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11 **UNITED STATES DISTRICT COURT**  
 12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 13 **SAN JOSE DIVISION**

14  
 15 **NATIONAL ASSOCIATION FOR GUN**  
**RIGHTS, INC.**, a non-profit corporation, and  
 16 **MARK SIKES**, an individual,

17 Plaintiffs,

18 v.

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

22 Defendants.

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

**DEFENDANTS’ MOTION TO DISMISS**  
**PLAINTIFFS’ FIRST AMENDED**  
**COMPLAINT**

Date: August 4, 2022  
 Time: 9:00 A.M.  
 Courtroom: Via Zoom Webinar  
 Judge: Hon. Beth Labson Freeman

Complaint filed: January 25, 2022  
 FAC filed: February 14, 2022

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 4, 2022, at 9:00 A.M., or as soon thereafter as  
3 the matter may be heard, in the Courtroom of the Honorable Beth Labson Freeman, United States  
4 District Judge for the Northern District of California, located at 280 South 1st Street, San Jose,  
5 California, 95113, Defendants City of San Jose, Jennifer Maguire in her official capacity as City  
6 Manager of the City of San Jose, and the City of San Jose City Council will and hereby do move  
7 this Court to dismiss the First Amended Complaint (ECF No. 19) (“FAC”) filed by Plaintiffs  
8 National Association for Gun Rights, Inc., and Mark Sikes in its entirety under Federal Rule of  
9 Civil Procedure (“Rule”) 12(b)(1) and under Rule 12(b)(6) for failure to state a claim as to each of  
10 Plaintiffs’ six causes of action.

11 This motion is based on this Notice of Motion and Motion, the accompanying  
12 Memorandum of Points and Authorities, the supporting Declaration of Tamarah P. Prevost and  
13 Sarah Zarate and all corresponding exhibits attached thereto, the Proposed Order, the anticipated  
14 reply brief, and any other papers Defendants may file in support of the motion, as well as all  
15 judicially noticeable facts, the files and records in this action, and such other evidence and  
16 argument as may be provided to the Court at or before the hearing.

17  
18 Dated: April 8, 2022

**COTCHETT, PITRE & McCARTHY, LLP**

19  
20 By:                   /s/ Tamarah P. Prevost                  

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1 **I. INTRODUCTION**

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

10 The Ordinance here requires non-exempted San Jose gunowners to obtain liability  
11 insurance for gun accidents and to pay a reasonable annual Gun Harm Reduction Fee (“Fee”),  
12 which a nonprofit organization will use to provide gunowners and their families with voluntary  
13 programming and services related to gun safety, mental health, and domestic violence.  
14 Notwithstanding the Ordinance’s modest scope, Plaintiffs seek to strike it down. The lead Plaintiff  
15 in this case is the National Association for Gun Rights (“NAGR”), which calls itself the nation’s  
16 largest “no compromise” pro-gun organization and is opposed to the existence of any law that  
17 regulates firearms in any way. Their operative First Amended Complaint (“FAC”) is legally  
18 defective and should be dismissed on two grounds.

19 First, Plaintiff’s claims fail under Federal Rule of Civil Procedure (“Rule”) 12(b)(1) for  
20 lack of standing and ripeness, because key components of the Ordinance, which bear directly on  
21 the validity of Plaintiffs’ claims, have not yet been decided by the City. For example, Plaintiffs’  
22 FAC rests on the theory that the annual Fee is a substantial and unconstitutional burden on the  
23 right to keep and bear arms—even though the amount of the Fee has not yet been set, and even  
24 though the criteria for the Ordinance’s “financial hardship” exemption have not yet been  
25 established. Similarly, Plaintiffs’ FAC is premised on speculation that the nonprofit organization  
26 referenced in the Ordinance (which the City Manager has not yet designated) will harbor anti-gun  
27 views and discourage gun ownership. Plaintiffs’ abstract objections to these and other aspects of  
28

1 the law rest on speculation, contingent future events, and hypotheticals that would require this  
2 Court to issue an advisory opinion about an ordinance that is still incomplete and unfinished.

3 Second, under Rule 12(b)(6), all six of Plaintiffs' claims under the First and Second  
4 Amendment to the U.S. Constitution, the California Constitution (Proposition 26), and the San  
5 Jose City Charter are legally defective under binding precedent or otherwise collapse under  
6 scrutiny. Because there are no facts Plaintiffs could allege to cure those defects, all six claims  
7 should be dismissed with prejudice.

## 8 **II. FACTUAL AND PROCEDURAL BACKGROUND**

### 9 **A. History of the Ordinance and Procedural Posture**

10 In June 2021, the City's mayor and City Council directed the City Attorney to draft a gun  
11 safety ordinance designed to mitigate gun harms for Council's consideration. *See* Decl. of Tamarah  
12 Prevost ("Prevost Decl.") ¶ 2, Ex. 1. Six months and seven detailed memoranda later, the Council,  
13 at its January 25, 2022 meeting, heard a first reading of the draft ordinance, directed that it be  
14 published, that certain amendments be drafted, and voted to re-consider the Ordinance at a later  
15 date. *Id.* ¶¶ 3-9, Exs. 2-8.

16 That same day, Plaintiffs NAGR and Mark Sikes, filed this lawsuit seeking to invalidate  
17 the Ordinance, even though it was still being negotiated and drafted. ECF 1; *see also* NAGR Press  
18 Release, *National Association for Gun Rights Files Lawsuit Against the City of San Jose* (Jan. 26,  
19 2022), *available at* <https://tinyurl.com/2p89jdu5> (NAGR denouncing "new ordinance" as  
20 "tyrannical"). "Unlike other groups such as the NRA, NAGR believes in absolutely NO  
21 COMPROMISE on gun rights issues." NAGR Website, *Frequently Asked Questions*,  
22 <https://nationalgunrights.org/resources/faqs/> (accessed Apr. 5, 2022).

23 On February 4, 2022, Defendants moved to dismiss the Complaint for lack of jurisdiction.  
24 ECF 17. On February 8, the City enacted the Ordinance. ¶ 26.<sup>1</sup> The Ordinance expressly leaves  
25 key aspects of the law unspecified and dependent on future action by the City Council and City  
26

27  
28 <sup>1</sup> "¶" on its own refers to a paragraph of the FAC.

1 Manager (§§ 10.32.215, 10.32.235(A), 10.32.240(B)),<sup>2</sup> which the FAC repeatedly concedes (*see*  
 2 ¶¶ 1, 36-37, 90-91). The Ordinance provides the Council and City Manager 180 days to take those  
 3 actions before the Ordinance becomes effective on August 7, 2022. § 2. On February 14, before  
 4 the Council or City Manager had taken any of those further actions, Plaintiffs filed their FAC  
 5 (ECF 19), and the Court terminated the motion to dismiss the Complaint as moot (ECF 21). Three  
 6 weeks later, Plaintiffs filed a motion for preliminary injunction that mirrors their FAC in  
 7 substance, and which is now fully briefed and set to be heard on July 21, 2022. ECF 25, 28, 31-32.

### 8 **B. Summary of the Ordinance**

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

22 The Ordinance applies to all City residents who own a gun, with three exceptions:  
 23 (1) peace officers, (2) those with a state concealed weapon license, and (3) those for whom  
 24 compliance with the Ordinance would create a “financial hardship.” § 10.32.255(A)-(C). With  
 25 respect to the latter, the Ordinance authorizes the City Manager to “promulgate [] regulations” on  
 26 “[t]he criteria by which a person can claim a financial hardship exemption.” § 10.32.235(A)(4).

---

27  
 28 <sup>2</sup> “§\_” on its own refers to a section of the Ordinance, which is attached as Exhibit K to the FAC.

1 The City Manager has not yet promulgated these regulations. *See* Decl. of Sarah Zarate, City  
2 Manager’s Office (“CMO Decl.”) ¶¶ 4-8. With respect to all non-exempt persons, the Ordinance  
3 imposes three main requirements.

4 **1. Liability Insurance Requirement**

5 First, gunowners must obtain “a homeowner’s, renter’s or gun liability insurance policy ...  
6 specifically covering losses or damages resulting from any accidental use of the Firearm, including  
7 but not limited to death, injury or property damage” within 30 days of the Ordinance taking effect  
8 (i.e., September 7, 2022) or a later date prescribed by regulation. § 10.32.210(A), (C). The purpose  
9 of the liability insurance requirement is to ensure victims of accidental shootings have access to  
10 compensation, and to leverage private insurance market forces as a means of “encouraging safer  
11 behavior.” § 10.32.220(B)(11)-(12). The Ordinance authorizes the City Manager to “promulgate []  
12 regulations” on “[p]rocesses and procedures related to the implementation of the liability insurance  
13 requirement, and forms necessary thereto,” which it must complete before the Ordinance can be  
14 fully effectuated. § 10.32.235(A)(1); CMO Decl. ¶¶ 4-8.

15 **2. Annual Gun Harm Reduction Fee**

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

28

1 The Ordinance does not set the amount of the Fee but leaves that to be “established by  
 2 [separate] resolution of the City Council.” § 10.32.215. *Accord* ¶¶ 1, 36, 90-91 (alleging that,  
 3 under Ordinance, Fee amount is “unspecified” and City Council must “determine the fee amount at  
 4 a later date”). To date, no such resolution has been passed. CMO Decl. ¶¶ 7-8. The Ordinance also  
 5 authorizes the City Manager to “promulgate [] regulations” concerning the “[d]esignation of the  
 6 nonprofit organization that will receive the [Fee], any processes and procedures related to the  
 7 payment of the fee, and any additional guidelines or auditing of the use of the monies from the fee”  
 8 (§ 10.32.235(A)(2)), as well as the annual due date for payment of the Fee (§ 10.32.215). The City  
 9 Manager has not yet promulgated these regulations. CMO Decl. ¶¶ 7-8. *Accord* ¶¶ 1, 37, 91  
 10 (conceding nonprofit has not yet been designated and characterizing services to be provided as  
 11 “unspecified programs”).

### 12 3. Self-Certification of Compliance

13 Third, much in the same way car owners must document their compliance with liability  
 14 insurance and annual registration fee requirements, the Ordinance requires gunowners to complete  
 15 a “City-designated attestation form” that states basic information about their gun liability insurance  
 16 and to keep that form and “proof of payment of the [Fee]” “with the[ir] Firearms where they are  
 17 being stored or transported.” § 10.32.230(A)-(B). Gunowners must also produce the form and  
 18 proof of payment “when lawfully requested to do so by a peace officer.” § 10.32.230(A). The City  
 19 Manager has not yet designated the attestation form. CMO Decl. ¶ 5.

20 Violations of the Ordinance are punishable by an administrative citation and fine, subject to  
 21 due process protections. § 10.32.240(A). Similar to the Fee, the Ordinance does not set the amount  
 22 of the administrative fine but leaves that to be “established by [separate] resolution of the City  
 23 Council.” § 10.32.240(B). To date, no such resolution has been passed. CMO Decl. ¶¶ 7-8. *Accord*  
 24 ¶¶ 17, 90 (conceding fine amount is presently “unspecified”). Contrary to Plaintiffs’ allegations  
 25 that the Ordinance authorizes the “seizure of firearms” of those who fail or refuse to comply with  
 26 the Ordinance (¶¶ 3, 44), the Ordinance only authorizes the “impoundment” of firearms and only  
 27 “to the extent allowed by law” (§ 10.32.245). There is currently no lawful basis to impound  
 28 firearms under state or federal law, meaning this particular provision will not take effect until, for

1 example, the passage of a state law permitting municipalities to impound firearms. The Ordinance  
2 also contains a severability clause. § 3.

### 3 **III. LEGAL STANDARDS**

#### 4 **A. Rule 12(b)(1)**

5 The plaintiff bears the burden of establishing the Court has jurisdiction. *Kokkonen v.*  
6 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).<sup>3</sup> The Court’s proper role is “to adjudicate  
7 live cases or controversies consistent with the powers granted the judiciary in Article III of the  
8 Constitution,” which means it lacks jurisdiction “to issue advisory opinions [ ] or to declare rights in  
9 hypothetical cases.” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir.  
10 2000) (en banc). The doctrine of ripeness “prevent[s] the courts, through avoidance of premature  
11 adjudication, from entangling themselves in abstract disagreements.” *Id.* Ripeness “is drawn from  
12 both Article III limitations on judicial power and from prudential reasons for refusing to exercise  
13 jurisdiction.” *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). “A Rule 12(b)(1)  
14 jurisdictional attack may be facial or factual,” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035,  
15 1039 (9th Cir. 2004). The City primarily makes a facial attack, that “the allegations contained in a  
16 complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* To the extent the Court  
17 deems any part of the City’s argument to represent a factual attack disputing the truth of Plaintiffs’  
18 allegations purporting to establish federal jurisdiction, the court “need not presume the truthfulness  
19 of the plaintiff’s allegations” and “may review evidence beyond the complaint without converting  
20 the motion to dismiss into a motion for summary judgment.” *Id.*

#### 21 **B. Rule 12(b)(6)**

22 Defendants are entitled to dismissal under Rule 12(b)(6) if, accepting Plaintiffs’ allegations  
23 as true, the complaint fails to state a claim. *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484  
24 (9th Cir. 1995). The Court should not accept as true “allegations that are merely conclusory,  
25 unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*,  
26 266 F.3d 979, 988 (9th Cir. 2001). Plaintiffs’ “obligation to provide the ‘grounds’ of [their]  
27

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28 <sup>3</sup> Unless otherwise noted, internal citations, alterations, and quotations are omitted.



1 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the  
 2 elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
 3 “Nor does a complaint suffice if it tenders naked assertions devoid of further factual  
 4 enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The allegations must be  
 5 “more than an unadorned, the-defendant-unlawfully-harmed-me accusation,” and “must be enough  
 6 to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

#### 7 **IV. ARGUMENT**

##### 8 **A. THE COURT SHOULD DISMISS THE FAC UNDER RULE 12(b)(1).**

###### 9 **1. The FAC Fails for Lack of Ripeness.**

10 The Ordinance was enacted in February 2022, but it expressly provides a 180-day period  
 11 before it becomes effective on August 7, 2022 (§ 2), during which time the Council would need to  
 12 pass resolutions setting the amount of the Fee and any administrative fine (§§ 10.32.215,  
 13 10.32.240(B)), and the City Manager would promulgate key regulations, such as those establishing  
 14 the criteria for the financial hardship exemption and designating the nonprofit organization  
 15 (§ 10.32.235(A)). *See generally* CMO Decl. Since the Ordinance is not yet “effective,” and since  
 16 none of the required resolutions or regulations have yet been passed or promulgated, Plaintiffs’  
 17 claims are not ripe for review. *See Scholl v. Mnuchin*, 489 F.Supp.3d 1008, 1024-27 (N.D. Cal.  
 18 2020).

19 Ripeness is justiciability doctrine that looks primarily at two considerations: “the hardship  
 20 to the parties of withholding court consideration” and “the fitness of the issues for judicial  
 21 decision.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The “basic rationale” of the  
 22 ripeness requirement is “to prevent the courts, through avoidance of premature adjudication, from  
 23 entangling themselves in abstract disagreements” (*id.* at 148), and to ensure that challenges to laws  
 24 are “test[ed] ... in a concrete situation” (*Toilet Goods Ass’n, Inc. v. Gardner*, 387 U.S. 158, 165  
 25 (1967)). Pre-enforcement challenges to laws are not ripe for judicial review if it is likely that the  
 26 law will change before it goes into effect. *See, e.g., Cramer v. Brown*, 2012 WL 13059699, at \*3  
 27 (C.D. Cal. Sept. 12, 2012) (finding pre-enforcement claim justiciable, in part, because the  
 28 legislature “ha[d] no power to amend the statute before its effective date” and there was “no reason

1 to think the law change”). Additionally, an issue “may not be ripe for review if further factual  
2 development would significantly advance [the court’s] ability to deal with the legal issues  
3 presented.” *Nat’l Park Hosp. Assn. v. Dep’t. of Interior*, 538 U.S. 803, 812 (2003); *see also*  
4 *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122-23 (9th Cir. 2010) (case not ripe  
5 if it “involves uncertain or contingent future events that may not occur as anticipated, or indeed  
6 may not occur at all”); *Vieux v. Easy Bay Reg’l Park Dist.*, 906 F.3d 1330, 1344 (9th Cir. 1990)  
7 (federal courts may not issue advisory opinions based on a “hypothetical state of facts”).

8 “The prudential considerations of ripeness are amplified when constitutional considerations  
9 are concerned.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (“*Scott*”).  
10 Indeed, “[t]he Supreme Court has neatly instructed that the jurisdiction of federal courts to hear  
11 constitutional challenges should be exercised only when the underlying constitutional issues [are  
12 tendered] in clean-cut and concrete form.” *Id.* (quoting *Rescue Army v. Mun. Ct. of Los Angeles*,  
13 332 U.S. 549, 584 (1947)). In *Scott*, for example, the Ninth Circuit determined that an equal  
14 protection challenge to an admissions policy was not ripe because it lacked a “basis to infer” how  
15 the policy’s criteria was to be implemented. 306 F.3d at 663. And “[w]ithout knowing the  
16 conditions under which the policy was to be implemented, no court can make a true determination  
17 as to whether the policy” passes constitutional muster. *Id.*

18 Here, Plaintiffs’ claims are not ripe for precisely the same reasons Plaintiffs repeatedly  
19 emphasize on the face of the FAC—i.e., because key aspects of the Ordinance that Plaintiffs  
20 challenge have not yet been established. *See, e.g.*, ¶¶ 1, 36-37, 90-91. For example, Plaintiffs  
21 challenge the constitutionality of the insurance and Fee requirements as an unconstitutional burden  
22 on Second Amendment rights, even Plaintiffs’ allege the amount of the Fee and the cost of the  
23 required insurance is “as yet unknown.” ¶¶ 1, 90. This is precisely the kind of situation in which it  
24 is “premature” to ask a federal court “to issue a binding interpretation of a local ordinance based  
25 on what might happen in the future without first giving the City ... the opportunity to interpret its  
26 own ordinance.” *United States v. Power Co.*, 2008 WL 2626989, at \*4 (D. Nev. June 26, 2008).  
27 Since claims are not ripe when based on “mere speculation” as to what a future regulatory decision  
28 will be (*United States v. Gila Valley Irr. Dist.*, 31 F.3d 1428, 1436 (9th Cir. 1994)), they certainly

1 are not ripe when the plaintiffs’ own complaint admits that necessary legislative action and  
 2 rulemaking has not yet occurred, and plaintiffs have no idea what the content of those items will  
 3 be. *See, e.g.*, ¶¶ 1, 36-37, 90-91. As for Plaintiffs’ speculative fears that firearms will be “seized”  
 4 and onerous fines imposed, that also is not ripe for review because it “rests upon contingent future  
 5 events that may not occur as anticipated, or indeed may not occur at all.” *Young v. Hawaii*, 992  
 6 F.3d 765, 828 (9th Cir. 2021) (en banc) (“*Young*”).

7 Similarly, Plaintiffs’ First Amendment challenge is based on allegations that the “yet-to-be-  
 8 determined nonprofit” will “likely” be “dedicated to exclusively preaching the negative risks of  
 9 gun ownership,” and that it will administer “unspecified programs” and “activities of ideological  
 10 or political nature with which Plaintiffs disagree,” such as “endorsing gun control.” ¶¶ 6, 53, 62-  
 11 63, 112. This is all speculation that ignores the Ordinance’s express limitations on the nonprofit’s  
 12 activities. § 10.32.220(B) (expressly prohibiting nonprofit from spending any “portion of the  
 13 monies from the [Fee]” on “litigation, political advocacy, or lobbying activities”). Plaintiffs’  
 14 speculation about the “likely” views and activities of the yet-to-be-determined nonprofit is also  
 15 devoid of factual support. *See Sierra Club v. United States Army Corps of Eng’rs*, 990 F.Supp.2d  
 16 9, 31-32 (D.C. Cir. 2013) (grounds for preliminary injunction not ripe where the complained-of  
 17 conduct “has not yet occurred and is still in the process of being addressed”).

## 18 **2. The FAC Does Not State a Proper Facial Constitutional Challenge.**

19 In addition to being unripe for review, Plaintiffs’ facial challenge to the Ordinance should  
 20 be rejected for other reasons. Courts may not “resolve questions of constitutionality with respect to  
 21 each potential situation that might develop” in litigation, especially when the moving party does  
 22 not demonstrate that the law “would be unconstitutional in a large fraction of relevant cases.”  
 23 *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007). Because constitutional facial challenges “often  
 24 rest on speculation” (*Jackson v. City and County of San Francisco*, 746 F.3d 953, 962 (9th Cir.  
 25 2014) (“*Jackson*”)), “they raise the risk of premature interpretations of statutes on the basis of  
 26 factually barebones records,” and “threaten to short circuit the democratic process by preventing  
 27 laws embodying the will of the people from being implemented in a manner inconsistent with the  
 28 Constitution” (*Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51

1 (2008)). To be successful, a facial challenge must show that “no set of circumstances exists under  
 2 which the [law] would be valid, i.e., that the law is unconstitutional in all of its applications,” or at  
 3 least that it lacks a “plainly legitimate sweep.” *Id.* at 449.

4 Plaintiffs fail to allege facts establishing that the Fee would be unconstitutional in a “large  
 5 fraction” of cases, especially since the amount of the Fee has not even been determined yet.  
 6 Assuming the Council and City Manager establish constitutionally reasonable fees, fines, and  
 7 regulations, the Ordinance’s sweep is plainly legitimate because it furthers the City’s legitimate  
 8 efforts to reduce the harm caused by gun-related accidents and imposes only de minimus or  
 9 marginal burdens on the constitutional right to obtain a keep a firearm in the home for self-defense.  
 10 *Cf. Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840  
 11 (2013) (rejecting facial challenge to ordinance that regulated gun shows “only minimally and only  
 12 on county property,” without even requiring empirical support justifying the regulation). Plaintiffs’  
 13 FAC should be dismissed for this reason alone.

## 14 **B. THE COURT SHOULD DISMISS THE FAC UNDER RULE 12(b)(6).**

### 15 **1. Plaintiffs Fail to State a Second Amendment Claim.**

16 Plaintiffs contend the Ordinance impermissibly burdens the Second Amendment rights of  
 17 City residents to whom the Ordinance applies. ¶¶ 45-49. The Ninth Circuit adjudicates Second  
 18 Amendment challenges using a two-step test, which “(1) asks whether the challenged law burdens  
 19 conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate  
 20 level of scrutiny.” *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). For purposes of  
 21 this Motion, Defendants concede the Ordinance imposes some minimal or slight burden, and so  
 22 proceed to the second step of the test. *See e.g., Heller*, 554 U.S. at 625; *Jackson*, 746 F.3d at 959.

#### 23 **a. The Appropriate Level of Scrutiny is Intermediate Scrutiny.**

24 To determine the appropriate level of scrutiny, Courts look to two factors. First, Courts  
 25 assess how close the law comes to the core of the Second Amendment right, which is the right to  
 26 keep firearms in the home for purposes of self-defense. *Heller*, 554 U.S. at 629; *Jackson*, 746 F.3d  
 27 at 963. Unless the challenged law “implicates the core of the Second Amendment right and  
 28 severely burdens that right,” courts in the Ninth Circuit generally apply intermediate scrutiny.

1 *Young*, F.3d 765 at 784; *see also Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir.  
2 2011) (“*Heller II*”) (“[A] regulation that imposes a substantial burden upon the core right of self-  
3 defense protected by the Second Amendment must have a strong justification, whereas a regulation  
4 that imposes a less substantial burden should be proportionately easier to justify.”). Here,  
5 intermediate scrutiny applies because the Ordinance does not “impos[e] restrictions on the use of  
6 handguns within the home” or otherwise come close to regulating the core Second Amendment  
7 right of keeping firearms in the home for self-defense. *Jackson*, 746 F.3d at 963. The Ordinance  
8 merely requires resident gunowners to obtain liability insurance to provide a mechanism for  
9 compensating victims of accidental gun injuries, and to pay a reasonable Fee to fund services  
10 aimed at reducing well-established harms that result from guns being present in the home.  
11 §§ 10.32.210(A), 10.32.215, 10.32.220.

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

25 Here, the burden the Ordinance imposes is minimal: it neither regulates the use of firearms,  
26 how or where they are stored, nor any other factors evaluated by courts as directly affecting  
27 residents’ ability to keep and bear arms for self-defense. *See e.g., Heller*, 554 U.S. at 629. Instead,  
28 it merely requires gunowners to obtain insurance and pay a reasonable annual Fee.

1 §§ 10.32.210(A), 10.32.215. The Ordinance neither seeks to ban guns nor threatens to seize them.  
 2 Indeed, the Ninth Circuit (in line with the other Circuits) has long applied intermediate scrutiny to  
 3 uphold similar laws. *See, e.g., Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (upholding DOJ’s  
 4 use of gun sale fee for enforcement efforts targeting illegal firearm possession after point of sale  
 5 under intermediate scrutiny); *Heller v. District of Columbia*, 801 F.3d 264, 278 (D.C. Cir. 2015)  
 6 (“*Heller III*”) (upholding \$48 in gun licensing fees under intermediate scrutiny); *Kwong v.*  
 7 *Bloomberg*, 723 F.3d 160, 161, 167 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) (upholding  
 8 \$340 gun licensing fee under intermediate scrutiny); *O’Connell v. Gross*, No. CV 19-11654-FDS,  
 9 2020 WL 1821832 (D. Mass. Apr. 10, 2020) (upholding law requiring mandatory safety courses  
 10 and \$300 in fees under intermediate scrutiny). Intermediate scrutiny is appropriate.

11 **b. The Ordinance Easily Survives Intermediate Scrutiny.**

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

15 First, the City’s objective of promoting public safety and addressing gun injuries is an  
 16 “important” government interest. *Chovan*, 735 F.3d at 1139; *see also Fyock*, 779 F.3d at 1000 (it is  
 17 “self-evident” that government’s interest in promoting public safety and reducing violent crime are  
 18 substantial and important government interests”); *Stimmel v. Sessions*, 879 F.3d 198, 201 (6th Cir.  
 19 2018) (referring to “government’s compelling interest of preventing gun violence”); *Torcivia v.*  
 20 *Suffolk Cty., New York*, 17 F.4th 342, 359 (2d Cir. 2021) (finding a “substantial governmental  
 21 interest in preventing suicide and domestic violence”). The Ordinance’s other stated purpose of  
 22 reducing the social and financial costs caused by guns (§ 10.32.200(B)) is also an important  
 23 interest. *See, e.g., Bauer*, 858 F.3d at 1226; *Kwong*, 723 F.3d at 168 (city permitted to recover  
 24 costs as part of scheme “designed to promote public safety and prevent gun violence”). There can  
 25 be no serious doubt that gun violence is a major public health crisis. *See* U.S. Centers for Disease  
 26 Control and Prevention, *Firearm Violence Prevention*, available at  
 27 <https://www.cdc.gov/violenceprevention/firearms/fastfact.html> (accessed Apr. 6, 2022) (deeming  
 28

1 firearm injuries a “serious public health problem.”). Thus, the Ordinance clearly meets the first  
2 prong under intermediate scrutiny.

3 Second, there is a reasonable fit between the challenged regulation and the City’s objective.  
4 *See Chovan*, 735 F.3d at 1139. When assessing the reasonableness of fit under immediate scrutiny,  
5 courts must give “substantial deference to the predictive judgments” of the legislature on public  
6 policy questions that fall outside the courts’ competence. *Turner Broad. Sys., Inc. v. FCC*, 520  
7 U.S. 180, 195 (1997) (“*Turner IP*”). This is because “the legislature is far better equipped than the  
8 judiciary to make sensitive public policy judgments (within constitutional limits)” on complex  
9 empirical questions like “the dangers in carrying firearms and the manner to combat those risks.”  
10 *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner Broad. Sys.,*  
11 *Inc. v. FCC*, 512 U.S. 622, 665 (1994) (“*Turner P*”). This Court’s “sole obligation” is simply “to  
12 assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based  
13 on substantial evidence.” *Turner II*, 520 U.S. at 181. That standard is easily met here.

14 The City’s reasonable legislative judgments are entitled to deference. Plaintiffs’ vaguely  
15 allege the Ordinance is “not a reasonable fit” with its stated aims of reducing gun injuries and  
16 reducing and offsetting some of the enormous social costs of gun injuries and violence in the City.  
17 *See* ¶¶ 52-56, 96. Simply because “primary costs” of gun violence are associated with City  
18 response costs does not detract from the City’s lawful goal (and authority) to prevent and reduce  
19 gun injuries and associated costs for the City and its residents in the first instance, with the goal of  
20 saving the City and its residents from ever incurring the related costs. That the Ordinance does not  
21 also seek to recover police or other response costs does not somehow invalidate it. And in any  
22 event, the PIRE study does include findings related to suicide and self-inflicted harm, which the  
23 Ordinance seeks to address.

24 Moreover, the City relied on several studies and findings to form its reasonable judgment  
25 that an insurance mandate will deter, prevent, or reduce accidental gun harm. *See e.g.*, Prevost  
26 Decl. ¶ 12, Ex. 11 (*The New England Journal of Medicine* article “Handgun Ownership and  
27 Suicide in California,” cited in Ordinance findings at § 10.32.200(B)(6)). The City also evaluated  
28 and reviewed materials concerning the civil liability and financial harm arising from gun violence.

1 *See id.* ¶ 13, Ex. 12 (The Educational Fund to Stop Gun Violence, “Unintentional Shootings”); *id.*  
2 ¶ 14, Ex. 13 (Hartford Courant, “Sandy Hook Families Settle Lawsuits Against Lanza Estate for  
3 \$1.5M”); *id.* ¶ 15, Ex. 14 (Gilman & Bedigian LLC, “Man who shot intruder in his home sued for  
4 wrongful death”). The Ordinance is also based on the City’s reasonable judgment that requiring  
5 gun liability insurance might be effective in reducing harm, relying on the useful analogue of  
6 automobile liability insurance. *See* § 10.32.200(B)(8) (noting “risk-adjusted premiums used by the  
7 automobile insurance industry reduced per-mail auto fatalities by 80% over the past five decades  
8 and saved 3.5 million lives”); Prevost Decl. ¶ 8, Ex. 7 (compendium of materials provided to City  
9 Council in advance its January 25, 2022 meeting).

10 This multitude of studies support the City’s view that the Ordinance’s insurance mandate,  
11 annual Fee requirement, and related education programming and services will positively improve  
12 public health, safety, and well-being. Indeed, a city is allowed “a reasonable opportunity to  
13 experiment with solutions to admittedly serious problems,” such as unintentional harm caused by  
14 firearms. *Jackson*, 746 F.3d at 966 (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41,  
15 52 (1986)). The Ordinance findings and legislative record more than sufficiently support the  
16 reasonableness of the fit between City’s important interests in deterring gun-related deaths and  
17 injuries and compensating victims of accidental shootings. *See City of Renton*, 475 U.S. at 51-52;  
18 *Jackson*, 746 F.3d at 969. Additionally, Plaintiffs are well-aware that the Mayor has publicly  
19 proposed a mere \$25 fee in a Memorandum provided for Council’s review. *See* Prevost Decl. ¶ 5,  
20 Ex. 4. Yet the FAC contains no non-conclusory allegations as to why such a minimal Fee would be  
21 an unconstitutional burden on Second Amendment rights. Nor do Plaintiffs’ claims account for the  
22 Ordinance’s “financial hardship” exemption, which would exempt from the Ordinance’s  
23 requirements any person who meets its yet-to-be-promulgated criteria. §§ 10.32.225(C),  
24 10.32.235(A)(4).

25 Ultimately, Plaintiffs’ allegations regarding the purported lack of a “reasonable fit”  
26 between the Ordinance and the City’s important interests are far too limited, ignore key provisions  
27 of the Ordinance, and ignore the deference due to a municipality’s reasonable legislative  
28 judgments. *See City of Renton*, 475 U.S. at 51-52 (municipality may rely on any evidence



1 “reasonably believed to be relevant” to substantiate its important interest in regulating speech);  
2 *Jackson*, 746 F.3d at 969 (finding San Francisco’s evidence more than “fairly supports” its  
3 conclusion that hollow point bullets are lethal).

4 Tellingly, Plaintiffs’ cited cases in its FAC (*see* ¶¶ 46-49, 86-87) striking down gun laws  
5 are inapposite as they either concerned “handgun bans,” a far more severe burden than the  
6 Ordinance here (*McDonald v. City of Chicago*, 561 U.S. 742, 750, 792 (2010); *District of*  
7 *Columbia v. Heller*, 554 U.S. 570, 635 (2008)), or actually contradict their position. *See Nordyke v.*  
8 *King*, 681 F.3d 1041, 1044-45 (9th Cir. 2012) (en banc) (upholding constitutionality of ordinance  
9 regulating display of guns at gun shows “no matter what form of scrutiny applies”); *United States*  
10 *v. Masciandaro*, 638 F.3d 458, 459-60 (4th Cir. 2011) (upholding constitutionality of federal law  
11 prohibiting carrying or possessing a loaded handgun in a motor vehicle in a national park area);  
12 *Bauer*, 858 F.3d 1216 (upholding California law requiring payment of \$19 fee on every firearm  
13 sale conducted in the state because of the “minimal nature of the burden” and plaintiff’s failure to  
14 show the fee “has any impact on [his] actual ability to obtain and possess a firearm”); *Kwong*, 723  
15 F.3d at 161, 167 (upholding mandatory \$340 three-year gun license fee because it imposed merely  
16 a “marginal, incremental, or [] appreciable [but not substantial] restraint” on Second Amendment  
17 rights, “especially considering that plaintiffs [] put forth no evidence ... that the fee is prohibitively  
18 expensive”). Like the plaintiffs in *Bauer* and *Kwong*, Plaintiffs’ FAC provides no facts on the cost  
19 of the liability insurance or annual fee requirements, nor that the Ordinance’s “financial hardship”  
20 exception under Section 10.32.225(C) would fail to fully address this concern.

21 Rather, Plaintiffs rely on three decades-old First Amendment fee cases (¶¶ 1, 57-58, 85-  
22 86), all of which are readily distinguishable. *See Minneapolis Star and Tribune Co. v. Minnesota*  
23 *Comm’r of Rev.*, 460 U.S. 575, 591-92 (1983) (newspaper tax held unconstitutional because it was  
24 “tailor[ed]” so that “a small group” of newspapers were required to pay enormous taxes); *Murdock*  
25 *v. Pennsylvania*, 319 U.S. 105, 113-14 (1943) (striking down licensing fee that was “not a nominal  
26 fee” properly imposed as a regulatory measure); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)  
27 (holding that fee imposed on a constitutional right cannot not be a general “revenue tax”). Indeed,  
28 the Ninth Circuit has rejected the same argument Plaintiffs make here. *See Bauer*, 858 F.3d at 1225

1 (upholding constitutionality of California law imposing \$19 fee on all gun sales). The Ordinance is  
 2 constitutional under *Bauer, Murdock, and Cox* because the Ordinance’s liability insurance and  
 3 annual Fee requirements are carefully tailored to ensure they are not a general revenue tax, directly  
 4 further the maintenance of public order in the matter regulated, and are even subject to a “financial  
 5 hardship” exception. § 10.32.225(C). In sum, intermediate scrutiny applies, and the Ordinance  
 6 clearly survives. Plaintiffs fail to state a claim under the Second Amendment.

7 **2. Plaintiffs Fail to State a First Amendment Claim Based on Compelled**  
 8 **Speech or Association.**

9 Plaintiffs’ First Amendment claim is based on speculation that a yet-to-be-designated  
 10 nonprofit with unknown leadership is likely hold anti-gun views and be hostile to the Second  
 11 Amendment. ¶¶ 60-64. This claim should be dismissed as pure speculation and for ignoring,  
 12 among other things, that the political advocacy that Plaintiffs fear the nonprofit might engage in is  
 13 expressly prohibited by the Ordinance. § 10.32.220(B) (providing that no portion of the Fee may  
 14 be used “for litigation, political activity, or lobbying activities”).

15 Additionally, Plaintiffs’ authorities cited in the FAC (i.e., a Thomas Jefferson quote and  
 16 two Supreme Court decisions from disparate contexts) do not support their First Amendment claim  
 17 that the Ordinance’s Fee requirement is compelled speech in violation of the First Amendment.  
 18 ¶¶ 61, 63, 110-113. First, *Janus* concerns whether non-union public employees can be compelled  
 19 to pay union dues to fund the unions’ political lobbying, advertising, litigation, and social and  
 20 recreational activities, and other activities. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2459-  
 21 61, 2480 (2018). *Janus*’s holding and reasoning are deeply rooted in the union context. *See, e.g.,*  
 22 *id.* at 2486 (“State and public sector unions may [not] extract agency fees from nonconsenting  
 23 employees . . . [u]nless employees clearly and affirmatively consent[.]”). Second, Plaintiffs cite a  
 24 case against the State Bar concerning the use of compulsory bar membership dues to engage in  
 25 political activities, such as “lobbying for or against state legislation,” opposing federal legislation,  
 26 and endorsing political measures. *See Keller v. State Bar of California*, 496 U.S. 1, 15 (1990).

27 Tellingly, Plaintiffs never explain why language and reasoning from these factually  
 28 inapposite cases should be extracted from their highly specific public union and State Bar contexts

1 and applied to an entirely different scenario, where a legislature seeks funds for reasonable  
2 measures to carry out its police powers to protect public health and safety. Nor do Plaintiffs cite  
3 any cases in which a court has applied these cases in that context, much less relied on them (as  
4 Plaintiffs do), to strike down a gun regulation. Plaintiffs’ argument should be rejected for these  
5 reasons alone. The core concern of the First Amendment compelled speech doctrine—i.e.,  
6 prohibiting compelled speech and association in matters of political lobbying, advocacy, or  
7 litigation—simply does not exist here. *See also Keller*, 496 U.S. at 12-13 (1990) (“If every citizen  
8 were to have a right to insist that no one paid by public funds express a view with which he  
9 disagreed, debate over issues of great concern to the public would be limited to those in the private  
10 sector, and the role of government as we know it radically transformed.”).

11       Ultimately, Plaintiffs fail to plausibly allege that the Ordinance will compel speech with  
12 which they do not agree—especially in view of federalism concern that federal courts should not  
13 invalidate state laws on the grounds that they violate the right of association based only on “factual  
14 assumptions.” *Wash. State Grange*, 552 U.S. at 457; *accord Cal. Democratic Party v. Jones*, 530  
15 U.S. 567, 600 (2000) (Stevens, J., dissenting) (“[A]n empirically debatable assumption ... is too  
16 thin a reed to support a credible First Amendment distinction” with respect to burdens on  
17 association). Plaintiffs’ First Amendment claim should be dismissed.

### 18                   **3. Plaintiffs Fail to Sufficiently Allege State Law Preemption.**

19       Plaintiffs argue that the Ordinance is preempted by state law under Article XI, Section 7 of  
20 the California Constitution. ¶¶ 65-69. Under that provision, a local ordinance that is “in conflict  
21 with the general laws” is preempted and void, but a “city may make and enforce ... all local, ...  
22 sanitary, and other ordinances ... not in conflict with general laws” under its police power. Cal.  
23 Const., Art. XI, § 7. The “general rule” is that “ordinances will be upheld against constitutional  
24 challenge if they are reasonably related to promoting the health, safety, comfort and welfare of the  
25 public, and if the means adopted to accomplish that promotion are reasonably appropriate to the  
26 purpose.” *Sunset Amusement Co. v. Bd. of Police Comm’rs*, 7 Cal.3d 64, 72 (1972). The Ordinance  
27 here fits well within that general rule.

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1           Additionally, under Article XI, Section 5(a) of the California Constitution, charter cities  
 2 (like San Jose) have the right to adopt ordinances that conflict with general state laws, provided the  
 3 subject of the ordinance is a “municipal affair” rather than one of “statewide concern.” As to  
 4 matters of “statewide concern,” charter cities remain subject to and controlled by applicable  
 5 general state laws only “if it is the intent and purpose of such general laws to occupy the field to  
 6 the exclusion of municipal regulation.” *Bishop v. City of San Jose*, 1 Cal.3d 56, 60-61 (1969). A  
 7 law is preempted if it “duplicates, contradicts, or enters an area fully occupied by general law,  
 8 either expressly or by legislative implication.” *Sherwin-Williams Co. v. City of Los Angeles*, 4  
 9 Cal.4th 893, 897-98 (1993).

10           Here, Plaintiffs do not argue that the Ordinance duplicates or contradicts state law. Instead,  
 11 they argue that “[g]un regulation is already fully occupied by the State of California.” ¶ 68.  
 12 Plaintiffs ignore that gun regulation as a whole has not been fully occupied by general law. *Great*  
 13 *Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 861 (Cal. 2002). Instead, the State  
 14 Legislature has expressly preempted only discrete areas of gun regulation, such as permitting,  
 15 licensing, and registration of firearms. *See* Cal. Pen. Code § 25605 (permitting and licensing); Cal.  
 16 Gov. Code § 53071 (registration and licensing). The State has neither expressly nor impliedly  
 17 preempted the entire field of gun regulation, or the discrete areas regulated by the Ordinance here  
 18 (e.g., firearm liability insurance, the provision of voluntary programming and services to gunowner  
 19 households to improve public health and safety). This impedes Plaintiffs’ preemption argument.

20           Additionally, Plaintiffs ignore the test for preemption. A local ordinance can only duplicate  
 21 or contradict state law if it addresses the exact same subject matter of the state law. In *Great*  
 22 *Western Shows*, for example, the California Supreme Court explained that, in a prior case, it had  
 23 “distinguished between licensing, which signifies permission or authorization, and registration,  
 24 which entails recording ‘formally and exactly’ and therefore declined to find express conflict  
 25 between the statute and the ordinance.” 27 Cal.4th at 860-61 (2002) (citing *Galvan v. Superior*  
 26 *Court*, 70 Cal.2d 851 (1969)). Here, the Ordinance has nothing to do with licensing. It neither  
 27 prevents nor expressly authorizes City residents to obtain gun licenses, prevents a law enforcement  
 28 official from issuing a license, or creates new or different requirements for obtaining a license.

1 Indeed, it expressly exempts from its requirements any gunowner with a concealed weapon license  
 2 under State law, indicating the City’s intent not to encroach into State territory. § 10.32.225(B).  
 3 Permitting, licensing, and registration concern completely different subjects than the insurance  
 4 mandate contained within the Ordinance. *See Great Western Shows*, 27 Cal.4th at 860-61; *Galvan*,  
 5 70 Cal.2d 85.

6 Numerous California state courts have upheld gun regulations, rejecting preemption  
 7 arguments similar to those Plaintiffs make here. *See e.g., Calguns Foundation, Inc. v. County of*  
 8 *San Mateo*, 218 Cal.App.4th 661 (2013) (upholding county ban on gun possession in County  
 9 parks); *Cal. Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal.App.4th 1302 (1998)  
 10 (ordinance banning sale of “Saturday Night Special” handgun); *Olsen v McGillicuddy*, 15 Cal.  
 11 App. 3d 897 (1971) (upholding ordinance prohibiting gun possession in cars); *Great Western*  
 12 *Shows*, 27 Cal. 4th 853, 863 (2002) (upholding regulation of gun sales on municipal land).  
 13 Plaintiffs’ state preemption argument is without merit and should be dismissed.

14 **4. Plaintiffs Fail to State a Claim that the Ordinance Imposes a Tax in**  
 15 **Violation of the California Constitution.**

16 Plaintiffs argue that the Ordinance’s insurance mandate and Fee requirements are taxes that  
 17 may not be imposed without voter approval under California Constitution Article XIII C, as  
 18 amended by Proposition 26. ¶¶ 70-72. A tax is defined to include any levy, charge, or exaction of  
 19 any kind imposed by a local government. Cal. Const., Art. XIII C, § 1 (“Proposition 26”).  
 20 Proposition 26 sets forth seven exemptions to this rule. *Id.* However, neither the insurance mandate  
 21 nor the Fee constitute a tax because (aside from modest administrative costs) none of the proceeds  
 22 from those requirements will pass into government hands. *See Schmeer v. County of Los Angeles*,  
 23 213 Cal.App.4th 1310 (2013).

24 In *Schmeer*, Los Angeles County enacted an ordinance that prohibited retail stores in  
 25 unincorporated areas of the county from providing disposable plastic carryout bags to customers.  
 26 213 Cal.App.4th at 1314. The stores could provide recyclable paper carryout bags but were  
 27 required to charge customers ten cents per bag. *Id.* Critically, the proceeds of the paper bag sales  
 28 were retained by the store—not the County—to be used for prescribed purposes, including to cover

1 the actual costs of the paper bags. *Id.* The *Schmeer* plaintiffs sued on the same theory advanced by  
 2 Plaintiffs here: that the bag charge is a tax as defined by Proposition 26. The court ruled that  
 3 because the proceeds of the bag charge are retained by the retail store and not remitted to the  
 4 county, the voter approval requirements of Article XIII C, § 2 [were] therefore inapplicable.” *Id.* at  
 5 1326, 1329. Applied here, *Schmeer* makes clear that Plaintiffs’ failure to explain how money that  
 6 never passes to the City could constitute a tax is fatal to their Proposition 26 claim. Under the  
 7 Ordinance, all monies from payment of the annual Fee will go directly to the nonprofit  
 8 organization, insurance premiums will be paid to insurance carriers, and insurance claims will be  
 9 paid out to victims of accidental gun injuries. *See* §§ 10.32.215, 10.32.220. The City will receive  
 10 none of the monies at issue.

11 *Schmeer* also defeats the Plaintiffs’ argument that the City must prove that the amount of  
 12 the fees is no more than necessary to cover the reasonable costs of the governmental activity and  
 13 that the manner in which those costs are allocated to a payor bear a reasonable relationship to the  
 14 payor’s burdens on, or benefits from, the governmental activity. ¶ 42. But even if it did not, this  
 15 argument would fail for the separate and independent reason that Fee money collected from  
 16 gunowners would be fairly categorized under the exception from Proposition 26 for fees “imposed  
 17 for a specific benefit conferred or privilege granted directly to the payor that is not provided to  
 18 those not charged.” Cal. Const., Art. XIII C, § 1 (“specific benefit exemption”); *see also S. Cal.*  
 19 *Edison Co. v. Pub. Util. Comm’n*, 227 Cal.App.4th 172, 200 (2014) (finding a public utility fee  
 20 was “designed to benefit ... ratepayers” and “[t]he possibility that some EPIC research may  
 21 incidentally provide a social benefit to the public at large does not transform EPIC into a tax where  
 22 a discrete group, namely the utility corporations’ ratepayers, is specifically benefitted.”)

23 In sum, neither the insurance mandate nor the Fee is a tax under Proposition 26, and  
 24 Plaintiffs’ claim should be dismissed.

### 25 **5. The Ordinance Does Not Violate the San Jose City Charter.**

26 Plaintiffs allege that the Ordinance violates the San Jose City Charter (“Charter”) “by  
 27 prohibiting the San Jose City Council from using its budgetary and appropriating powers to direct  
 28

1 how” the designated nonprofit expends the Fee, and by “divert[ing] a City fee to a nonprofit rather  
2 than the City’s General Fund.” ¶¶ 73-81. Both arguments fail.

3 When interpreting a California statute, Federal courts apply California rules of statutory  
4 construction. *Lares v. West Bank One*, 188 F.3d 1166, 1168 (9th Cir. 1999). The same rules of  
5 construction apply to local ordinances and city charters. *See 1300 N. Curson Investors, LLC v.*  
6 *Drumea*, 225 Cal.App.4th 325, 332 (2014); *Laurent v. City and County of San Francisco*, 99  
7 Cal.App.2d 707, 708 (1950). The language of the Charter and the Ordinance must be read in the  
8 context of the respective statutes as a whole. *See Isaakhani v. Shadow Glen Homeowners Assn.,*  
9 *Inc.*, 63 Cal.App.5th 917, 931-932 (2021); *City of San Jose v. Lynch*, 4 Cal.2d 760, 766 (1935).  
10 And when interpreting a statute, the court must “avoid a construction that would lead to  
11 impractical or unworkable results.” *Los Angeles Unified Sch. Dist. v. Garcia*, 58 Cal.4th 175, 194  
12 (2013). But read in context, the isolated the provisions of the Ordinance and the Charter upon  
13 which Plaintiffs rely do not support their conclusion.

14 ***a. The Charter Does Not Require Placing the Fee into the General***  
15 ***Fund.***

16 Plaintiffs ignore the first sentence of Section 1211 of the Charter, which states that “[a]ll  
17 monies paid into the San Jose City Treasury shall be credited to and kept in separate funds in  
18 accordance with provisions of this Charter or ordinance.” *Id.* When read together with the  
19 sentences that follow, it is clear the General Fund applies to “monies paid into the City Treasury.”  
20 *Id.* But the Ordinance requires that the Fee be paid to the designated nonprofit, not “paid into the  
21 City Treasury.” § 10.32.215.

22 ***b. The Fee is Not Subject to the Charter’s Budgetary Procedures.***

23 The premise of Plaintiffs’ argument, that the Ordinance “violates the [Charter’s]  
24 reservation of budgeting and appropriation power to the City Council,” is incorrect. Sections 1204,  
25 1206, and 1207 of the Charter do not apply to the Fee. All three sections concern the City’s  
26 budgetary process, which expressly applies to “City departments, offices, and agencies” – not the  
27 designated nonprofit or the Fee it receives. Charter §§ 1204, 1206, 1207. The nonprofit is not a  
28 City department, office, or agency. Indeed, “[n]o City official or employee shall sit on the board of

1 directors of the Designated Nonprofit Organization” (§ 10.32.305(B)), and the City “shall not  
2 specifically direct how the monies from the [Fee] are expended” (§ 10.32.220(C)).

3 The Ordinance does not provide for or contemplate using the Fee for the operation of City  
4 departments. § 10.32.220(C). Rather, the Ordinance requires the designated nonprofit to “spend  
5 every dollar generated from the [Fee]” on programs and initiatives within a particular category –  
6 none of which include the operation of offices, departments, or agencies of the City. *Id.*; *c.f.*  
7 Charter § 1207. Therefore, the Fee is not subject to the City’s budgetary process and Plaintiffs’  
8 argument fails on its premise.

9 ***c. The Council Properly Delegated Regulatory Authority to the City***  
10 ***Manager.***

11 The City Manager is the Chief Administrative Officer and head of the administrative  
12 branch of San Jose’s council-manager government. Charter §§ 300, 700. The City Manager is thus  
13 “responsible for the faithful execution of all laws, provisions of [the] Charter, and acts of the  
14 Council which are subject to enforcement by the City Manager or by officers who are under the  
15 City Manager’s direction and supervision.” *Id.* § 701(d).

16 The Council may lawfully delegate administrative or ministerial functions to the City  
17 Manager. *Sacramento Chamber of Commerce v. Stephens*, 212 Cal. 607, 610 (1931). It is  
18 sufficient that the Council “declare a policy, fix a primary standard, and authorize executive or  
19 administrative officers to prescribe subsidiary rules and regulations that implement the policy and  
20 standard and to determine the application of the policy or standard to the facts of particular cases.”  
21 *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 167 (Cal. 1976) (citation omitted). That is precisely  
22 the case here.

23 The Ordinance directs the City Manager to “implement the requirements and fulfill the  
24 policies of [the Ordinance] relating to the reduction of gun harm,” including by designating the  
25 nonprofit receiving the Fee and setting forth “processes and procedures relating to the payment of  
26 the fee, and any additional guidelines or auditing of the use of the monies from the fee.” §  
27 10.32.235 (A), *et seq.* The nonprofit clearly has more than vague directions from the City. ¶¶ 77,  
28 143. Simply because the City “shall not specifically direct how” the designated nonprofit will



1 expend the fee, that does not “violate the City Charter’s delegation of executive functions to the  
 2 administrative branch of the City Government.” *Id.* San Jose maintains authority over how the  
 3 designated nonprofit expends the fee through the administrative oversight of the City Manager. (§  
 4 10.32.235). But “[n]either Council nor any of its members nor the Mayor shall interfere with the  
 5 execution by the City Manager of [their] powers and duties.” Charter § 411. Therefore, authority  
 6 over expenditure of the Fee is properly vested and Plaintiffs claim the City is violating its own  
 7 charter are false.

#### 8 **6. Plaintiffs Fail to State a Claim for Declaratory Relief.**

9 Plaintiffs’ make a claim for declaratory relief “to the extent that each of the claims above  
 10 have not already established a remedy.” ¶ 148. This claim should be dismissed as impermissibly  
 11 duplicative of Plaintiffs’ other five claims, and because it fails for all the same reasons as those set  
 12 forth above.

#### 13 **C. THE FAC SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND.**

14 Defendants respectfully request that the FAC be dismissed without leave to amend, in light  
 15 of futility, and serious federalism concerns. Preliminarily, the Ninth Circuit’s permissive standards  
 16 for granting leave to amend do not apply here. Rule 15(a) only allows parties to amend pleadings  
 17 to “assert matters that were overlooked or were unknown *at the time the party interposed the*  
 18 *original complaint.*” 6 Wright & Miller, FED. PRAC. & PROC. § 1473 (3d ed. 2021). Both Plaintiffs’  
 19 original complaint and FAC were filed before the Ordinance was effective. No amount of  
 20 amending could teleport the FAC “to the future,” to a time when the Ordinance is effective. And  
 21 allowing Plaintiffs to supplement their pleadings under Rule 15(d) would also not be permissible.  
 22 “If jurisdiction is lacking at the outset [of a litigation], the district court has no power to do  
 23 anything with the case except dismiss.” *Morongo Band of Mission Indians v. Cal. State Bd. of*  
 24 *Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Lopez v.*  
 25 *Turnage*, 2021 WL 5142070, at \*1 (N.D. Cal. Oct. 15, 2021). Moreover, the Ordinance is what it  
 26 is. The legal defects described in this Motion cannot be cured by adding different factual  
 27 allegations to the FAC. “Any amendment would be futile.” *Leadsinger, Inc. v. BMG Music Pub.*,  
 28 512 F.3d 522, 532 (9th Cir. 2008).

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A practice of allowing plaintiffs to sue legislators before a bill is effective so that the plaintiffs could amend or supplement their pleadings when the bill becomes effective is inappropriate. *Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *Portland Police Ass’n v. City of Portland*, 658 F.2d 1272, 1275 n.3 (9th Cir. 1981) (citing “federalism concerns” as reason for declining to exercise jurisdiction in litigation involving municipal police department policies); *Westlands Water Distrib. Dist. v. Nat. Res. Defense Council*, 276 F.Supp.2d 1046, 1051 (E.D. Cal. 2003). The Court should dismiss the FAC with prejudice.

**V. CONCLUSION**

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

Dated: April 8, 2022

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