

United States District Court
Northern District of California

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

NATIONAL ASSOCIATION FOR GUN
RIGHTS, INC., et al.,

 Plaintiffs,

 v.

CITY OF SAN JOSE, et al.,

 Defendants.

Case No. 22-cv-00501-BLF

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION**

[Re: ECF No. 25]

The City of San Jose passed the Reduction of Gun Harm – Liability Insurance Requirement and Gun Harm Reduction Fee ordinance on January 25, 2022.¹ In the preamble, the City determined that the Ordinance was an exercise of its police powers “for the protection of the welfare, peace and comfort of the residents of the City of San Jose.” This suit was filed the same day.

Plaintiffs National Association for Gun Rights, Inc. (“NAGR”) and Mark Sikes (collectively “Plaintiffs”) bring suit against Defendants City of San Jose (the “City”), the City Manager Jennifer Maguire, and City of San Jose City Council (collectively “Defendants”) to challenge Part 6 of Chapter 10.32 of Title 10 (§§ 10.32.200- 10.32.250) of the City of San Jose’s local ordinances (the “Ordinance”). *See* First Amended Complaint (“FAC”), ECF No. 19. The Ordinance at issue purports “to reduce gun harm by: (a) requiring gun owners to obtain and maintain liability insurance; and (b) authorizing a fee to apply to gun harm reduction programs.” *Id.* ¶ 19. Plaintiffs assert that the Ordinance violates their Second Amendment and First Amendment rights (First and Second Claims), the California Constitution (Third and Fourth

¹ The Ordinance’s second reading and enactment occurred on February 8, 2022.

1 Claims), and the City of San Jose’s City Charter (Fifth Claim). *Id.* ¶¶ 82-146.

2 Shortly after commencing suit, Plaintiffs filed the present Motion for Preliminary
 3 Injunction (“Motion”) to enjoin enforcement of the Ordinance, which was initially scheduled to go
 4 into effect on August 8, 2022 but the implementation of which has since been delayed past
 5 December 2022. Pls.’ Mot. Prelim. Inj. 9, ECF No. 25; Defs.’ Suppl. Br. 7, ECF No. 64. On June
 6 23, 2022—after the Motion was briefed but before the hearing—the Supreme Court of the United
 7 States issued its opinion in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111
 8 (2022), altering the framework under which both parties briefed the Motion. This Court
 9 subsequently ordered the parties to file supplemental briefs addressing *Bruen* and the proper legal
 10 standard for evaluating the Second Amendment issues in the Motion. ECF No. 62. The Court has
 11 considered the parties’ initial and supplemental briefing, the *amicus curiae* brief and response, and
 12 the oral arguments presented on July 14, 2022. For the reasons discussed below, Plaintiffs’
 13 Motion is DENIED.

14 I. BACKGROUND

15 On June 29, 2021, the San Jose City Council directed City Attorney Nora Frimann to
 16 return to Council with an ordinance requiring San Jose gun owners to “obtain and maintain a City-
 17 issued document evincing payment of an annual fee, and attestation of insurance coverage for
 18 unintentional firearm-related death, injury, or property damage.” FAC ¶ 18. On January 14, 2022,
 19 the City Attorney returned with a recommendation for an ordinance “(a) requiring gun owners to
 20 obtain and maintain liability insurance; and (b) authorizing a fee to apply to gun harm reduction
 21 programs.” *Id.* ¶ 19. On January 25, 2022, the City Council initially approved the Ordinance,
 22 and, on February 8, 2022, the Council voted to finally approve Ordinance No. 30716. *Id.* ¶ 26.

23 Plaintiff NAGR describes itself as a nonprofit grassroots organization dedicated to
 24 defending the Second Amendment right to keep and bear arms. *Id.* ¶ 13. Its members include San
 25 Jose residents who would be subject to the Ordinance. Plaintiff Sikes is a San Jose resident, who
 26 legally owns a gun and would be subject to the Ordinance if it were to go into effect. *Id.* ¶ 14.

27 A. The Ordinance

28 Ordinance No. 30716 is comprised of four sections, with the first section containing the

1 operative provisions of Part 6 to Title 10 of the San Jose Municipal Code. *See* FAC, Ex. K. Part 6
 2 contains sections §§ 10.32.200-10.32.250 and is titled, “Reduction of Gun Harm – Liability
 3 Insurance Requirement and Gun Harm Reduction Fee” (the “Ordinance”). *Id.* at 5-12. The
 4 second, third, and fourth sections establish the Ordinance’s effective date, its severability, and the
 5 bases for the City Council’s action in passing the Ordinance, respectively.

6 **i. Insurance Requirement**

7 The Ordinance itself begins with a recitation of the City’s authority to adopt the Ordinance,
 8 its purpose, and specific factual findings propelling the City’s action. Ordinance § 10.32.200.
 9 The first operative provision requires San Jose residents who own or possess a firearm to obtain a
 10 homeowner’s, renter’s, or gun liability insurance policy “covering losses or damages resulting
 11 from any accidental use of the Firearm.” *Id.* § 10.32.210 (the “Insurance Requirement”).

12 **ii. Gun Harm Reduction Fee**

13 The second main provision is the requirement for San Jose gun owners to pay an Annual
 14 Gun Harm Reduction Fee (the “Fee”) to a Designated Nonprofit Organization (the “Nonprofit”),
 15 selected by the City Manager. *Id.* § 10.32.215, 10.32.235. The Fee amount will be established by
 16 City Council, and every dollar generated must be used by the Nonprofit to provide “services to
 17 residents of the City that own or possess a [f]irearm in the City, to members of their household, or
 18 to those with whom they have a close familial or intimate relationship.” *Id.* § 10.32.220(A). The
 19 Ordinance instructs the Nonprofit to spend the funds generated from the Fee exclusively for
 20 programs and initiatives designed to “(a) reduce the risk or likelihood of harm from the use of
 21 firearms in the City of San Jose, and (b) mitigate the risk of physical harm or financial, civil, or
 22 criminal liability that a San Jose firearm owner or her family will incur through her possession of
 23 firearms.” *Id.* § 10.32.220(C). The Ordinance also provides a non-exhaustive list of services the
 24 Nonprofit may provide, which include suicide prevention, violence reduction, addiction
 25 intervention, substance abuse, mental health services relating to gun violence, and firearms safety
 26 education. *Id.* § 10.32.220(A)(1)-(5). Proceeds generated by the Fee may not be used for
 27 litigation, political advocacy, or lobbying activities nor may the City “specifically direct how the
 28 monies from the Gun Harm Reduction Fee are expended.” *Id.* §§ 10.32.220(B)-(C).

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iii. Compliance and Implementation

San Jose residents who are required to obtain and maintain insurance must maintain a City-designated attestation form, to which they must also affix proof of payment of the Fee. Ordinance § 10.32.230. The Ordinance exempts peace officers, persons with concealed carry licenses, and persons for whom compliance would create a “financial hardship” from complying with its provisions. *Id.* § 10.32.225.

Any violation of the Ordinance is punishable by an administrative citation with fines to be established by City Council. *Id.* § 10.32.240. Additionally, the Ordinance prospectively would permit the impoundment of any non-compliant person’s firearm, subject to a due process hearing and to the extent allowed by law. *Id.* § 10.32.245. That said, the City confirmed in its briefing and in oral arguments that there is currently no federal or state law authorizing the City to impound firearms under the Ordinance, and therefore, the impoundment provision is inoperable absent some future change in the applicable law. *See* Defs.’ Opp. Mot. Prelim. Inj. (“Opp.”), at 3.

The Ordinance authorizes the City Manager to promulgate all regulations necessary to implement the requirements and fulfill the policies of the Ordinance, including designating the Nonprofit, providing guidelines on and auditing the use of the Fee, and establishing the criteria for the “financial hardship” exemption. *Id.* § 10.32.235. The Ordinance also authorizes the City Manager to collect any cost recovery fees associated with fulfilling the policies of the Ordinance. *Id.* § 10.32.250.

To date, the City Council and City Manager have not yet established the amount of the Fee, the amount of any administrative citation fines, or the identity of the Nonprofit. Opp. 3-4.

B. Procedural History

On January 25, 2022, the same day as the City Council’s meeting to consider approving the Ordinance, Plaintiffs filed the original Complaint, seeking declaratory and injunctive relief from the Ordinance. *See* Compl. ¶ 16, ECF No. 1.

The First Amended Complaint asserts six claims for relief, including a claim under the Declaratory Judgment Act. First, Plaintiffs allege that the Ordinance violates their Second Amendment rights by requiring gun owners to purchase insurance and pay annual fees (First

1 Claim). FAC ¶¶ 82-105. Plaintiffs also claim the Fee constitutes a compelled subsidy in violation
 2 of their First Amendment freedoms of speech and association (Second Claim). *Id.* ¶¶ 106-115.
 3 The FAC asserts violations of the California Constitution, specifically that the State of California
 4 has occupied the field of residential handgun possession to the exclusion of local governments
 5 (Third Claim) and the Ordinance imposes fees that are in fact taxes subject to voter approval
 6 (Fourth Claim). *Id.* ¶¶ 116-133. Finally, Plaintiffs allege that the Ordinance violates the San Jose
 7 City Charter’s budgeting and appropriation provisions, the delegation of executive functions, and
 8 the requirement that all City revenues and receipts be deposited in the City’s accounts (Fifth
 9 Claim). *Id.* ¶¶134-146; *see also* FAC, Ex. A (“City Charter”).

10 On March 8, 2022, Plaintiffs moved to enjoin the enforcement of the Ordinance, currently
 11 scheduled to go into effect on August 8, 2022, though later postponed. Mot. 4; Defs.’ Suppl. Br.
 12 7. The City opposed, asserting ripeness objections in addition to substantive arguments. Opp. 4-
 13 6. The Motion was fully briefed by March 29, 2022, with a hearing scheduled for July 14, 2022.
 14 ECF Nos. 32 (“Reply”), 60.

15 On June 23, 2022, the Supreme Court of the United States issued its opinion in *New York*
 16 *State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), which struck down New York
 17 State’s “may-issue” licensing regime and altered the Ninth Circuit’s Second Amendment
 18 framework. *See, e.g., Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021), abrogated by *Bruen*,
 19 142 S. Ct. 2111.

20 On June 27, 2022, this Court ordered the parties to file supplemental briefs, addressing
 21 *Bruen* and the proper legal standard for Plaintiffs’ Second Amendment challenge. ECF No. 62.
 22 On July 11, 2022, the Court received a request to file an *amicus* brief from Brady, a nonprofit
 23 organization dedicated to reducing gun violence, which the Court granted. ECF No. 66, 69.

24 II. LEGAL STANDARD

25 A. Ripeness

26 “Ripeness is an Article III doctrine designed to ensure that courts adjudicate live cases or
 27 controversies and do not issue advisory opinions or declare rights in hypothetical cases.” *Bishop*
 28 *Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1153 (9th Cir. 2017) (internal quotation marks and

1 brackets omitted). As an Article III doctrine of justiciability, ripeness must be established
2 separately for each claim of relief sought. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332,
3 352-53 (2006); *cf. City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 875 n.8 (9th Cir. 2009)
4 (“[I]t is beyond question that every claim before us must meet minimum constitutional
5 requirements for jurisdiction, such as ripeness.”). The ripeness inquiry contains both a
6 constitutional and a prudential component. *See Bishop Paiute*, 863 F.3d at 1153. Constitutional
7 ripeness is analyzed “under the rubric of standing because ripeness coincides squarely with
8 standing’s injury in fact prong,” while prudential ripeness considers two overarching factors: “[1]
9 the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding
10 court consideration.” *Id.* 1153-54.

11 “A claim is fit for decision if the issues raised are primarily legal, do not require further
12 factual development, and the challenged action is final.” *Wolfson v. Brammer*, 616 F.3d 1045,
13 1060 (9th Cir. 2010) (quoting *US W. Commc’ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th
14 Cir. 1999). In considering the hardship to the parties, courts consider whether “withholding
15 review would result in direct and immediate hardship and would entail more than possible
16 financial loss,” as well as “whether the regulation requires an immediate and significant change in
17 plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance.” *Wolfson*,
18 616 F.3d at 1060 (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009)).

19 **B. Preliminary Injunction**

20 “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*
21 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction
22 must establish “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer
23 irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his
24 favor, and [4] that an injunction is in the public interest.” *Id.* at 20. Alternatively, an injunction
25 may issue where “the likelihood of success is such that serious questions going to the merits were
26 raised and the balance of hardships tips sharply in plaintiff’s favor,” provided that the plaintiff can
27 also demonstrate the other two *Winter* factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
28 1127, 1131-32 (9th Cir. 2011) (citation and internal quotation marks omitted).

1 A preliminary injunction should not be granted, “unless the movant, *by a clear showing*,
 2 carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (italics in
 3 original). That said, “the burdens at the preliminary injunction stage track the burdens at trial.”
 4 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). In cases
 5 where the government bears the burden as to the ultimate question of the challenged law’s
 6 constitutionality, the moving party must “mak[e] a colorable claim that its [constitutional] rights
 7 have been infringed, or are threatened with infringement, at which point the burden shifts to the
 8 government to justify the restriction.” *Cal. Chamber of Com. v. Council for Educ. & Rsch. on*
 9 *Toxics*, 29 F.4th 468, 478 (9th Cir. 2022).

10 **III. DISCUSSION**

11 Because the City’s ripeness challenges directly bear upon the Court’s jurisdiction and
 12 ability to reach the merits in this case, the Court first addresses the City’s ripeness arguments.

13 **A. Ripeness**

14 The City’s ripeness argument, although broadly asserted against the entire lawsuit, appears
 15 to focus only on the First and Second Amendment challenges to the Fee. The City asserts that
 16 Plaintiffs’ First Amendment challenge to the Fee is not ripe because Plaintiffs assume that the yet-
 17 to-be-designated Nonprofit’s activities will inevitably violate the First Amendment. Opp. 4-5.
 18 The City also argues that, because the City Council has not established the Fee amount yet, the
 19 Fee’s burden on Plaintiffs’ Second Amendment rights is uncertain, and thereby their Second
 20 Amendment challenge is also unripe. *Id.* at 6. The City does not argue that Plaintiffs’ challenges
 21 to the Insurance Requirement are unripe, nor does the City dispute constitutional ripeness, *i.e.*, the
 22 existence of an injury-in-fact. Rather, the City primarily argues the lack of prudential ripeness by
 23 disputing the fitness of the Fee for judicial determination at this time. *Id.* at 5.

24 Plaintiffs respond that pre-enforcement challenges to an ordinance are ripe where there is
 25 an “actual and well-founded fear that the challenged statute will be enforced.” Reply 3 (quoting
 26 *Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013)). They argue
 27 that there is nothing to suggest that the City will not enforce the Ordinance, and it is sufficient that
 28 the Ordinance would condition lawful gun ownership on making a financial donation and

1 acquiring liability insurance. *Id.*

2 **i. Ripeness of First Amendment Claim**

3 Plaintiffs' Complaint asserts that the mandatory Fee would infringe their First Amendment
4 rights to free speech and free association. FAC ¶ 62. Because gunowners must pay the Fee
5 regardless of whether they want to associate with or donate to the Nonprofit, the required Fee
6 would be "[c]ompelling [them] to subsidize the speech of other private speakers." Mot. 15
7 (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464
8 (2018)). Plaintiffs compare the mandatory Fee to the mandatory union agency fees struck down in
9 *Janus*, which were imposed on all relevant employees regardless of whether they were union
10 members or agreed with the union's tactics. 138 S. Ct. at 2460.

11 The City responds that, as a threshold matter, Plaintiffs' challenges are unripe. The
12 Nonprofit, the City argues, has not yet been designated nor have its activities been confirmed, so
13 Plaintiffs are merely speculating that the Nonprofit will "inevitably hold the City's anti-gun
14 biases" and be "hostile to gun ownership." Opp. 5, 16 (quoting Mot. 5, 8, 17).

15 In assessing whether this question is fit for judicial decision, the Court begins with the
16 observation that the First Amendment freedom of association is closely, if not inextricably, tied to
17 speech and expression. *See, e.g., Janus*, 138 S. Ct. at 2463 ("The right to eschew *association for*
18 *expressive purposes* is likewise protected.") (emphasis added); *Knox v. Serv. Emps. Int'l Union,*
19 *Loc. 1000*, 567 U.S. 298, 309 (2012) ("[T]he ability of like-minded individuals to *associate for the*
20 *purpose of expressing* commonly held views may not be curtailed.") (emphasis added); *NAACP v.*
21 *State of Ala. ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) ("It is beyond debate that freedom to
22 engage in *association for the advancement of beliefs and ideas* is an inseparable aspect of the . . .
23 freedom of speech.") (emphasis added).

24 The Supreme Court further defined the relationship between speech and association in
25 *Keller v. State Bar of California*, which involved a state bar's mandatory membership dues. 496
26 U.S. 1 (1990). There, the Supreme Court held that the compelled fee was justified by the State's
27 interest in regulating the legal profession and, therefore, the state bar may use proceeds from the
28 mandatory dues to constitutionally fund "activities germane to those goals" or "expenditures . . .

1 necessarily or reasonably incurred” for those goals. *Id.* at 14. However, *Keller* held that the state
2 bar could not use the mandatory dues to fund “activities of an ideological nature,” drawing a
3 distinction between activities that implicated speech and those that were “germane” to the
4 association’s legitimate functions. *Id.*

5 Turning to the Nonprofit at issue, as yet, the Ordinance does not specify what the
6 Nonprofit’s activities will be. Although the Ordinance lists five possible services that the
7 Nonprofit may fund, that list is neither mandatory nor exhaustive. Ordinance § 10.32.220(A)
8 (“Such expenditures may include, but are not necessarily limited to the following. . . .”). The only
9 other indication of the Nonprofit’s activities is the Ordinance’s directive that the Nonprofit’s
10 programs and initiatives be designed to “(a) reduce the risk or likelihood of harm from the use of
11 firearms in the City of San Jose, and (b) mitigate the risk of physical harm or financial, civil, or
12 criminal liability that a San Jose firearm owner or her family will incur through her possession of
13 firearms.” Ordinance § 10.32.220(C). However, this broad mission statement does not inform the
14 Court as to whether the Nonprofit’s activities will be permissibly “germane” to a justifiable state
15 interest or impermissibly “ideological” in nature. *Keller*, 496 U.S. at 13-14.

16 It is also unclear whether the Fee would fund *any* kind of speech or expressive activities,
17 much less anti-gun sentiments. *See* Ordinance § 10.32.220(A)-(C) (mentioning “services,”
18 “programs,” and “initiatives”). For instance, one can readily envision a regulatory scheme in
19 which the Nonprofit adopts a program that violates the First (and Second) Amendment, perhaps by
20 undertaking a public service advertising campaign to reduce gun ownership. *Cf. United States v.*
21 *United Foods, Inc.*, 533 U.S. 405 (2001) (holding that compelled subsidies used to fund industry
22 advertisements unconstitutional under the First Amendment); *but cf. Glickman v. Wileman Bros.*
23 *& Elliott*, 521 U.S. 457, 472–73 (1997) (“[O]ur cases provide affirmative support for the
24 proposition that assessments to fund a lawful collective program may sometimes be used to pay
25 for speech over the objection of some members of the group.”). However, one can also just as
26 readily conceive of a program that may reduce gun harm without involving speech or other
27 expressive activity, such as offering optional firearm safety training to first-time gun owners. *Cf.*
28 *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (finding no First Amendment violation

1 where closure sanction of a bookstore was targeting non-expressive activity). Absent speculation
2 on the Nonprofit’s activities, Plaintiffs’ First Amendment claim “rests upon contingent future
3 events that may not occur as anticipated.” *Texas v. U.S.*, 523 U.S. 296, 300 (1998). Because
4 “further factual development would significantly advance [the Court’s] ability to deal with the
5 legal issues presented,” the Court cannot say that the First Amendment claim is fit for judicial
6 decision. *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812 (2003) (internal
7 quotation marks omitted).

8 Plaintiffs’ arguments to the contrary are mostly inapposite. To start, although the City
9 argues that Plaintiffs’ Fee challenges are *prudentially* unripe, Plaintiffs’ response and cited
10 authorities only bear upon *constitutional* ripeness, with one case only summarily addressing
11 prudential ripeness in a footnote and another finding the case to be prudentially unripe. *Compare*
12 *Opp.* 4-5 with Reply 3; *see also Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867,
13 872 n.5 (9th Cir. 2013); *Nichols v. Brown*, 859 F. Supp. 2d 1118, 1135 (C.D. Cal. 2012)
14 (“Furthermore, this case is not ripe for review for prudential reasons as well.”). As a result, the
15 generally undisputed allegation that the City intends to enforce the Ordinance does not rebut or
16 respond to the City’s prudential ripeness argument where the Court does not know what the City
17 will be enforcing.

18 Plaintiffs also submit that the Nonprofit will “inevitably hold the City’s anti-gun biases,”
19 will be “hostile to gun ownership,” and will be “inherently political.” Mot. 8; Reply 10. Such
20 viewpoints, however, are not apparent from the face of the Ordinance. True, the Ordinance
21 proposes five non-exhaustive examples of services the Nonprofit *may* (but not shall) provide.
22 Ordinance § 10.32.220(A)(1)-(5). However, Plaintiffs do not explain how suicide prevention,
23 violence reduction, addiction intervention, mental health services, or firearm safety training
24 necessarily evidence viewpoints that are “hostile” to gun ownership or are “inherently political.”
25 And, as noted above, these programs may or may not even involve any speech or expressive
26 activities in the first instance. Without a concrete idea of the Nonprofit’s actual programs and
27 activities, the Court is left “entangling [itself] in abstract disagreements.” *Thomas v. Anchorage*
28 *Equal Rts. Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

1 With respect to the “hardship to the parties of withholding court consideration,” the Fee
 2 does not require an “immediate and significant change in plaintiffs’ conduct of their affairs with
 3 serious penalties attached to noncompliance.” *Wolfson*, 616 F.3d at 1060. Here, the only change
 4 in Plaintiffs’ conduct would be the preparation (if any) to potentially pay a fee, an obligation that
 5 arises only if they do not qualify for the “financial hardship” exemption and is only punishable by
 6 an administrative citation. Ordinance §§ 10.32.225, 10.32.240. Furthermore, the City does not
 7 expect to finalize its contract with any non-profit before December 2022, Defs.’ Suppl. Br. 7, and
 8 even so, there has been no indication as to the City Manager’s regulations establishing the “date
 9 by which payment shall be made annually.” Ordinance § 10.32.215. Given that the Ordinance’s
 10 Fee provision would not force an immediate change to Plaintiffs’ current conduct, the Court does
 11 not find any hardship for withholding court consideration on Plaintiffs’ First Amendment
 12 challenge to the Fee.

13 Because the Nonprofit has not yet been identified nor have its activities been determined,
 14 the Court finds that Plaintiffs’ First Amendment challenge to the Fee is prudentially unripe.²

15 **ii. Ripeness of Second Amendment Claim**

16 In response to Plaintiffs’ Second Amendment challenge to the Fee, the City argues that,
 17 because the Fee’s amount has not yet been determined, whether the Fee would infringe upon
 18 Plaintiffs’ Second Amendment rights beyond a *de minimis* burden is not fit for judicial
 19 determination. Opp. 6. Plaintiffs respond that it is sufficient that “the Ordinance will condition
 20 lawful gun ownership on the making of a financial donation to a nonprofit that the Ordinance
 21 characterizes as a city ‘fee.’” Reply 3.

22 Whether an annual mandatory fee on gun owners violates the right to “keep and bear
 23 Arms” will turn on the Fee amount and the City’s criteria for determining “financial hardship.”

24
 25 ² Notwithstanding its assessment of the claim’s ripeness, the Court notes that the substance of
 26 Plaintiffs’ First Amendment argument contains compelling points, especially regarding the
 27 Supreme Court’s holding in *Janus*, 138 S. Ct. 2448. As the City Manager develops the regulations
 28 applicable to the Fee, close attention to Plaintiffs’ arguments may be wise.

1 Ordinance §§ 10.32.215, 10.32.225. In and of itself, a fee that is merely associated with owning a
2 firearm—and for which the failure to pay does not result in that ownership being revoked, Opp.
3 3—would not necessarily be inconsistent with the “historical tradition of firearm regulation.”
4 Indeed, the Supreme Court in *Bruen* expressly contemplated regulations that may permissibly
5 include fee payments, so long as the fees were not so “exorbitant [so as to] deny ordinary citizens
6 their right to public carry.” *Bruen*, 142 S. Ct. at 2138 n.9. Here, the Court cannot assess whether
7 such a Fee would be so “exorbitant” as to infringe upon Plaintiffs’ rights without additional
8 information on the Fee amount or the as-yet-to-be-determined “criteria by which a person can
9 claim a financial hardship exemption.” Ordinance § 10.32.235(A)(4). Absent the promulgation of
10 regulations on these two points, the Court would be left to issue an impermissible advisory
11 opinion on the Ordinance’s constitutionality under the Second Amendment.

12 The hardships of withholding judicial consideration of Plaintiffs’ Second Amendment
13 challenge to the Fee are identical to those arising from withholding consideration of Plaintiffs’
14 First Amendment challenge. *See supra* Section III(A)(i). Plaintiffs are not threatened by “serious
15 penalties attached to noncompliance” that would force them to make “an immediate and
16 significant change” to their regular conduct. *Wolfson*, 616 F.3d at 1060. Even if the preparation
17 to pay a fee could be considered significant, the obligation would certainly not be immediate, as
18 the City has postponed the implementation and designation of the Nonprofit to at least December
19 2022. Defs.’ Suppl. Br. 7. As a result, the Court’s decision to withhold judicial consideration
20 would not impose any immediate or significant hardships to the parties.

21 Accordingly, both Plaintiffs’ First and Second Amendment challenges to the Fee provision
22 are prudentially unripe, and the Court does not proceed to address those claims in its preliminary
23 injunction analysis. Plaintiffs’ other challenges to the Fee provision—*i.e.*, that the Fee infringes
24 upon a preempted field, violates the California voter approval tax requirement, and violates the
25 City Charter—will be analyzed on their merits, as the City does not specifically dispute the
26 ripeness of those claims. Opp. 4-6. Plaintiffs’ challenges to the Insurance Requirement will
27 likewise also be considered.

28 The Court DENIES as unripe Plaintiff’s motion for preliminary injunction to the extent it

1 seeks to enjoin the Fee provision on First and Second Amendment grounds.

2 **B. Likelihood of Success**

3 Having addressed the threshold ripeness issues, the Court proceeds to whether Plaintiffs
4 have shown that they are likely to succeed on the merits of their remaining claims. *See Winter*,
5 555 U.S. at 20.

6 **i. Second Amendment**

7 Plaintiffs challenge both the Fee and Insurance Requirement under the Second Amendment
8 (Claim 1), though only the Insurance Requirement is ripe for review. After the FAC was filed, the
9 U.S. Supreme Court issued its opinion in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*,
10 holding that New York State’s “may-issue” licensing regime—*i.e.*, where officials have discretion
11 and *may issue*, rather than *shall issue*, concealed-carry licenses upon proof of proper cause—was
12 unconstitutional. 142 S. Ct. 2111 (2022). In striking down the New York statute, the Supreme
13 Court acknowledged and expressly rejected the “two-step” means-end scrutiny framework that
14 Circuit Courts of Appeals (and the parties) have used to analyze Second Amendment challenges.
15 *See id.* at 2127. In its place, *Bruen* pronounced a constitutional test adhering to the principles in
16 *D.C. v. Heller*, that is, “a test rooted in the Second Amendment’s text, as informed by history.” *Id.*
17 at 2127 (citing *D.C. v. Heller*, 554 U.S. 570, 576-77 (2008)). This motion for preliminary
18 injunction is considered under the *Bruen* standard.

19 **a. The Bruen Framework**

20 *Bruen* articulates the Second Amendment constitutional standard as follows: “When the
21 Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively
22 protects that conduct. The government must then justify its regulation by demonstrating that it is
23 consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2129–30. The
24 Supreme Court further emphasized that “[t]o justify its regulation, the government may not simply
25 posit that the regulation promotes an important interest.” *Id.* at 2126.

26 To determine whether the Second Amendment’s plain text covers an individual’s conduct,
27 courts must first identify and delineate the specific course of conduct at issue, which in *Bruen* was
28 “carrying handguns publicly for self-defense.” *Id.* at 2134. *Bruen* conducted a textual analysis of

1 the words “bear” and “keep” to determine whether the conduct of publicly carrying a firearm fell
2 within the language of the Second Amendment. *Id.* at 2134-35.

3 If the conduct at issue is covered by the text of the Second Amendment, the burden then
4 shifts to the government to show why the regulation is consistent with the Nation’s historical
5 tradition of firearm regulation, specifically the periods closest to the adoption of the Second
6 Amendment (1791) and the Fourteenth Amendment (1868). *Id.* at 2135-36. Courts need not
7 themselves engage in “searching historical surveys” for potential regulatory analogues—they are
8 “entitled to decide a case based on the historical record compiled by the parties.” *Id.* at 2130 n.6.
9 If the parties are able to identify instances of historical firearm regulations, courts must reason by
10 analogy to determine whether the two regulations are “relevantly similar.” *Id.* at 2132 (quoting
11 Cass R. Sunstein, *On Analogical Reasoning Commentary*, 106 Harv. L. Rev. 741, 773 (1993)).
12 Two relevant metrics for this comparison are “how and why the regulations burden a law-abiding
13 citizen’s right to armed self-defense”; in other words, “whether modern and historical regulations
14 impose a comparable burden on the right of armed self-defense and whether that burden is
15 comparably justified.” *Id.* at 2132-33.

16 With this updated framework in mind to evaluate the Insurance Requirement’s
17 constitutionality under the Second Amendment, the Court turns to the parties’ arguments.

18 b. Plain Text

19 The Court must first identify Plaintiffs’ “proposed course of conduct” and assess whether
20 that conduct is covered by the Second Amendment’s plain text.³ *Bruen*, 142 S. Ct. at 2134.

21
22 ³ As an initial note, Plaintiffs rely on the City’s prior concession that “[f]or the purposes of
23 opposing the Motion, [the City] concede that the Ordinance imposes some minimal or slight
24 burden.” Opp. 7. The City has since withdrawn that concession as not “constitutionally relevant”
25 and argues that the Ordinance does not infringe upon conduct protected by the Second
26 Amendment’s text. Defs.’ Suppl. Br. 3 n.1. The Court recognizes that both parties’ Second
27 Amendment analysis likely changed in the wake of *Bruen* and will consider the City’s arguments,
28 notwithstanding their prior concession made under a now-obsolete legal framework.

1 Neither Plaintiffs’ nor the City’s supplemental briefing specifies a course of conduct for
2 the Court to analyze. *See* Pls.’ Suppl. Br. 3, ECF No. 65; Defs.’ Suppl. Br. 3-4. When prompted
3 at oral arguments, Plaintiffs initially articulated the relevant conduct as requiring citizens to
4 purchase insurance to avoid a penalty, but they later argue that the conduct is “the mere ownership
5 of a gun.” Pls.’ Resp. Br. Brady Amicus Curiae 2, ECF No. 70. On the other hand, *amicus curiae*
6 defined the conduct as “insuring liability that might arise from a firearm-related accident.” Br.
7 Brady Amicus Curiae (“Brady Br.”) 3-4, ECF No. 66-1.

8 The Supreme Court provided limited guidance on how to define the proposed course of
9 conduct—*Bruen* simply stated the conduct at issue with New York’s “may-issue” permitting
10 scheme as “carrying handguns publicly for self-defense.” *Bruen*, 142 S. Ct at 2134. Extrapolating
11 from the Supreme Court’s example and for purposes of evaluating this motion only, the Court
12 defines the conduct at issue here as “owning or possessing a firearm without firearm liability
13 insurance.”⁴ This definition closely tracks Plaintiffs’ initial articulation of the conduct in question.

14 The Court recognizes that, because the impoundment provision is not operable under
15 current law, the Insurance Requirement would not imperil the ownership or possession of
16 anyone’s firearms. *See* Defs.’ Suppl. Br. 3-4; Brady Br. 3-4. However, even if ownership or
17 possession is not threatened by impoundment, the requirement to obtain insurance is nonetheless
18 triggered by the conduct of “own[ing] or possess[ing] a Firearm in the City.” Ordinance §
19 10.32.210(A). Under the “plain text” prong of the *Bruen* analysis, the Court only reviews
20 Plaintiffs’ proposed conduct and the plain text of the Second Amendment. *Bruen*, 142 S. Ct at
21 2134. To the extent *Bruen* accounts for the degree to which Plaintiffs’ Second Amendment rights
22 have been burdened, that analysis would occur under the “historical tradition” prong of the *Bruen*
23 framework. *Id.* at 2149 (evaluating “the burden these surety statutes may have had on the right to
24 _____

25 ⁴ On a more developed record, the Court may reevaluate this description of the proposed conduct
26 for purposes of the *Bruen* analysis. The Court also notes the strong arguments offered by *amicus*
27 that the Second Amendment is not implicated by the Insurance Requirement or Fee provisions.
28 Brady Br. 3-6. The Court will revisit this issue as the case proceeds.

1 public carry” and determining that the burden was “likely too insignificant to shed light on New
2 York’s proper-cause standard”).

3 Having defined the conduct at issue as “owning or possessing a firearm without firearm
4 liability insurance,” the Court finds that Plaintiffs are likely to prevail on a finding that this
5 conduct is covered by the plain text of the Second Amendment. And, as *Bruen* teaches, the
6 Constitution thus “presumptively protects that conduct.” 142 S. Ct. at 2130.

7 c. Historical Tradition

8 Because Plaintiffs’ proposed conduct is likely covered by the Second Amendment’s plain
9 text, the burden shifts to the City to “demonstrate[e] that [the Insurance Requirement] is consistent
10 with the Nation’s historical tradition of firearm regulation.” *Bruen*, 142 S. Ct at 2130; *see also*
11 *Gonzales*, 546 U.S. at 429 (“[T]he burdens at the preliminary injunction stage track the burdens at
12 trial.”). The Court finds that the City has presented a sufficiently “relevantly similar” historical
13 regulation to defeat Plaintiffs’ likelihood of success on *Bruen*’s historical tradition prong.

14 *Bruen* described the analogical reasoning of the historical tradition prong as “neither a
15 regulatory straightjacket nor a regulatory blank check. . . . [C]ourts should not ‘uphold every
16 modern law that remotely resembles a historical analogue’ [but] analogical reasoning requires only
17 that the government identify a well-established and representative historical *analogue*, not a
18 historical *twin*.” *Bruen*, 142 S. Ct. at 2133 (emphasis in original). “[E]ven if a modern-day
19 regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass
20 constitutional muster.” *Id.* As one example, *Bruen* noted that “[a]lthough the historical record
21 yields relatively few 18th- and 19th-century ‘sensitive places’ where weapons were altogether
22 prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no
23 disputes regarding the lawfulness of such prohibitions. We therefore can assume it settled that
24 these locations were ‘sensitive places’ where arms carrying could be prohibited consistent with the
25 Second Amendment.” *Id.* (internal citation omitted).

26 Here, the City has cited several potential historical analogues with varying degrees of
27 similarity to the Insurance Requirement. *See* Defs.’ Suppl. Br. 6-7 (citing 18th and 19th century
28 laws regarding safe gunpowder storage, requiring loyalty oaths as conditions of gun ownership,

1 prohibiting firing guns in certain circumstances, imposing surety bonds, and taxing dangerous
 2 animals). Several of these are readily distinguishable. For instance, “dangerous animal” laws
 3 address a different societal problem than the Insurance Requirement, one that was not subject to
 4 constitutional protection. *See Mitchell v. Williams*, 27 Ind. 62, 62 (1866) (reviewing “an act to
 5 discourage the keeping of useless and sheep-killing dogs”). Eighteenth century loyalty oaths are
 6 similarly distinguishable, as the purpose behind those was to “deal with the potential threat
 7 coming from armed citizens who remained loyal to Great Britain.” Saul Cornell & Nathan
 8 DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 74 Fordham L.R.
 9 487, 506 (2004). Gunpowder storage laws had a somewhat analogous purpose to the Ordinance’s,
 10 in that they were intended to protect communities from accidental fire and explosion. *Id.* at 512.
 11 However, the regulations themselves were often specific to gunpowder and not easily translatable
 12 to firearm regulations. *See id.* at 511 (citing regulations that powder must be kept in the “highest
 13 story of the house” or in “four stone jugs or tin cannisters”).

14 However, the Court finds that the mid-19th century surety statutes, cited by the City and
 15 discussed at length in *Bruen*, bear striking analogical resemblances to the Insurance Requirement.
 16 142 S. Ct. at 2148; *see* Defs.’ Suppl. Br. 6. These statutes typically required certain individuals to
 17 post bond before carrying weapons in public if there was “reasonable cause” to fear these
 18 individuals would cause injury or breach of the peace, with the bond forfeited if the wielder did in
 19 fact injure another or breach the peace. *Bruen*, 142 S. Ct. at 2148.

20 As an initial point, the Court notes that the history of reallocating costs of firearm-related
 21 accidents—from which the Insurance Requirement descends—can be traced back to the early
 22 American practice of imposing strict liability for such accidents. *See* Brady Br. 8-10. As early as
 23 1814, the Supreme Judicial Court of Massachusetts noted that “[i]t is immaterial . . . whether the
 24 act of the defendant [causing a firearm injury] was by his intention and purpose injurious to the
 25 plaintiff, or the mischief which ensued was accidental,” a legal principle that had “never been
 26 questioned” at the time. *Cole v. Fisher*, 11 Mass. (1 Tyng) 137, 138 (1814); *see also Moody v.*
 27 *Ward*, 13 Mass. (1 Tyng) 299, 301 (1816) (noting that militia commanders whose soldiers fire
 28 “guns in and near the highways on days of military musters . . . are legally responsible for all

1 damage sustained by a citizen in consequence of such neglect.”). Strict liability for gun accidents
2 eventually transitioned to a negligence standard in the mid-1800s, which in turn gave rise to
3 liability insurance to “insure against the consequences of negligence.” Brady Br. 9-10 (citing
4 *Morgan v. Cox*, 22 Mo. 373, 376-77 (1856) (commenting on the transition of firearm strict
5 liability to negligence)). However, whether the standard was strict liability or negligence, the
6 Nation nonetheless maintained a “historical tradition” of shifting the costs of firearm accidents
7 from the victims to the owners of the implicated firearms.

8 With this historical backdrop in mind, the Court considers whether 19th century surety
9 statutes are sufficiently analogous to the Insurance Requirement. Both regulations share similar,
10 albeit not identical, deterrent purposes: surety laws were “intended merely for prevention” of
11 future harm, *Bruen*, 142 S. Ct. at 2149, while the Insurance Requirement is intended to “reduce the
12 number of gun incidents by encouraging safer behavior.” Ordinance § 10.32.200(B)(12). Both
13 schemes also achieve their purposes through similar means, namely the threat of financial
14 consequences (either through a peace bond or higher premiums) for individuals deemed to be
15 high-risk (either by a judge or an underwriter). *See Bruen*, 142 S. Ct. at 2151 (“[A]lthough surety
16 statutes did not directly restrict public carry, they did provide financial incentives for responsible
17 arms carrying.”). The Supreme Court also highlighted the fact that surety laws were not complete
18 bans on public carry, much like the Insurance Requirement. *Id.* 2148 (noting that surety laws were
19 “not *bans* on public carry”) (italics in original). Accordingly, the Court finds that surety laws and
20 the Insurance Requirement share substantial overlap as to the “how and why the regulations
21 burden a law-abiding citizen’s right to armed self-defense.” *Bruen*, 142 S. Ct. at 2133.

22 Plaintiffs argue that surety laws are distinguishable because these laws imposed a financial
23 burden only *after* “cause has been shown *specific to the individual*.” Pls.’ Suppl. Br. 4 (emphasis
24 in original). The Insurance Requirement, they argue, would assume “every person is a danger”
25 and apply to all San Jose gun owners, regardless of whether they have shown themselves to be
26 high-risk. Pls.’ Suppl. Br. 4-5. This is certainly a fair distinction between surety laws and the
27 Insurance Requirement but ultimately one that does not bear upon the metrics identified in *Bruen*.
28 142 S. Ct at 2133 (“how and why the regulations burden a law-abiding citizen’s right to armed

1 self-defense”). First, although the Insurance Requirement applies to all gun owners, the actual
 2 amount of the financial burden (*i.e.*, insurance premiums) involves a risk evaluation that *is* tailored
 3 to the individual and analogous to “reasonable cause” determinations under surety statutes. *See*
 4 Stephen G. Gilles & Nelson Lund, *Mandatory Liability Insurance for Firearm Owners: Design*
 5 *Choices and Second Amendment Limits*, 14 Engage 18 (2013) (“Competitive pressures would lead
 6 insurance carriers to keep the premiums for low-risk gun owners low, while charging higher
 7 premiums to those who are more likely to cause injuries to other people.”). Second, at this stage
 8 in both the litigation and the Ordinance’s implementation, there is no evidence on how low gun
 9 liability insurance premiums may be for low-risk gun owners.⁵ *But see id.* at 22 n.34 (estimating a
 10 baseline premium of about \$20 per year for an average firearm owner). A *de minimis* low-risk
 11 premium could retain analogical resemblance to the *de minimis* (but nonetheless discernible)
 12 burdens that surety laws imposed on low-risk gun owners in the 19th century. *Cf. Bruen*, 142 S.
 13 Ct. at 2149 (acknowledging that “the hypothetical possibility of posting a bond” may be a burden
 14 but “the burden these surety statutes may have had on the right to public carry was likely too
 15 insignificant”). *Bruen* does not demand a “historical twin,” and neither will this Court.

16 The Court also notes the *Bruen* Court’s general approval of the regulations attendant to
 17 “shall-issue” regimes. *Id.* at 2138 n.9 (noting with approval that “shall-issue” regimes often
 18 require licensing applicants to “undergo a background check or pass a firearms safety course”);
 19 *see also id.* at 2162 (Kavanaugh, J., concurring) (noting additional “shall issue” requirements such
 20 as fingerprinting, mental health records checks, and training in laws regarding the use of force).

21 Plaintiffs’ proposed conduct can be interpreted to be covered by the Second Amendment’s
 22 plain text, but the City has sufficiently demonstrated at this preliminary stage that the Insurance
 23 Requirement is likely to be consistent with the Nation’s historical traditions. Although the
 24 Insurance Regulation is not a “dead ringer” for 19th century surety laws, the other similarities

25
 26 ⁵ The Insurance Requirement may not even impose any financial burden, as Plaintiffs have not
 27 produced any evidence that ordinary homeowners’ and renters’ insurance would not already
 28 satisfy the Requirement. *See Brady Br.* 15-16.

1 between the two laws would render the Ordinance “analogous enough to pass constitutional
2 muster.”⁶ *Id.* at 2133.

3 Accordingly, the Court finds that Plaintiffs have not shown a likelihood of success as to
4 their Second Amendment challenge to the Ordinance’s Insurance Requirement. Furthermore, as
5 discussed at Section III(A)(ii), Plaintiffs’ Second Amendment challenge to the Ordinance’s Fee
6 provision is not presently ripe for review, and the Court issues no opinion as to the Fee’s
7 constitutionality under the Second Amendment.

8 **ii. First Amendment**

9 The FAC’s Second Claim for Relief for violations of the First and Fourteenth Amendments
10 is limited to contesting the Ordinance’s Fee provision and, thus, is not ripe for review. FAC ¶¶
11 106-115; *see also supra* Section III(A)(i).

12 **iii. California State Preemption**

13 In addition to their allegations that the Ordinance violates the U.S. Constitution, Plaintiffs
14 also assert that the Ordinance is preempted by California general law (Claim 3).

15 Pursuant to article XI, Section 7 of the California Constitution, the City of San Jose may
16 “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations
17 *not in conflict with general laws.*” Cal. Const. art. XI, § 7 (emphasis added). The Supreme Court
18 of California considers a local ordinance to be “in conflict” if it “duplicates, contradicts, or *enters*
19 *an area fully occupied by general law*, either expressly or by legislative implication.” *O’Connell*
20 *v. City of Stockton*, 41 Cal. 4th 1061, 1067, 162 P.3d 583, 587 (2007) (emphasis added). “The
21 party claiming that general state law preempts a local ordinance has the burden of demonstrating
22 preemption.” *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 38 Cal. 4th 1139, 1149 (2006), as
23

24 ⁶ The Court briefly addresses the public comments made by San José Mayor Sam Liccardo
25 regarding the Ordinance as the first of its kind. *See, e.g.*, FAC ¶ 23; *see also* Mot. 3. To the extent
26 the mayor’s comments characterize the Ordinance as something different from what the parties
27 have briefed in this case, the Court accords no weight to those comments. The Court is charged
28 with reviewing the constitutionality of the Ordinance as drafted, not as described by the mayor.

1 modified (Aug. 30, 2006).

2 Plaintiffs only argue that the Ordinance violates the California Constitution by entering an
3 “area fully occupied by general law,” rather than duplicating or contradicting state law. Mot. 18.
4 Because the State of California has already enacted legislation on several topics relating to firearm
5 regulations—*see* Mot. 18 (citing Cal. Pen. Code sections on firearm safety, appearance, storage,
6 carrying and possession, sale and transfers, registration, background checks, equipment, etc.)—the
7 City of San Jose, Plaintiffs argue, is preempted from regulating the field of “residential handgun
8 possession.” Mot. 18 (citing *Fiscal v. City & Cnty. of San Francisco*, 158 Cal. App. 4th 895, 909
9 (2008)). Here, Plaintiffs have largely focused on Cal. Pen. Code § 25605 and Cal. Gov. Code §
10 53071 as evidence of the California Legislature’s intent, as well as *Fiscal*, 158 Cal. App. 4th 895.

11 The City acknowledges that the State of California has occupied some areas of gun
12 regulation but disputes that the entire field of gun regulation has been preempted. Opp. 17-18
13 (citing *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 861 (2002) (“A review of
14 the gun law preemption cases indicates that the Legislature has preempted discrete areas of gun
15 regulation rather than the entire field of gun control.”)). The City also argues that *Fiscal*’s remark
16 that California has preempted the entire field of “residential handgun possession” is non-
17 controlling dicta, as the San Francisco ordinance in *Fiscal* involved a near total handgun ban.
18 Opp. 18-19 (citing *Fiscal*, 158 Cal. App. 4th at 915, 919). Finally, the City argues that the specific
19 language of the allegedly preempting California statutes’ only extends to permitting and
20 registration requirements. Opp. 19 (citing Cal. Pen. Code § 25605; Cal. Gov. Code § 53071).⁷

21 The Court first considers whether Plaintiffs’ cited statutes evidence an “express
22 manifest[ation]” of the California Legislature’s intent to occupy the field to the exclusion of the
23 City’s Ordinance. Here, Penal Code § 25605 does not purport to advance legislative intent of any

24
25 ⁷ The City does not raise (nor can it) any ripeness challenge specific to Plaintiffs’ preemption
26 claim, as the key preemption issue is “primarily legal and does not require substantial further
27 factual development,” such as the subsequent promulgation of the City Manager’s regulations.
28 *Wolfson*, 616 F.3d at 1060.

1 kind, a conclusion *Fiscal* implicitly acknowledged. 158 Cal. App. 4th at 908 (“[W]e *infer* from
2 [Section 25605] that the Legislature intended to occupy the field of residential handgun
3 possession.”) (emphasis added). The Government Code § 53071, on the other hand, does contain
4 an express manifestation of intent; however, its language is explicitly limited to “the intention of
5 the Legislature to occupy the whole field of *regulation of the registration or licensing of*
6 *commercially manufactured firearms.*” Cal. Gov. Code § 53071 (emphasis added). Although
7 these statutes may manifest an intent to occupy the field of firearm permitting and registration,
8 neither can be fairly read to contain a legislative intent to occupy the *entire* field of gun regulation.
9 Nor can the Ordinance’s insurance and fee regulations be transmuted into a permitting scheme to
10 fall within this intent, as violations do not imperil one’s possession of a firearm. Ordinance §
11 10.32.240; *see also* Opp. 3.

12 Having determined that Plaintiffs’ cited statutes do not expressly preempt the Ordinance,
13 the Court proceeds to the issue of whether the California Legislature has nonetheless *implicitly*
14 occupied the field. In *Great Western Shows*, the California Supreme Court surveyed the body of
15 California gun law preemption cases and concluded that “the Legislature has chosen not to broadly
16 preempt local control of firearms but has targeted certain specific areas for preemption.” 27 Cal.
17 4th at 861-64; *see also Am. Fin. Servs. Assn. v. City of Oakland*, 34 Cal. 4th 1239, 1255 (2005)
18 (remarking that “rather than intending to deprive municipalities of their police power to regulate
19 handgun sales, [the Legislature] has been cautious about depriving local municipalities of aspects
20 of their constitutional police power to deal with local conditions.”); *Calguns Found., Inc. v. Cnty.*
21 *of San Mateo*, 218 Cal. App. 4th 661, 676 (2013) (“[T]he cases uniformly construe state regulation
22 of firearms narrowly, finding no preemption of areas not specifically addressed by state law.”).

23 Plaintiffs’ reliance on *Fiscal* to establish preemption is misplaced for multiple reasons.
24 Where the California Supreme Court has not squarely addressed an issue of California law, this
25 Court must predict how the state high court would decide the issue using, *inter alia*, intermediate
26 appellate court decisions. *See All. for Prop. Rts. & Fiscal Resp. v. City of Idaho Falls*, 742 F.3d
27 1100, 1102 (9th Cir. 2013) (“When the state’s highest court has not squarely addressed an issue,
28 we must predict how the highest state court would decide the issue using intermediate appellate

1 court decisions. . .”). Here, not only has it not squarely addressed the issue of *Fiscal*’s scope of
 2 California gun law preemption, the California Supreme Court had remarked in *Great Western*
 3 *Shows* that the “Legislature has chosen not to broadly preempt local control of firearms but has
 4 targeted certain specific areas for preemption.” 27 Cal. 4th at 864. Furthermore, another Court of
 5 Appeal had addressed *Fiscal* at length and expressly declined to construe Government Code §
 6 53071 as a broad “expression of intent to occupy the whole field of firearm regulation.” *Calguns*,
 7 218 Cal. App. 4th at 673-74, 677 (limiting *Fiscal* to its facts and the “extreme breadth of the
 8 ordinance being challenged [in *Fiscal*]”). Given the absence of the final word from the state high
 9 court and the lack of uniformity among the intermediate state appellate courts on the scope of
 10 preemption Plaintiffs advance, this Court is not persuaded that the California Supreme Court
 11 would interpret Penal Code § 25605 and Government Code § 53071 to occupy the entire field of
 12 “residential handgun possession.”

13 Furthermore, even if the Court were to adopt *Fiscal*’s implied preemptive scope of all
 14 “residential handgun possession,” Plaintiffs have not established that the Ordinance’s provisions
 15 would fall within that field of preemption, *i.e.*, that the Insurance and Fee provisions necessarily
 16 implicate handgun possession. In *Fiscal*, the challenged ordinance purported to (1) prohibit the
 17 sale and transfers of all firearms without exception and (2) limit handgun possession to
 18 governmental and professional purposes with an option for residents to surrender their handguns
 19 to law enforcement. *Fiscal*, 158 Cal. App. 4th at 901. Accordingly, the ordinance in *Fiscal*, by its
 20 own language, directly implicated the possession of handguns.⁸ *Id.* (“Section 3 is entitled
 21 ‘Limiting Handgun Possession in the City and County of San Francisco.’”). By contrast, there is
 22 no operation of San Jose’s Ordinance that would result in a firearm being removed from its
 23 _____

24 ⁸ At the hearing, Plaintiffs argued that *Fiscal* should be interpreted to preempt any ordinance that
 25 merely *impacts* residents possessing guns. However, this unrestricted interpretation would in
 26 effect preempt *all* local gun regulation, a result expressly rejected by *Fiscal* itself. 158 Cal. App.
 27 4th at 905 (“[T]he Legislature has never expressed an intent to preempt the entire field of firearm
 28 regulation to the exclusion of local control.”).

1 owner's possession. Opp. 3. Without a means by which possession could be revoked, the Court
 2 does not consider the Ordinance to be entering the field of residential handgun *possession*.

3 Given the state high court's interpretation on state gun law preemption, the Court holds
 4 that Plaintiffs are not likely to succeed on their claim that the California Legislature has impliedly
 5 preempted the Ordinance's Insurance and Fee Provisions.

6 **iv. California Tax Requirement**

7 Plaintiffs also argue that, under the California Constitution, the Ordinance's provisions are
 8 treated as taxes (Claim 4) and, therefore, should have been submitted to the voters for approval.

9 Specifically, the California Constitution article XIII C prohibits local governments from
 10 imposing, extending, or increasing any general tax unless that tax is approved by a majority vote
 11 to the electorate. Cal. Const. art. XIII C, § 2(b). A "tax" is defined as "any levy, charge, or
 12 exaction of any kind imposed by a local government," subject to certain exceptions for charges
 13 that do not exceed the "reasonable costs to the local government" of providing a service or benefit.
 14 Cal. Const. art. XIII C, § 1(e). Notably, article XIII C "does not expressly require that any levy,
 15 charge or exaction must be payable to a local government" to qualify as a tax. *Schmeer v. Cnty. of*
 16 *Los Angeles*, 213 Cal. App. 4th 1310, 1326 (2013), as modified (Mar. 11, 2013) (internal
 17 quotation marks omitted).

18 Plaintiffs argue that both the Insurance Requirement and the Fee are taxes that were not
 19 "submitted to the electorate and approved by a majority vote," as required by the California
 20 Constitution. Mot. 19 (quoting Cal. Const. art. XIII C, § 2(b)). The required insurance and Fee,
 21 Plaintiffs assert, do not fall under any exception to the definition of a "tax" because none of the
 22 charges purport to pay for government activities and, therefore, by definition "exceed the
 23 reasonable costs to the local government." Mot. 19-20; *see also* Cal. Const., art. XIII C, § 1(e).

24 The City responds that neither the required insurance nor the Fee can qualify as a tax,
 25 because California courts have interpreted the California Constitution's voter approval
 26 requirement to apply to a fee only if the resulting proceeds would pass into government hands.
 27 Opp. 19-20 (citing *Schmeer*, 213 Cal. App. 4th at 1326-29). The City also argues that,
 28 alternatively, both the required insurance and the Fee would qualify for an exception to the voter

1 approval requirement because they confer a “specific benefit” directly to the payor and not
2 conferred on those not charged. Opp. 20 (citing Cal. Const., art. XIII C, § 1).

3 Because the question of whether fees not payable to the government are considered taxes is
4 a legal question of state constitutional interpretation and does not rely on further factual
5 development, it would be ripe for review. *See Wolfson*, 616 F.3d at 1060. On this particular
6 question of state law, *Schmeer* is the only California appellate court opinion on point. In *Schmeer*,
7 a Los Angeles ordinance required that all retail stores provide only recyclable or reusable bags for
8 their customers’ use, and all retail customers must pay 10 cents to the retail store for each
9 recyclable bag used. *Schmeer*, 213 Cal. App. 4th at 1314. The collected proceeds were retained
10 by the store and could only be used for the store’s costs of compliance, the recyclable bags, and
11 any educational materials promoting the use of reusable bags. *Id.* After conducting a lengthy
12 interpretative analysis on whether a government-imposed fee that was not payable or remitted to
13 the government would qualify as a “tax,” the *Schmeer* court concluded that the California
14 Constitution’s voter approval requirements were “limited to charges payable to, or for the benefit
15 of, a local government.” *Schmeer*, 213 Cal. App. 4th at 1326-31 (emphasis added); *see also*
16 *Howard Jarvis Taxpayers Ass’n v. Bay Area Toll Auth.*, 51 Cal. App. 5th 435, 453 (2020)
17 (distinguishing *Schmeer* on the basis that the toll increases at issue were remitted to a
18 governmental entity), reh’g denied (July 13, 2020).

19 Although the Ordinance’s Insurance Requirement and Fee are imposed by the City in an
20 admittedly different context from a retail bag fee, *Schmeer*’s analysis nonetheless provides useful
21 guidance for this Court to predict how the California Supreme Court may consider the issue. For
22 instance, *Schmeer* found that “[t]axes ordinarily are imposed to raise revenue for the government.”
23 *Schmeer*, 213 Cal. App. 4th at 1326 (citing *California Farm v. State Water Res. Control Bd.*, 51
24 Cal. 4th 421, 437 (2011), as modified (Apr. 20, 2011); *Sinclair Paint Co. v. State Bd. of*
25 *Equalization*, 15 Cal. 4th 866, 874 (1997)). Here, no provision of the Ordinance would generate
26 revenue for the City, as insurance premiums are paid to insurance companies and the Fee is paid
27
28

1 directly to the Nonprofit.⁹ The *Schmeer* opinion also independently addressed Plaintiffs’
 2 argument that—because the City would not be engaged in any activity under the Ordinance—the
 3 Ordinance’s charges would necessarily exceed “reasonable costs of the government activity”.
 4 Mot. 19 (quoting Cal. Const., art. XIII C, § 1). However, rather than adopting a tautological
 5 interpretation of article XIII C’s exceptions, *Schmeer* considered the exceptions’ reference to costs
 6 of *government activity* as support that the exceptions “do not contemplate the situation where a
 7 charge is paid to an entity or person other than a local government or where such an entity or
 8 person incurs reasonable costs.” *Schmeer*, 213 Cal. App. 4th at 1327. This analysis, though
 9 applied in the context of a retail bag fee, nonetheless translates effectively to assist the Court’s
 10 present analysis of the California Constitution.

11 In any event, Plaintiffs do not offer a conflicting or alternative interpretation of article XIII
 12 C other than noting the California Constitution does not define a “tax” by where the funds are
 13 deposited. Reply 11. This response, however, simply disagrees with *Schmeer*’s interpretation and
 14 holding without providing supporting authority to the contrary. Plaintiffs’ citation to *Nat’l Fed’n*
 15 *of Indep. Bus. v. Sebelius* is inapposite, as article XIII C in the California Constitution bears no
 16 similarity to and need not be interpreted consistently with the Taxing Clause in the U.S.
 17 Constitution. *See* Mot. 19; Reply 11 (citing *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519,
 18 564-66 (2012)).

19 Plaintiffs also note that *Schmeer* held that article XIII C’s voter approval requirements
 20 apply to “charges payable to, *or for the benefit of, a local government.*” Reply 11 (emphasis in
 21 original) (quoting *Schmeer*, 213 Cal. App. 4th at 1328-29). Accordingly, “[i]f, as Defendants have
 22 argued elsewhere, the Ordinance benefits San Jose, article XIII C applies.” Reply 11. This
 23 interpretation, however, conflates a benefit to the local government with a benefit to the public at
 24 large. There is little dispute that the Ordinance is intended to provide a benefit to the *public*—

25

26 ⁹ Section 10.32.250 of the Ordinance does permit the City Manager to charge and collect “cost
 27 recovery fees associated with fulfilling” the Ordinance directives, but Plaintiffs do not challenge
 28 this portion of the Ordinance.

1 indeed, one would hope and expect that everything the City of San Jose enacts (tax or no tax) is
 2 for the public benefit of its citizenry. Ordinance § 10.32.200. However, *Schmeer*'s "for the
 3 benefit of" language only contemplated benefits inuring to the *local government* itself, such as a
 4 "charge payable to a third party creditor to extinguish a debt owed by a local government."
 5 *Schmeer*, 213 Cal. App. 4th at 1329 n.7. Additionally, given that the Los Angeles bag fee was
 6 almost certainly a charge intended to provide public environmental benefits, *Schmeer* could not
 7 have intended that article XIII C's voter approval requirement applied to every charge for the
 8 *public's* benefit. *See id.* at 1314.

9 Because the Ordinance's Insurance Requirement and Fee are not payable to the City and
 10 do not provide a specific benefit to the City itself, the Court is persuaded by *Schmeer*'s
 11 interpretation that such charges are not a "tax" requiring voter approval and, therefore, does not
 12 reach the City's alternate argument invoking the "specific benefits" exception to article XIII C.
 13 Opp. 20. Accordingly, Plaintiffs have not shown that they are likely to succeed on their claim that
 14 the Ordinance violates article XIII C of the California Constitution.

15 **v. San Jose City Charter**

16 Finally, Plaintiffs argue that the Ordinance's Fee provisions violate San Jose's City Charter
 17 (Claim 5). Mot. 20-21. They argue that, because the Fee is paid directly to the Nonprofit, the
 18 Ordinance violates the City Charter's requirement for all "revenues and receipts" to be placed in a
 19 special fund or the General Fund. *Id.* at 21 (citing City Charter § 1211). The Ordinance also
 20 allegedly violates the delegation of budgeting and appropriation powers to the City Council by
 21 prohibiting City Council from directing how the Fee proceeds are expended. *Id.* (citing City
 22 Charter §§ 1204, 1206-07). The same prohibition, Plaintiffs argue, violates the delegation of
 23 executive functions to the City Manager. *Id.* at 20-21 (citing City Charter §§ 502, 701).

24 The City responds that most of the cited City Charter provisions do not apply to the Fee
 25 because it is not "paid into the City Treasury" and does not pay for any City operations. Opp. 21-
 26 22 (citing City Charter §§ 1204, 1206, 1207, 1211). Additionally, the City asserts that the
 27 Ordinance properly confers on the City Manager administrative oversight and audit authority over
 28 how the Nonprofit expends the Fee's proceeds. Opp. 22 (citing Ordinance § 10.32.235).

1 As an initial point, although Plaintiffs’ claims relating to the City Charter’s “revenues and
2 receipts,” budgeting, and appropriation sections primarily present legal and interpretative
3 questions and are likely ripe, Plaintiffs’ claim regarding the City Manager’s executive and
4 administrative functions would likely “require further factual development.” *See* Ordinance §
5 10.32.235(A); *see also Wolfson*, 616 F.3d at 1060. At this stage of the proceedings, the Court will
6 review Plaintiffs’ City Charter challenges to the extent they do not rely on subsequent regulations
7 and yet-to-be-determined facts—however, the Court’s discussion is correspondingly and
8 necessarily limited to the Ordinance’s broad outline of the Fee structure and implementation.

9 The Court first addresses Plaintiffs’ argument that payment of the Fee to the Nonprofit
10 violates § 1211 of the City Charter, which reads in its entirety:

11 All monies paid into the City Treasury shall be credited to and kept in separate
12 funds in accordance with provisions of this Charter or ordinance. A fund, to be
13 known as the “General Fund,” is hereby created as a medium of control and
14 accounting for all City activities excepting activities for which special funds are
established and maintained. All revenues and receipts which are not required by
this Charter, State law or ordinances to be placed in special funds shall be credited
to the General Fund.

15 City Charter § 1211. This section addresses two potentially overlapping categories of funds: “All
16 monies paid into the City Treasury” and “All revenues and receipts.” The Ordinance, however,
17 directs “every dollar generated” from the Fee to be spent by the Nonprofit and used exclusively for
18 the Nonprofit’s programs and initiatives. Ordinance § 10.32.220(C). Accordingly, because the
19 Fee is neither “paid into the City Treasury” nor is it received by the City as revenue, Plaintiffs
20 have not shown likelihood of success in proving that the Fee’s proceeds would fall under § 1211
21 of the City Charter. *See also supra* Section III(B)(iv).

22 Plaintiffs’ claims that the Ordinance violates the City Charter’s budgeting and
23 appropriations provisions rely on a similarly faulty premise, namely that the Nonprofit’s
24 operations are City activities. Mot. 20. Plaintiffs are correct that the City Council retains the
25 power to adopt a budget, *see* City Charter § 1206; however, the City Charter defines the budget as
26 “a complete financial plan of *all City funds and activities*.” *Id.* § 1205 (emphasis added). Because
27 the Fee’s proceeds are not “revenues or receipts” and the Nonprofit is not a City department or
28 entity, the Nonprofit’s funds and operations would not fall under the City’s budgeting obligations.

1 For the same reason, Plaintiffs have not shown likelihood of success in proving that the
2 Nonprofit’s expenditures are subject to the City Charter’s appropriations section, which delegates
3 to the City Council the authority to “appropriate monies for the operation of *each of the offices,*
4 *departments and agencies of the City.*” *Id.* § 1207 (emphasis added). Especially as Plaintiffs
5 themselves have asserted the Fee does not pay for government activity, *see* Mot. 19, the
6 Nonprofit’s operations and expenditures cannot be reasonably interpreted to violate the City
7 Charter’s budgeting and appropriation sections.

8 Finally, Plaintiffs argue that, by permitting the City to direct fees to a non-governmental
9 entity whose expenditures are expressly insulated from City control, the Ordinance undermines the
10 City Manager’s responsibility for the “faithful execution of all laws,” as well as the purpose of the
11 General Fund as a medium of control on “the City government’s ability to hide, or avoid oversight
12 of, how City fee revenues are spent.” Reply 12-13 (citing City Charter §§ 701(d), 1211).
13 However, the Ordinance authorizes the City Manager to “promulgate all regulations necessary to
14 implement” the Ordinance, including any guidelines for and auditing how the Nonprofit expends
15 its funds. Ordinance § 10.32.235. As a result, the fact that the City may not specifically direct the
16 Nonprofit’s activities does not *necessarily* violate the City Charter § 701 or abdicate the City
17 Manager’s executive and administrative functions. That said, as the Court noted, the City’s
18 involvement with the Fee is difficult to assess in the abstract. Plaintiffs may revisit this issue once
19 the City Manager promulgates the relevant implementing regulations, but for purposes of this
20 motion, Plaintiffs have not met their burden.

21 In summary, Plaintiffs’ City Charter claims rely on the mistaken premises that the Fee is
22 characterized as City revenue and the Nonprofit is included in the City budget, neither of which is
23 supported by the City Charter’s text or the Ordinance’s language. *See* Reply 11-12 (referring to
24 the Fee as “revenue”). Furthermore, Plaintiffs’ claim regarding the City Manager’s authority and
25 oversight over the Nonprofit would turn on the actual regulations promulgated by the City
26 Manager. Accordingly, the Court finds that Plaintiffs have not shown that they are likely to
27 succeed on the merits of their City Charter challenges.

28 Because the Court finds that Plaintiffs have not established that they are likely to succeed

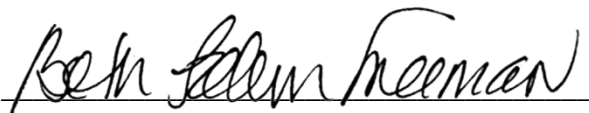
1 on the merits on their Second Amendment, California Constitution, and City Charter claims, it
2 does not reach the remaining *Winter* factors. *See* 555 U.S. at 20.

3 **IV. ORDER**

4 For the foregoing reasons, IT IS HEREBY ORDERED that Plaintiffs' motion for a
5 preliminary injunction to restrain and enjoin Defendants from enforcing any provision of the
6 Ordinance is DENIED.

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8 Dated: August 3, 2022

9 
10 BETH LABSON FREEMAN
11 United States District Judge

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United States District Court
Northern District of California