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8

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

12 **NATIONAL ASSOCIATION FOR GUN**  
**RIGHTS, INC.**, a non-profit corporation, and  
13 **MARK SIKES**, an individual,

14 Plaintiffs,

15 v.

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

18 Defendants.  
19

Case No. 5:22-cv-00501-BLF

**DEFENDANTS' CORRECTED**  
**OPPOSITION TO THE HJTA**  
**PLAINTIFFS' MOTION TO REMAND**

*[This corrected brief replaces ECF No. 87,  
as ordered by the Court at ECF No. 88.]*

Date: April 6, 2023  
Time: 9:00 a.m.  
Judge: Hon. Beth Labson Freeman  
Dept.: San Jose Courthouse, Crtrm 3 (5th Floor)

20 **HOWARD JARVIS TAXPAYERS**  
**ASSOCIATION**, Silicon Valley Taxpayers  
21 Association, Silicon Valley Public Accountability  
22 Foundation, James Barry, and George Arrington,

23 Plaintiffs,

24 v.

25 **CITY OF SAN JOSE**, and all persons interested  
in the matter of San Jose Ordinance No. 30716,  
26 establishing an Annual Gun Harm Reduction Fee,

27 Defendants.  
28

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

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1 **I. STATEMENT OF ISSUES TO BE DECIDED**

2 In March 2022, the plaintiffs in the above-captioned *Howard Jarvis Taxpayers Association*  
 3 action (“HJTA plaintiffs” or “HJTA”) filed a complaint in state court against the City of San Jose  
 4 (“City”) challenging a new \$25 Gun Harm Reduction Fee (“Fee”) under federal and state law. The City  
 5 timely removed the action to this Court and filed a motion to dismiss. In September 2022, the Court  
 6 granted that motion, dismissed *all* the HJTA plaintiffs’ claims (most with leave to amend), and ordered  
 7 HJTA and the other plaintiffs in this consolidation action to file an amended consolidated complaint by  
 8 February 2, 2023. ECF No. 81 at 24. On January 10, 2023, before filing an amended complaint, the  
 9 HJTA plaintiffs filed a Motion to Remand (“Motion”) all their dismissed claims for lack of federal  
 10 subject matter jurisdiction, including under the Tax Injunction Act which bars federal courts from  
 11 issuing declaratory or injunctive relief regarding “any tax under State law.” 28 U.S.C. § 1341.

12 The two primary issues to be decided in resolving the Motion are: (1) Should the Motion be  
 13 denied as premature because HJTA currently has no live claims to remand? (2) To the extent the  
 14 Motion is not premature and is ripe for decision before the Fee is fully implemented, is the \$25 Fee a  
 15 “tax under State law” within the meaning of 28 U.S.C. § 1341?

16 **II. INTRODUCTION**

17 Many motions are difficult; this one is not. A few months ago, the HJTA plaintiffs’ claims were  
 18 all dismissed, mostly with leave to amend. They have not subsequently filed an amended complaint.  
 19 Despite having no live claims before this Court, the HJTA plaintiffs seek to have all their “claims”  
 20 remanded to state court.<sup>1</sup> Despite the absence of an operative complaint, the Motion asks the parties  
 21 and the Court to argue and decide what aspects (if any) of this important constitutional litigation should  
 22 be severed and remanded, based on speculation about how HJTA is likely re-plead its claims in the  
 23 future. Even if such adjudication-by-supposition were legally permissible (it is not), there is no good  
 24 reason for the parties and the Court to be engaging in it instead of HJTA simply filing an amended  
 25

26 \_\_\_\_\_  
 27 <sup>1</sup> For simplicity, rather than continually referring to HJTA’s “dismissed claims,” or its “claims” in scare  
 28 quotes, this Opposition brief generally refers to them as HJTA’s “claims” without scare quotes.

1 complaint. Only then will the Court be able to issue a non-advisory opinion on its subject matter  
2 jurisdiction over the HJTA plaintiffs' amended claims. The Motion should be denied.

### 3 **III. PROCEDURAL HISTORY**

4 The City timely removed the HJTA plaintiffs' complaint to this Court on April 15, 2022. *See*  
5 *HJTA* Action, ECF No. 1; *see also* Mot. at 3:4 (HJTA conceding that removal "was not [] improper").  
6 HJTA declined to file a motion to remand in the subsequent 30 days, thereby waiving all grounds for  
7 remand except lack of subject matter jurisdiction. 28 U.S.C. § 1447(c); *Smith v. Mylan Inc.*, 761 F.3d  
8 1042, 1044 (9th Cir. 2014). Since the action was removed, this Court has related the *HJTA* Action to  
9 the earlier-filed *NAGR* Action (ECF No. 41), consolidated the two cases for all purposes (ECF No. 80),  
10 largely granted the City's motions to dismiss the *NAGR* and HJTA plaintiffs' respective claims (ECF  
11 No. 81), and ordered the plaintiffs to file an "amended consolidated complaint by February 2, 2023"  
12 (*id.* at 24:18-19). On January 10, 2023, a few weeks before they were due to file an amended complaint,  
13 the HJTA plaintiffs filed the present Motion. ECF No. 86 ("Mot.").

14 In their Motion, the HJTA plaintiffs seek remand of all their claims, including their federal  
15 constitutional claims, on three stated bases: (1) because their suit is "largely predicated" on state  
16 constitutional theories (Mot. at 2:4-11, 3:5-9); (2) because they originally brought their claims as part  
17 of a state-law validation action, for which there is no "comparable federal procedure" (*id.* at 3:5-9); and  
18 (3) because the Tax Injunction Act, 28 U.S.C. § 1341, supposedly deprives this Court of jurisdiction  
19 (*id.* at 2:4-11). For the reasons explained below, all of HJTA's arguments are meritless.

### 20 **IV. ARGUMENT**

#### 21 **A. The HJTA plaintiffs presently have no claims to remand.**

22 The Motion's most glaring flaw is that it incorrectly assumes the HJTA plaintiffs presently have  
23 live claims to remand, when in fact all their claims were dismissed. *See* ECF No. 81 at 24:9-14. While  
24 HJTA's original complaint brought four claims under federal and state law for "(1) violation of  
25 constitutional rights of speech and association under both the U.S. and California Constitution;  
26 (2) 'unconstitutional condition' of the Second Amendment and California Constitution; (3) 'special tax  
27 lacking voter approval' under the California Constitution, and (4) 'unconstitutional delegation of power  
28 to tax' under the California Constitution" (*id.* at 5:4-11), the Court dismissed *all* those claims with

1 leave to amend, except that it dismissed with prejudice the state-law aspect of the second claim (*id.* at  
 2 24:9-14). The Court then gave the consolidated HJTA and NAGR plaintiffs until February 2, 2023, to  
 3 file an amended consolidated complaint. *Id.* at 24:18-20. On January 10, 2023, before filing an  
 4 amended complaint, the HJTA plaintiffs filed their Motion seeking remand of all their dismissed claims  
 5 for lack of federal subject matter jurisdiction. As of the date of this Corrected Opposition brief (January  
 6 26, 2023), there was still no amended complaint on file.

7 In other words, the HJTA plaintiffs presently have no claims to remand—and they won’t have  
 8 any claims to remand unless and until they file an amended complaint. Indeed, the Court telegraphed  
 9 this very point to the parties when it indicated that questions about supplemental jurisdiction over the  
 10 HJTA plaintiffs’ claims would need to wait until an amended complaint is filed: “To the extent any of  
 11 HJTA Plaintiffs’ claims are denominated as validation actions ... *in an amended complaint*, the Court  
 12 *may* decline to exercise supplemental jurisdiction over those claims.” *Id.* at 24:15-17 (emphases added).  
 13 Notwithstanding this guidance, the HJTA plaintiffs filed their Motion to remand before filing an  
 14 amended complaint, effectively seeking an advisory opinion.

15 It would be both procedurally infirm and deeply prejudicial to the City to grant HJTA’s Motion,  
 16 which asks this Court to remand claims that do not presently exist and, thus, are unavailable to the City  
 17 to analyze. Without seeing the HJTA plaintiffs’ actual amended claims, it is impossible for the City  
 18 even to make an informed decision about the extent to which it opposes remand, much less have a fair  
 19 and reasonable opportunity to ascertain whether those claims “aris[e] under” federal law under 28  
 20 U.S.C. § 1331, or the extent to which they “raise[] a novel or complex issue of State law” or present the  
 21 kind of “exceptional circumstances” that present “compelling reasons” for declining supplemental  
 22 jurisdiction under 28 U.S.C. § 1367(c). Accordingly, the Motion is premature and should be denied.

23 **B. Even if HJTA had any live claims to remand, its arguments lack merit.**

24 **1. HJTA bringing its claims as a validation action does not deprive this Court of**  
 25 **jurisdiction under 28 U.S.C. §§ 1331 and 1343, and the issue of whether to**  
 26 **decline supplemental jurisdiction under § 1367(c) is not ripe for review.**

27 In its Motion, HJTA seeks to reframe its case as one in which “state constitutional theories ...  
 28 dominate [its] complaint,” while its federal constitutional claims are of secondary importance. Mot. at  
 3:6-7. HJTA then argues, without any supporting legal authority, that this somehow provides a legal



1 basis for remanding *all* its claims. This is wrong for several reasons.

2 **First**, HJTA’s argument fundamentally misunderstands how federal subject matter jurisdiction  
3 works. *See, e.g., Obenchain v. Reg’l Transp. Comm’n of S. Nevada*, 2014 WL 3696306, at \*2 (D. Nev.  
4 July 23, 2014) (rejecting argument that plaintiff’s action should be remanded because his federal claims  
5 were not “pivotal” to his case). “A single federal claim having the violation of a federal constitutional  
6 right as an element gives rise to jurisdiction under 28 U.S.C. § 1331.” *Id.* (citing *Standage Ventures,*  
7 *Inc. v. Arizona*, 499 F.2d 248, 249 (9th Cir. 1974)); *see also* 28 U.S.C. § 1343(a)(3) (providing district  
8 courts “original jurisdiction of any civil action ... [t]o redress the deprivation, under color of any State  
9 law ... of any right ... secured by the Constitution of the United States”).

10 Here, the City cannot know the precise substance of HJTA’s hypothetical future claims, but its  
11 Motion indicates it intends to re-bring “a federal compelled speech/association claim,” and a “claim  
12 under the state law doctrine of unconstitutional conditions” based on Second Amendment rights. Mot.  
13 at 6:23-26.<sup>2</sup> This Court would presumably have jurisdiction under over the First Amendment claim  
14 under §§ 1331 and 1343, and jurisdiction under § 1331 over the Second Amendment claim because  
15 (although it is styled as arising under a “state law doctrine”) HJTA’s “right to relief necessarily depends  
16 on resolution of a substantial question of federal law.” *Sauk-Suiattle Indian Tribe v. City of Seattle*,  
17 --- F.4th ----, 2022 WL 17999429, at \*4 (9th Cir. 2022). HJTA cites *Carnegie-Mellon Univ. v. Cohill*,  
18 484 U.S. 343 (1988), as somehow supporting remand of federal-law claims (*see* Mot. at 8:7-11), but  
19 that case says nothing of the sort. *See* 484 U.S. at 345 (deciding only if *state-law* claims were properly  
20 remanded after “all federal-law claims in the action ha[d] been eliminated”).

21 **Second**, regarding HJTA’s state-law claims that the \$25 Fee is an unlawful “tax” under the  
22 California Constitution, those claims are “related” to HJTA’s federal-law claims under § 1367(a)

23 \_\_\_\_\_  
24 <sup>2</sup> HJTA’s statement that it “does not want to waive its First Amendment claim” (Mot. at 8:5-6) is  
25 contrary to its previous suggestion that it might dismiss its federal-law claims in order to obtain remand  
26 of its state-law claims. *See* Hrg. Tr. at 23-24 (Aug. 18, 2022) (HJTA’s counsel: “[P]erhaps if we dismiss  
27 the federal First Amendment claim, all the rest of our case could go back to state court, if your Honor  
28 gave us the opportunity to do that.” The Court: “I actually think, Mr. Bittle, that that makes sense.”).

1 because they all concern the same subject matter—i.e., the lawfulness of the Fee. *See also Carnegie-*  
2 *Mellon*, 484 U.S. at 349 (noting that federal courts have “a wide-ranging power ... to decide state-law  
3 claims in cases that also present federal questions”). Whether the Court should nevertheless decline to  
4 exercise supplemental jurisdiction over those claims under § 1367(c) requires a factually and legally  
5 intensive analysis that is impossible to perform without an operative complaint.

6 And even if HJTA had an operative complaint, a serious question would remain: whether issues  
7 under § 1367(c) are ripe for decision. As of today, there are still several important steps to complete  
8 before the Fee is fully implemented. *See* ECF No. 85 (City’s Status Report) (Jan. 6, 2023). The  
9 nonprofit organization to which the Fee will be paid still not been formed, the Fee amount is still  
10 subject to revision by the City Council, enforcement of the Fee has not yet begun, and Fee monies have  
11 not yet been used to provide any services to gun owners or their families. *Id.* Until the Fee is fully  
12 implemented, one cannot fully assess the extent (if any) to which HJTA’s state-law claims raise a  
13 “complex issue” of state law, “substantially predominate” over federal-law claims, or present “other  
14 compelling reasons for declining jurisdiction.” 28 U.S.C. § 1367(c)(1), (2), (4). Ripeness requires that  
15 “[t]he disagreement must not be nebulous or contingent but must have taken on fixed and final shape so  
16 that a court can see what legal issues it is deciding.” *Ariz. v. Atchison, T. & S. F. R. Co.*, 656 F.2d 398,  
17 402 (9th Cir. 1981) (quoting *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 244 (1952)).  
18 Until the Fee is fully implemented, the § 1367(c) issue is not ripe for decision.

19 **Third**, HJTA’s purported concern for the rights of an absent third party, the Golden State Second  
20 Amendment Coalition (“GS2AC”), does nothing to advance its Motion. *See* Mot. at 5:15-16, 7:1-12  
21 (arguing that not remanding would violate GS2AC’s “right to participate in this litigation”). As a  
22 threshold matter, none of the HJTA plaintiffs argue they have third-party standing to enforce GS2AC’s  
23 rights—nor could they. *See SurvJustice Inc. v. DeVos*, 2019 WL 1434141, at \*7 (N.D. Cal. Mar. 29,  
24 2019) (“A plaintiff asserting third-party standing must show ... a close relationship with the third party”  
25 and “some hindrance to the third party’s ability to protect [its] own interests”); *see also Charleston v.*  
26 *Nevada*, 830 Fed. App’x 948, 949 (9th Cir. 2020) (declining to construe appellants’ arguments as  
27 invoking third-party standing because “they neither expressly do so nor cite any relevant cases”).  
28

1           Indeed, GS2AC appears perfectly capable of protecting its own rights and interests. The state  
2 court docket in the *HJTA* action shows that GS2AC was represented by legal counsel when it lodged a  
3 post-removal filing there on May 3, 2022. *See* Superior Court of Santa Clara County, Public Portal,  
4 *available at* <https://traffic.sccscourt.org/search> (Case No. 22CV395596). This indicates that GS2AC has  
5 known about this litigation for more than eight months but decided not to seek to intervene or  
6 otherwise participate in this case. And even if GS2AC were so necessary a party that it should be  
7 *compelled* to participate in this litigation (of course, it should not), the federal removal statute  
8 authorizes this Court to “issue all necessary orders and process to bring before it all proper parties  
9 whether served by process issued by the State court or otherwise.” 28 U.S.C. § 1447(a). In sum, the  
10 *HJTA* plaintiffs have no standing to represent GS2AC’s interests, and this Court is not stripped of  
11 subject matter jurisdiction over *HJTA*’s claims simply because a represented nonparty with notice of  
12 the suit and the right to seek intervention has declined to do so.

13           ***Finally***, at a more fundamental level, the Motion appears to conflate this court’s subject matter  
14 jurisdiction over *HJTA*’s *federal-law* claims under §§ 1331 and 1343, with this Court’s separate and  
15 unrelated discretion under § 1367(c) to “decline to exercise supplemental jurisdiction over a [related  
16 *state-law*] claim” if the latter “substantially predominates” over the federal claims. *Id.* § 1367(c)(2).  
17 Contrary to *HJTA*’s argument, nothing in § 1367(c) allows district courts to decline jurisdiction over  
18 federal-law claims. *See id.* § 1367(c) (authorizing courts only to decline supplemental jurisdiction  
19 “over a claim under subsection (a)”). And while it is true that the California validation statutes provide  
20 some unique procedures, the ultimate “purpose of the validation statutes is to serve ‘the acting agency’s  
21 need to settle promptly all questions about the validity of its action.’” *Quantification Settlement*  
22 *Agreement Cases*, 201 Cal.App.4th 758, 833 (2011) (quoting *Friedland v. City of Long Beach*, 62  
23 Cal.App.4th 835, 842 (1998)). It is squarely within the jurisdictional and institutional competencies of  
24 this federal court to decide questions about whether the \$25 Fee at issue here is lawful—particularly  
25 when some of those challenges, according to *HJTA*, hinge on questions of constitutional law under the  
26 First and Second Amendments to the U.S. Constitution.<sup>3</sup>

27 \_\_\_\_\_  
28 <sup>3</sup> *HJTA* errs in relying on *Davis v. Mariposa Co. Bd. of Supervisors*, 38 Cal.App.5th 1048 (2019). *See*

1                   **2. HJTA’s argument under the Tax Injunction Act is both wrong on the merits**  
 2                   **(because the Fee is not a “tax” under the Act) and not ripe for review.**

3                   HJTA’s final argument is that remand of all their claims is required by the Tax Injunction Act  
 4 (the “TIA” or “Act”). *See* Mot. at 2:4-11, 8:21-11:10. The Act provides that federal district courts may  
 5 not “enjoin, suspend or restrain the assessment, levy or collection of *any tax under State law* where a  
 6 plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341 (emphasis  
 7 added). As its text indicates, the Act applies only if the assessment at issue is a state “tax.” *Id.*

8                   “Not every exaction by state authorities is a tax.” *Hexom v. Oregon Dep’t of Transp.*, 177 F.3d  
 9 1134, 1135 (9th Cir. 1999); *see also id.* at 1136 (explaining the Act applies to “taxes” but not “fees”);  
 10 *Kathrein v. City of Evanston*, 636 F.3d 906, 911-12 (7th Cir. 2011) (outlining four categories of fees, or  
 11 “non-taxes”). “Federal law determines whether an assessment qualifies as a ‘tax’ for purposes of the  
 12 TIA.” *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000). That said, “[s]tate law determinations as  
 13 to whether a fee is a tax may still be pertinent or instructive.” *McLeod v. Columbia County*, 254  
 14 F.Supp.2d 1340, 1345 (S.D. Ga. 2003); *Dignet, Inc. v. W. Union ATS, Inc.*, 845 F.Supp. 1237, 1240  
 15 (N.D. Ill. 1994); *accord Trailer Marine Transp. Corp. v. Vazquez*, 977 F.2d 1, 5 (1st Cir. 1992).

16                   In the Ninth Circuit, whether an assessment is a “tax” or a “fee” turns on a three-factor test that  
 17 looks to “(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is  
 18 imposed; and (3) whether the assessment is expended for general public purposes, or used for the  
 19 regulation or benefit of the parties upon whom the assessment is imposed.” *Bidart Bros. v. California*  
 20 *Apple Comm’n*, 73 F.3d 925, 931 (9th Cir. 1996) (“*Bidart*”). The third factor is the most important.  
 21 *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183 (9th Cir. 2006) (“When the first two *Bidart*  
 22 factors are not dispositive, courts emphasize the third factor”); *see also Kathrein*, 636 F.3d at 912  
 23 (indicating the key inquiry is whether an assessment’s “purpose is to regulate behavior [a fee] or to

24 \_\_\_\_\_  
 25 Mot. at 4:13-21. That case says nothing about remanding state-law claims denominated as a validation  
 26 action, but instead concerns whether a state Court of Appeal has *appellate jurisdiction* over an action  
 27 challenging a tax if the appellants blew the validation statute’s 30-day deadline to appeal. *Davis*, 38  
 28 Cal.App.5th at 1051-52.

1 raise revenue [a tax]”). As part of this analysis, courts often consider a variety of specific issues,  
2 including “whether the agency places the money in a special fund, whether collection of the charge is  
3 assigned to the State Tax Assessor, whether the requested injunction poses a threat to the central stream  
4 of tax revenues, and whether the enacting entity referred to the charge as a ‘tax.’” *Am. Trucking Ass’ns,*  
5 *Inc. v. Alviti*, 944 F.3d 45, 55 (1st Cir. 2019) (“*Alviti*”); *see, e.g., Hexom*, 177 F.3d at 1136 (considering  
6 these issues in its *Bidart*-factor analysis).

7 Here, application of the above factors makes clear that the \$25 Fee is not a tax but a fee. Indeed,  
8 the *only* factor that weighs in favor of HJTA’s view that the Fee is a tax is the first *Bidart* factor,  
9 because the Fee is imposed by a legislature (i.e., the City Council) rather than an agency. *See Bidart*, 73  
10 F.3d at 931. On the other hand, *all* of the remaining factors weigh strongly against finding that the \$25  
11 Fee is a tax.

12 For example, the second *Bidart* factor favors the City because the \$25 Fee is imposed on a  
13 “narrow class” rather than a “broad class” of persons. *Bidart*, 73 F.3d at 931; *Wright*, 219 F.3d at 911-  
14 12. Instead of applying to all of San Jose’s 983,000 residents and 324,000 households,<sup>4</sup> the Fee applies  
15 to only those that own or possess a firearm and are not covered by any of the Ordinance’s three  
16 exemptions. *See* Ordinance §§ 10.32.215, 10.32.225. While there are no record facts indicating how  
17 many people or households that might be, a recent study would put the number at an estimated 50,000  
18 to 55,000 households that own guns, minus whatever (unknown) number of those households are  
19 covered by one of the Ordinance’s exemptions. Pacific Institute for Research and Evaluation, *Incidence*  
20 *and Cost of Firearm Injuries in San Jose, CA* at 2 (Jan. 19, 2022), *available at* [shorturl.at/gmM28](https://shorturl.at/gmM28); *see*  
21 *also id.* at 3 (citing 2014 data that 11% of households in Santa Clara County own guns). While these  
22 estimates are outside the record and thus render any analysis premature and unripe, they do provide a  
23 preliminary indication that the Fee is imposed on a sufficiently “narrow class” of persons to weigh  
24 against finding a tax. *See, e.g., Trailer Marine*, 977 F.2d at 3, 6 (finding annual \$35 fee paid to DMV  
25 was not a tax, in part, because it applied only to vehicle owners who drive on public roadways).

26 \_\_\_\_\_  
27 <sup>4</sup> *See* U.S. Census Bureau, *Quick Facts: San Jose, California*, <https://www.census.gov/quickfacts/fact>  
28 [/table/sanjosecitycalifornia/PST045221](https://www.census.gov/quickfacts/fact/table/sanjosecitycalifornia/PST045221) (July 2021 estimates, rounded here to the nearest thousand).

1 The third *Bidart* factor also favors the City because the \$25 Fee is not “expended for general  
2 public purposes,” but rather is “used for the regulation or benefit of the parties upon whom the  
3 assessment is imposed”—here, San Jose gun owners. *Bidart*, 73 F.3d at 931. Unlike taxes, which are  
4 generally “treated as general revenues and paid into the state’s general fund,” the Fee here is more like  
5 a fee that is “placed in a special fund” and used only for “special purposes.” *Bidart*, 73 F.3d at 932; *see*  
6 *also Wright*, 219 F.3d at 911 (exaction not “paid to the tax collector or the state’s general fund” was not  
7 a tax); *Trailer Marine*, 977 F.2d at 6 (\$35 fee paid to DMV and held in separate fund to benefit  
8 automobile accident victims was not a tax); *San Juan Cellular Tel. Co. v. Public Serv. Comm’n*, 967  
9 F.2d 683, 686-87 (1st Cir. 1992) (Breyer, J.) (fee equal to 3% of businesses’ revenue, for use by a  
10 particular agency, was not a tax).<sup>5</sup> Additionally, because the \$25 Fee is paid not to the government but  
11 to a nonprofit (Ordinance § 10.32.215), the Fee will not “raise significant revenue” for the government  
12 (*Kathrein*, 636 F.3d at 912), and enjoining the Fee would pose “no threat to the central stream of tax  
13 revenue” (*Hexom*, 177 F.3d at 1136).

14 HJTA’s motion ignores the controlling three-factor analysis under *Bidart*, and instead argues  
15 that the \$25 Fee is a tax under the Act for scattershot reasons based on a handful of out-of-circuit  
16 decisions (*see* Mot. at 8-11)—including one case that held the charge at issue was not a tax but a fee.  
17 *See Hager v. City of W. Peoria*, 84 F.3d 865, 870-72 (7th Cir. 1996) (concerning \$20 heavy truck  
18 permit fee paid into city’s general fund). All of HJTA’s other cases are readily distinguishable because  
19 they involve large taxes on industry that are materially different from the small \$25 Fee here. *See Ass’n*  
20 *for Accessible Medicines v. James*, 974 F.3d 216, 220, 223 (2d Cir. 2020) (assessment on opioid

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21  
22 <sup>5</sup> Moreover, the scope of “special purposes” on which a fee can be spent, *Bidart*, 73 F.3d at 932, can be  
23 incredibly broad. *See Edye v. Robertson*, 112 U.S. 580, 590, 596 (1884) (holding that statutory levy on  
24 ship owners for each immigrant passenger, even “though paid into the treasury,” was not a tax because it  
25 was used for the special purposes of “the care of immigrants,” “the protection of the citizens among  
26 whom they are landed,” and “the general purposes and expenses of carrying th[e] [immigration] act into  
27 effect”); *accord Bidart*, 73 F.3d at 933 (citing *Edye* for proposition that “an assessment levied for public  
28 purposes” is not a tax if it is part of a regulatory program); *Wright*, 219 F.3d at 911 (similar).

1 manufacturers to fund “opioid treatment, recovery and prevention and education services” statewide  
2 was not a fee that delivered “narrow benefits” to the regulated entities, but a tax used to fund “broad  
3 public health initiatives” for the state’s residents); *A Bonding Co. v. Sunnuck*, 629 F.2d 1127, 1128,  
4 1133 (5th Cir. 1980) (holding that 1% fee on all bail bonds was a tax); *City of Chattanooga v.*  
5 *BellSouth Telecomms.*, 1 F.Supp.2d 809, 812-13 (E.D. Tenn. 1998) (“franchise fee” equal to 5% of  
6 telecommunications companies’ gross revenue was a tax because it was not intended to defray any  
7 industry-related infrastructure costs but “to pay the City’s general debts and obligations”).

8 Moreover, while federal law controls what is a tax under the Act, “[s]tate law determinations as  
9 to whether a fee is a tax may still be pertinent or instructive.” *McLeod*, 254 F.Supp.2d at 1345. Thus,  
10 this Court’s prior conclusion that HJTA has failed to adequately plead the Fee is a tax under state law  
11 provides yet another reason to conclude that the Fee is not a tax under the Act. *See* ECF No. 81 at 13:27-  
12 14:20, 22:15-21 (relying on *Schmeer v. County of Los Angeles*, 213 Cal.App.4th 1310 (2013)). HJTA  
13 trying to relitigate arguments it has already raised and lost does not advance its Motion. *Compare* Mot.  
14 at 10:4-10 (HJTA arguing *Schmeer* is “easily distinguishable on its facts” and does not prevent the Fee  
15 from being a “tax” under the California Constitution), *with* ECF No. 81 at 13:27-14:20, 22:15-21 (the  
16 Court rejecting plaintiffs’ “attempt to distinguish *Schmeer* on its facts,” and instead finding *Schmeer*’s  
17 analysis to be “thorough,” “persuasive,” and thus the “touchstone” of the Court’s legal analysis).

18 Finally, to the extent that the Court has any doubts about whether the \$25 Fee is a “tax” under  
19 the Act, the prudent course would be to defer answering that question until there is a factual record.  
20 *See, e.g., Collins Holding Corp.*, 123 F.3d at 801 (concluding that “whether the ... ordinance is a tax or  
21 a fee ... could be better answered on a fuller record”). Here, that could mean waiting until after the  
22 nonprofit organization that will collect the Fee has been formed and designated, the final Fee amount  
23 has been set by the City Council, and the Fee requirement has begun to be enforced and used to provide  
24 actual services for gun owners and their families.

## 25 **V. CONCLUSION**

26 For the foregoing reasons, the Motion should be denied without prejudice to the HJTA plaintiffs  
27 re-bringing the motion after filing an amended complaint.

1 Dated: January 26, 2023

Respectfully submitted,

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