvements to district-owned wetlands
14 elsewhere. The owner sued. The district argued that, even if the demand for 14 acres
15 constituted a “taking” of property under the Fifth Amendment, the district offered the owner
16 a constitutional alternative – to pay money. (570 U.S. at 611.) The Court rejected the
17 district’s defense. It held that, if the district could not constitutionally order the applicant
18 to surrender the extra 2.7 acres, then neither could it offer the “alternative” of paying money
19 to keep the 2.7 acres. (570 U.S. at 611-612.)

20 Other cases have similarly held. (See, e.g., *Robbins v. Superior Court* (1985) 38
21 Cal.3d 199 [conditioning right of privacy on waiver of public assistance funds]; *Committee*
22 *to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252 [conditioning right of
23 abortion on waiver of public assistance funds]; *Murdock v. Pennsylvania* (1943) 319 U.S.
24 105 [conditioning right to distribute religious literature on payment of a recurring license
25 fee]; *Frost & Frost Trucking Co. v. R.R. Com. of Cal.* (1926) 271 U.S. 583 [conditioning
26 right to use public highways on payment of a state licensing fee].)

27

1 Here, the City is conditioning the right to keep and bear arms upon the payment of
2 an annual city fee. The City does not purport to charge the fee to recover any public cost
3 of regulating the payers. It is a naked city-charged price for exercising a federal constitu-
4 tional right. And if the price is not paid, the City will take that right away by confiscating the
5 owner's firearms. (S.J. Muni. Code § 10.32.245). Worse yet, the City is requiring gun
6 owners to choose *between* constitutional rights. Gun owners can exercise their rights
7 against compelled speech and association *or* they can exercise their right to keep and bear
8 arms, but they cannot do both. They must choose.

9 Plaintiffs have adequately pled a claim against the City for imposing an unconstitu-
10 tional condition. The City's motion to dismiss plaintiffs' complaint should be denied.

11 V

12 THE COMPLAINT ADEQUATELY PLEADS
13 A VIOLATION OF CALIFORNIA'S
14 RIGHT TO VOTE ON TAXES

15 The City's argument for dismissing plaintiffs' third cause of action rests entirely on
16 one case, *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310. *Schmeer* held
17 that a local ordinance barring grocers from furnishing disposable plastic bags to their
18 customers, and requiring the grocers to charge and keep ten cents for each paper bag
19 requested by a customer, did not impose a "tax" that required voter approval as that term
20 is used in article XIII C, sections 1 and 2 of the California Constitution.

21 The California Constitution defines a "tax" as "any levy, charge, or exaction of any
22 kind imposed by a local government." (Cal. Const., art. XIII C, § 1(e).) The *Schmeer* court
23 admitted that the bag fee was *imposed* by a local government, and that article XIII C "does
24 not explicitly state that the levy, charge or exaction must be *payable* to a local government."
25 (*Schmeer*, 213 Cal.App.4th at 1327.) Nevertheless, the court concluded, "[t]he term 'tax'
26 in ordinary usage refers to a compulsory payment made to the government or remitted to
27 the government." The *Schmeer* court cited no precedent for this interpretation of article
XIII C.

1 As stated earlier, this case was removed from state court by defendant City.
2 Plaintiffs' complaint was drafted in hopes that, due to the high profile of this case, it would
3 eventually be taken up by the California Supreme Court where, in that court, the proper
4 interpretation of article XIII C would be a question of first impression. As the California
5 Supreme has said, until it reviews an issue, "the last word on the subject has not been
6 spoken." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 817;
7 *Hill v. Nat'l Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 59 (dissent) ["the issue could not
8 be considered settled until this court had spoken"].)

9 However, even in this Court, plaintiffs believe that *Schmeer* is easily distinguished
10 from the case at bar. *Schmeer* ruled it was not a tax when commercial retailers with no
11 connection to the government were required to collect a ten cent payment for a ten cent
12 product, and only from persons who purchased the product. Here, however, the City plans
13 to form its own nonprofit organization, run by hand-picked people it will install, to carry out
14 an agenda that the City codified in its ordinance, and to fund that organization's mission
15 through an annual fee that every gun owner must pay whether or not he receives anything
16 in return.

17 In a recent news article, San Jose Mayor Sam Liccardo sat down with reporter Mary
18 Harris for a question and answer session. Ms. Harris asked, "The \$25 fee, what will that
19 go toward? Who decides what it goes toward?" Mayor Liccardo answered, "*We're forming*
20 a 501(c)(3) foundation, which is going to receive the dollars, and the board, which will be
21 comprised of a host of folks, including, for example, Stanford professors, an epidemiologist
22 who has been focused on gun harm, and nonprofit experts who understand domestic
23 violence prevention programs, suicide prevention. *We've invited* at least one member of
24 a gun group [who] has actually joined this effort to create this nonprofit ... helping *us* to
25 understand, how do *we* best communicate." (Mary Harris, "San Jose's New Gun Law Is
26 the First of Its Kind," Feb. 3, 2022, [https://slate.com/news-and-politics/2022/02/san-jose-
27 gun-law-mayor-sam-liccardo-interview.html](https://slate.com/news-and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html).)

1 Because of the sharply different facts of this case, where the City is forming the
2 nonprofit that will receive the money, choosing its board, and framing its agenda according
3 to city goals, and where every gun owner must pay the “fee” to the nonprofit, every year,
4 whether or not he requests or receives any services from the nonprofit, there is a much
5 stronger argument than in *Schmeer* that this exaction is a tax.

6 The City also argues that, “even if the Fee were a ‘tax,’ it would fall under
7 Proposition 26’s ‘specific benefits exception.’” (Motion at 28:24.) The City is referring to
8 article XIII C, section 1(e)(1), which provides that a fee is not a tax if it is “imposed for a
9 *specific* benefit conferred or privilege granted *directly* to the payor that is not provided to
10 those not charged, and which does not exceed the reasonable costs to the local
11 government of conferring the benefit or granting the privilege.”

12 The City’s motion, however, repeatedly asserts that its nonprofit organization will
13 provide programs and services only to those persons who voluntarily request them.
14 (Motion at 12:11; 14:4; 15:7; 19:14; 22:20 [“Plaintiffs appear to fear that the nonprofit will
15 express unspecified anti-gun views in providing *entirely voluntary* services”].) If services
16 are provided only if voluntarily requested, then a fee imposed every year on every gun
17 owner obviously fails to satisfy article XIII C, section 1(e)(1) which exempts a fee only if
18 everyone not “directly” receiving the “specific benefit” is “*not charged*.”

19 Since section 1(e)(1) is inapplicable and *Schmeer* is distinguishable, plaintiffs are
20 entitled to their day in court. They have adequately pled a claim that the City’s fee is
21 actually a tax that needs voter approval under California’s state constitution. The City’s
22 motion to dismiss plaintiffs’ complaint should be denied.

23 VI

24 IF THE CITY’S “FEE” IS ACTUALLY A TAX, THEN
25 THE COMPLAINT ADEQUATELY PLEADS THAT THE
26 CITY IS DELEGATING PART OF ITS TAXING POWER

27 The City is correct that plaintiffs’ fourth cause of action hinges on the success of
their third cause of action. If it is ultimately found that San Jose’s new Gun Harm Reduc-

1 tion Fee is properly classified as a “tax” under California’s definition of a tax as “any levy,
2 charge, or exaction of any kind imposed by a local government” (Cal. Const., art. XIII C,
3 § 1(e)), then the City is delegating part of its taxing power to the private nonprofit
4 organization that will be collecting, appropriating and spending the tax.

5 The City contends that plaintiffs’ claim is “vague” and provides no specifics. Not
6 true. The complaint alleges:

7 33. Only the government possesses the power to tax.

8 34. The power to tax includes the power to collect taxes and
9 appropriate tax revenues.

10 35. Under the Ordinance, the Annual Gun Harm Reduction Fee will
11 be collected by the private nonprofit organization that the City Manager will
12 designate. That revenue will not be remitted to the City, but will be
13 appropriated by the private organization. San Jose Municipal Code section
14 10.32.220(C) states, “The Designated Nonprofit Organization shall spend
15 every dollar generated from the Gun Harm Reduction Fee,” and “the City
16 shall not specifically direct how the monies from the Gun Harm Reduction
17 Fee are expended.”

18 36. Under article XIII, section 31 of the California Constitution, the
19 power to tax may not be granted to a private entity. It provides, “The power
20 to tax may not be surrendered or suspended by grant or contract.” ...³

21 37. The Ordinance unconstitutionally delegates some of the City’s
22 power to tax and appropriate tax revenues to a private organization, not
23 answerable to the voters, that the City Manager will designate.

24
25
26 ³ The ellipsis replaces an additional allegation that the Ordinance violates article XI,
27 section 11 of the California Constitution. The City correctly notes that article XI, section 11
applies only to the State Legislature, not the City. Plaintiffs hereby withdraw that allega-
tion, or the Court may order it stricken.

1 The City contends that these allegations are insufficient to state a claim under article
2 XIII, section 31 because they do not identify any specific contract or grant. (Motion at
3 29:21.) Yet earlier in its motion, the City argued that this case is not ripe because the City
4 Manager has not yet designated the nonprofit organization that will collect the fee. (Motion
5 at 18:11.) That means no specific contract or grant exists yet. Plaintiffs cannot be faulted
6 for not specifically identifying something that doesn't yet exist. A contract or grant will exist,
7 however, by the time this Court hears the City's motion because, under the terms of the
8 Ordinance, the City *cannot* be the one collecting the fee. Rather, "[a] person who resides
9 in the City and owns or possesses a Firearm in the City shall pay an Annual Gun Harm
10 Reduction Fee *to the Designated Nonprofit Organization* each year." (S.J. Muni. Code §
11 10.32.215.) Nor will the City appropriate or spend the revenue from the fee. San Jose
12 Municipal Code section 10.32.220(C) provides, "the City shall *not* specifically direct how
13 the monies from the Gun Harm Reduction Fee are expended." Rather, "[t]he Designated
14 Nonprofit Organization shall spend every dollar generated from the Gun Harm Reduction
15 Fee."

16 The only way these powers can be conferred upon the nonprofit is through a grant
17 or a contract. While the grant or contract may not be executed yet, one or the other is
18 required by the Ordinance, in violation of article XIII, section 31, which prohibits
19 surrendering the power to tax by grant or contract.

20 The City cites *Russell City Energy Co. v. City of Hayward* (2017)14 Cal.App.5th 54,
21 but that case assists plaintiffs. It explains that section 31 must be read broadly, and thus
22 can be violated if a city surrenders "control of a taxing power or municipal function" (*id.* at
23 64) because section 31 prohibits not only total surrender of the power to tax, but also "the
24 municipality's piecemeal surrender of its power to tax." (*Id.* at 65.)

25 The City argues that it is not violating section 31 "because the imposition of the Fee
26 and the Fee amount are both controlled entirely by the City Council." (Motion at 30:1.) But
27 *imposition* of the fee and the setting of its *amount* are not the parts of the City's taxing

1 power that plaintiffs allege are being surrendered. They allege that the City is surrendering
2 its power to *collect* the tax and to *appropriate* and *spend* its revenue.

3 The complaint adequately pleads that the City is delegating part of its taxing power
4 in violation of article XIII, section 31. For the reasons above, the City's motion to dismiss
5 plaintiffs' complaint should be denied in its entirety.

6 DATED: May 6, 2022.

Respectfully submitted,

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