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14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 JAMES FAHR; DESIREE
17 BERGMAN; COLIN RUDOLPH;
18 SAN DIEGO COUNTY GUN
19 OWNERS PAC; and FIREARMS
20 POLICY COALITION, INC.,

Plaintiffs,

v.

20 CITY OF SAN DIEGO,
21 CALIFORNIA; and DAVID
22 NISLEIT, in his official capacity as
23 Chief of Police of San Diego City,
24 California,

Defendants.

Case No.: '21CV1676 BAS BGS

**PLAINTIFF'S APPLICATION FOR
TEMPORARY RESTRAINING
ORDER; ALTERNATIVE MOTION
FOR PRELIMINARY INJUNCTION;
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES**

Judge: Hon. _____

Date:

Time

Courtroom:

25 **PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING**
26 **ORDER; ALTERNATIVE MOTION FOR PRELIMINARY INJUNCTION**

27 Plaintiffs James Fahr, Desiree Bergman, Colin Rudolph, San Diego County
28 Gun Owners PAC, and Firearms Policy Coalition, Inc. ("Plaintiffs"), by and through

1 their attorneys, and pursuant to Fed. Rule of Civ. Pro. 65, hereby and respectfully
2 apply to this Court for the issuance of a temporary restraining order or, in the
3 alternative, a preliminary injunction temporarily enjoining Defendants City of San
4 Diego, California, and David Nislet, in his official capacity as the Chief of Police of
5 San Diego City (“Defendants”), and all their respective employees, officers, agents,
6 representatives, and those acting in concert or participation with them, from enforcing
7 sections 53.18(c)(1) and (c)(2) of the San Diego Municipal Code (“SDMC”) (the
8 “Ordinance”), on the basis that the Ordinance is inflicting and will continue to inflict
9 unless and until enjoined irreparable injury upon the fundamental rights secured under
10 the Second and Fourteenth Amendments to the United States Constitution.
11
12

13
14 As an alternative form of relief, Plaintiffs respectfully request that the Court set
15 and schedule a hearing and further briefing on their above-stated Application as a
16 Motion for Preliminary Injunction pursuant to and under the standards of FRCP 65.
17

18 Both requests are based on the supporting memorandum of points and
19 authorities, declarations, and exhibits, the Complaint and matters cited therein, and
20 such other evidence and argument as may be permitted at the hearing.
21

22 Dated: September 24, 2021

The DiGuiseppe Law Firm, P.C.

/s/ Raymond M. DiGuiseppe

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1 **SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant City of San Diego enacted Ordinance Number O-2022-7 (the
4 “Ordinance” or “Ban”) on September 14, 2021. It was signed into law by Mayor
5 Gloria on September 23, 2021, rendering it fully effective on October 23, 2021. The
6 Ban must be enjoined, immediately, because it is inflicting irreparable injury to the
7 fundamental rights of law-abiding San Diegans every moment it remains in effect.
8 Under the Ban, these responsible citizens are being forced to dispossess themselves of
9 constitutionally protected property that they lawfully acquired before the Ban for
10 constitutionally protected purposes, and they are being barred from ever again
11 acquiring or using any such property for these protected purposes. Such a broad
12 prohibition against the exercise of constitutional rights, untailed in any way and
13 untethered from any legitimate interest that could be achieved, wouldn’t be tolerated
14 for a moment if the rights being targeted were secured under the First Amendment.
15 Just the same, it cannot be tolerated here, where it targets rights of equal importance
16 secured under the Second Amendment—specifically, the right to keep and bear arms.

17
18
19 The Ban outlaws all “unfinished frames or receivers” and any other precursor
20 firearm parts necessary to manufacture or assemble a firearm (hereinafter “non-
21 firearm objects” or “NFO”s) within San Diego, forcing San Diegans to rid themselves
22 of any NFOs they previously acquired for purposes of exercising their right to self-
23 manufacture firearms in common use for lawful purposes, without any compensation,
24 and barring them from ever again lawfully acquiring or using any NFOs for such
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1 purposes. All this despite the fact that California has actually established a regulatory
2 path for all its law-abiding citizens to lawfully self-manufacture firearms—a path that
3 the Ban perversely cuts off, leaving San Diegans out in the pasture with no ability to
4 lawfully exercise this important right recognized throughout the history and tradition
5 of this Nation and clearly enshrined under the Second Amendment.
6

7
8 The Constitution’s text, our Nation’s history and tradition, and the Supreme
9 Court’s binding precedents all command the Ban be struck down as unconstitutional.
10 Because they unquestionably face “a realistic danger of sustaining a direct injury as a
11 result of the law’s operation or enforcement,” *Skyline Wesleyan Church v. Cal. Dep’t*
12 *of Managed Health Care*, 968 F.3d 738, 747 (9th Cir. 2020), for so long as this Ban
13 remains enforceable, Plaintiffs seek to vindicate their rights and to immediately enjoin
14 its enforcement through this request for preliminary relief.
15
16

17 **II. RELEVANT BACKGROUND**

18 **A. The Ban**

19 The Ordinance bans the possession, purchase, sale, receipt, and transportation
20 of non-serialized, “unfinished frames or receivers,” as well as non-serialized firearms.
21 Specifically, with few exceptions not relevant here, it is unlawful for any person to
22 “[p]ossess, purchase, transport, or receive,” or to “[s]ell, offer to sell, transfer, or offer
23 to transfer” an “unfinished frame or unfinished receiver,” “unless the unfinished frame
24 or unfinished receiver is imprinted with a serial number issued to that unfinished
25 frame or unfinished receiver by a Federal Firearms Importer or Federal Firearms
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1 Manufacturer, or engraved or permanently affixed with a serial number provided by
2 the California Department of Justice for that unfinished frame or unfinished receiver.”
3
4 SDMC § 53.18(c)(1)-(2). The Ordinance sweepingly defines the terms “unfinished
5 frame” and “unfinished receiver” so as to capture all parts and components necessarily
6 required for the manufacture or assembly of a firearm, and virtually anything else that
7
8 *could* be “shaped or formed” into such an object. SDMC § 53.18(b)(11)-(12).¹

9 And the Ban’s purported exception for the possession, purchase, receipt, or
10 transport of an unfinished frame or receiver “imprinted with a serial number issued to
11 that unfinished frame or unfinished receiver by a Federal Firearms Importer or Federal
12 Firearms Manufacturer, or engraved or permanently affixed with a serial number
13 provided by the California Department of Justice for that unfinished frame or
14 unfinished receiver,” is no refuge from the Ban’s criminal proscriptions. No legal or
15
16 practical means exist to lawfully self-manufacture a firearm with a *pre-serialized*
17 unfinished frame or receiver under federal or state law—it’s impossible.
18

19
20 The federal firearms regulatory regime only recognizes—and thus federal
21 firearms importers or manufacturers only place—serial numbers *required* by federal
22

23
24 ¹ “Unfinished frame” means “a piece of any material that does not
25 constitute the completed frame of a firearm, but that has been shaped or formed
26 in any way for the purpose of becoming the frame of a firearm, and which may
27 be made into a functional frame of a firearm through milling, drilling, or other
28 means.” SDMC § 53.18(b)(11). “Unfinished receiver” means “a piece of any
material that does not constitute the completed receiver of a firearm, but that
has been shaped or formed in any way for the purpose of becoming the receiver
of a firearm, and which may be made into a functional receiver of a firearm
through milling, drilling, or other means.” SDMC § 53.18(b)(12).

1 law. Such serialization is currently limited to *firearms* as defined under federal law.
2 No statutory or regulatory scheme currently exists for serialization of NFOs. *See* 27
3 C.F.R. § 478.92(a)(1) and (a)(2) (firearms importers and manufacturers “must legibly
4 identify each *firearm* manufactured or imported” through serialization).² Indeed, ATF
5 has proposed modifying its regulatory definitions to create a serialization requirement
6 for such components *specifically because* no such requirement and thus no mechanism
7 for serialization exists. Proposed Rules, United States Dept. of Justice, Definition of
8 “Frame or Receiver” and Identification of Firearms, 86 Fed. Reg. 27720, 27722-27.
9
10

11 California’s regulatory regime provides a statutory mechanism for its citizens to
12 lawfully engage in the self-manufacturing or assembly of a firearm (excluding
13 firearms statutorily defined as an “unsafe handgun,” Cal. Pen. Code, § 29182(e)(2))
14 when they apply for and obtain a serial number after passing a background check. Cal.
15 Pen. Code, § 29180, et seq. However, as the express language of this scheme provides,
16 one must *personally* apply for and obtain the serial number, *personally* manufacture or
17 assemble the firearm, and then *personally* engrave or permanently affix the serial
18 number (or *personally* have it engraved or permanently affixed) within ten days of
19 completing the firearm. *Id.* at § 29180(b) & (b)(2)(A); *see also* 11 CCR § 5518(b)(2).
20
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24 ² Under subdivision (a)(2), “[a] firearm frame or receiver that is not a
25 component part of a complete weapon at the time it is sold, shipped, or
26 otherwise disposed of by [the importer or manufacturer] must be identified *as*
27 *required by this section.*” 27 C.F.R. § 478.92(a)(2) (italics added). Nothing
28 within subdivision (a)(2) or any other part of this section creates any
serialization or other specific identification requirement for such components.
Thus, no serialization process exists for such components, and none will exist
unless and until the regulatory scheme is changed to specifically require it.

1 In other words, the California scheme *solely* authorizes the issuance of a serial
2 number to the person or entity who applied and was approved for it, and thus it *solely*
3 authorizes the approved applicant to engage in the self-manufacturing process. It does
4 not permit or even envision a situation where a person could lawfully acquire, through
5 purchase, receipt, or other transfer, a *pre-serialized* NFO from some third-party
6 individual or entity and then lawfully manufacture or assemble a firearm with *that*
7 NFO, since California issues these serial numbers *solely* to the approved applicant.
8 Indeed, it is unlawful for the applicant to thereafter sell or transfer the self-built
9 firearm to anyone else. Cal. Pen. Code § 29180(d)(1).
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13 Indeed, “[i]f *the applicant* fails to engrave, cast, stamp (impress), or
14 permanently place the unique serial number in a conspicuous location on the receiver
15 or frame of the firearm and upload the required digital images before the end of the
16 tenth day, the unique serial number will become invalid.” 11 CCR § 5518(b)(2)(B)
17 (italics added). So, the serial number on any pre-serialized NFO that one *could* acquire
18 from a third party would invariably be invalid and thus useless for purposes of being
19 able to lawfully self-manufacture a firearm, 11 CCR § 5518(b)(2)(B), *and*, in all such
20 events, the acquisition, possession, and transport of the NFO would be unlawful under
21 the Ordinance because it would lack a *valid* serial number. Thus, the Ordinance
22 expressly and completely bans anyone in San Diego from purchasing, receiving,
23 possessing, and transporting the very items one would engrave onto or permanently
24 affix the State-issued number for purposes of otherwise lawfully self-manufacturing a
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1 firearm compliant with State law and the Ordinance itself.

2 So, despite the City’s claim that it “is intended to be applied and interpreted
3 consistent with state and federal law,” SDMC § 53.18(a), the Ban’s very text
4 effectively precludes any path for any San Diego resident to self-manufacture her own
5 firearm under either state or federal law. The one *theoretical* exception is illusory,
6 rendering the general prohibition set forth in SDMC § 53.18(c) total and complete.
7

8 In net effect then, all those San Diegans who lawfully acquired and possess
9 NFOs for the purpose exercising their rights to self-manufacture a firearm in common
10 use before the Ban was enacted, including the named individual Plaintiffs herein and
11 similarly situated members of Plaintiffs FPC and SDCGO, must dispossess
12 themselves of this valuable personal property—and any other item that could be
13 construed as an “unfinished frame” or “unfinished receiver” under the Ban’s sweeping
14 reach—within no more than 30 days of the Ban’s final passage. *And* the Ban
15 forevermore prohibits everyone in San Diego from acquiring the necessary products
16 for self-manufacturing firearms—even in strict compliance with State law. Notably,
17 the Ban even specifically limits any “affirmative defense” based on being “in
18 compliance with” State law to non-serialized *firearms* and affords no protection for
19 any possession, purchase, transport, or receipt of non-serialized unfinished frames or
20 receivers. *Compare* SDMC § 53.18(c)(3)(D), creating such a defense for the
21 possession, purchase, transport, or receipt of non-serialized firearms, with 53.18(c)(1),
22 which provides no such defense for non-serialized unfinished frames or receivers.
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1 The Ban has real teeth as a criminal law too. Unless an offense is traffic-related
2 or unless the City Attorney exercises her sole discretion to charge it as an infraction,
3 “[a] violation of any of the provisions or failing to comply with any of the mandatory
4 requirements of this Code shall constitute a misdemeanor.” SDMC § 12.0201. Anyone
5 convicted of a misdemeanor violation of the Code is subject to a fine up to \$1,000,
6 imprisonment in the county jail for up to six months, or both. *Id.* And, as with all
7 misdemeanors, San Diegans are subject to *multiple* such convictions *and* punishments
8 for “each and every day during any portion of which any violation of any provision of
9 this Code is committed, continued or permitted by such person.” *Id.*

13 **B. The Impact on Plaintiffs**

14 All the individual Plaintiffs in this case are responsible, peaceable citizens of
15 San Diego City who are not disqualified from exercising any of their rights to possess
16 firearms or ammunition. Cmplt. ¶¶93, 105, 118; Dec. of J. Fahr ¶¶ 1-2; Dec. of D.
17 Bergman ¶¶ 1-2; Dec. of C. Rudolph ¶¶ 1-2. They all own and possess in the City of
18 San Diego one or more unfinished frames or receivers now prohibited under the Ban,
19 which they lawfully acquired before enactment of the Ban. Cmplt. ¶¶ 96, 109, 121;
20 Dec. of J. Fahr ¶¶ 1, 5; Dec. of D. Bergman ¶¶ 1, 6; Dec. of C. Rudolph ¶¶ 1, 6. All
21 their unfinished frames or receivers are of a type that would allow for the construction
22 of California-compliant AR-15-platform semi-automatic rifles in common use for
23 lawful purposes throughout California and the United States. Cmplt. ¶¶ 98, 111, 123;
24 Dec. of J. Fahr ¶ 7; Dec. of D. Bergman ¶ 8; Dec. of C. Rudolph ¶ 8. Further, they all

1 desire and intend to use their unfinished frames or receivers to construct such firearms
2 for their own self-defense, defense of others, and proficiency training at their local
3 shooting ranges. Cmplt. ¶¶ 99, 112, 124; Dec. of J. Fahr ¶¶ 6, 8; Dec. of D. Bergman
4 ¶¶ 7, 9; Dec. of C. Rudolph ¶¶ 7, 9.

5
6 But for the Ban, all Plaintiffs would retain their now-prohibited unfinished
7 frames or receivers and use them for these constitutional and lawful purposes. Cmplt.
8 ¶¶ 100, 113, 125; Dec. of J. Fahr ¶ 9; Dec. of D. Bergman ¶ 10; Dec. of C. Rudolph ¶
9 10. However, because of the Ban, all these Plaintiffs must dispossess themselves of
10 this property within 30 days of the Ban’s enactment or they all face criminal
11 prosecution under § 53.18(c)(1) and thus forfeit the ability to use it for such protected
12 purposes. Cmplt. ¶¶ 101, 114, 126; Dec. of J. Fahr ¶ 10; Dec. of D. Bergman ¶ 11;
13 Dec. of C. Rudolph ¶ 11.

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16
17 Plaintiffs Fahr, Bergman, and Rudolph also desire and intend to purchase,
18 acquire, possess, and transport within San Diego City additional unfinished frames
19 and receivers prohibited under the Ordinance in the future for the same lawful and
20 constitutionally protected purposes. Cmplt. ¶¶ 102, 115, 127; at Dec. of J. Fahr ¶ 11;
21 Dec. of D. Bergman ¶ 12; Dec. of C. Rudolph ¶ 12. But for the Ban’s restraints, they
22 would all exercise their constitutional right to purchase, acquire, possess, and transport
23 such additional unfinished frames and receivers for these purposes. Cmplt. ¶¶ 103,
24 116, 128; Dec. of J. Fahr ¶ 12; Dec. of D. Bergman ¶ 13; Dec. of C. Rudolph ¶ 13.

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28 Plaintiffs FPC and SDCGO are non-profit entities whose core organizational

1 purposes include protecting and preserving the constitutional rights enshrined under
 2 the Second Amendment for law-abiding individuals in the City of San Diego,
 3 including the right to self-manufacture firearms in common use for lawful purposes.
 4
 5 Cmpl. ¶¶ 17, 18; Dec. of B. Combs ¶¶ 4-7; Dec. of M. Schwartz ¶¶ 4-6. They both
 6 bring this action on behalf of Plaintiffs, Fahr, Bergman, and Rudolph, and their
 7
 8 similarly situated members in San Diego City who wish to construct a California-
 9 compliant firearm in common use for lawful purposes with unfinished frames or
 10 receivers they lawfully acquired before enactment of the Ban but now face
 11
 12 dispossession of this property, and such members who wish to acquire additional such
 13 NFOs for the same purposes but now face criminal sanction under the Ban for any
 14
 15 attempt to acquire such component parts. Cmpl. ¶¶18-19; Dec. of B. Combs ¶¶ 8-16;
 16 Dec. of M. Schwartz ¶¶ 7-15.

17 III. GENERAL LEGAL STANDARDS

18 “The purpose of a TRO is to preserve the status quo before a preliminary
 19 injunction hearing may be held; its provisional remedial nature is designed merely to
 20 prevent irreparable loss of rights prior to judgment.” *Alvarez v. Larose*, 445 F.Supp.3d
 21 861, 864 (S.D. Cal. 2020). “The standard for issuing a temporary restraining order is
 22 identical to the standard for issuing a preliminary injunction.” *Id.*; *Stuhlberg Intern.*
 23 *Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).
 24
 25

26 To obtain preliminary relief, a plaintiff ““must establish that he is likely to
 27 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
 28

1 preliminary relief, that the balance of equities tips in his favor, and that an injunction
2 is in the public interest.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d
3 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Defense Council, Inc.*, 555
4 U.S. 7, 20 (2008)). Alternatively, injunctive relief “is appropriate when a plaintiff
5 demonstrates that serious questions going to the merits [are] raised and the balance of
6 hardships tips sharply in the plaintiff’s favor.” *Alliance for the Wild Rockies v.*
7 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

10 IV. ARGUMENT

11 A. Plaintiffs Hold a Strong Likelihood of Success on Their Claims

12 “[A] party seeking preliminary injunction must establish that it will prevail on
13 the merits with a ‘reasonable certainty.’” *South Bay United Pentecostal Church v.*
14 *Newsom*, 508 F.Supp.3d 756, 767 (S.D. Cal. 2020) (quoting *Sierra Club v. Hickel*, 433
15 F.2d 24, 33 (9th Cir. 1970)). “While Plaintiffs carry the burden of demonstrating
16 likelihood of success, they are not required to prove their case in full at this stage but
17 only such portions that enable them to obtain the injunctive relief they seek.” *Alvarez*,
18 445 F.Supp.3d at 865. And “[i]n this circuit, the burden is lessened to a fair chance of
19 success on the merits in cases in which the harm that may occur to the plaintiff is
20 sufficiently serious.” *Id.* (citing *William Inglis & Sons Baking Co. v. ITT Continental*
21 *Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1975)).

26 1. The Individual Second Amendment Right to Keep and Bear Arms 27 Protects All Firearms in Common Use for Lawful Purposes

28 Incorporated against the states and local governments through the Fourteenth

1 Amendment in *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010), the Second
2 Amendment guarantees “an individual right to keep and bear arms,” *District of*
3 *Columbia v. Heller*, 554 U.S. 570, 595 (2008), through its declaration that “[a] well-
4 regulated Militia being necessary to the security of a free State, the right of the people
5 to keep and bear Arms *shall not* be infringed, U.S. Const., amend. II (italics added).
6
7 The “central” holding of the Supreme Court in *Heller* is “that the Second Amendment
8 protects a personal right to keep and bear arms for lawful purposes, most notably for
9 self-defense within the home.” *McDonald* at 780. The Second Amendment is not a
10 “second-class right, subject to an entirely different body of rules than the other Bill of
11 Rights guarantees,” *id.*, and it cannot “be singled out for special—and specially
12 unfavorable—treatment,” *id.* at 778–79. “The very enumeration of the right takes out
13 of the hands of government—even the Third Branch of Government—the power to
14 decide on a case-by-case basis whether the right is really worth insisting upon.” *Heller*
15 at 634. Thus, it “elevates above all other interests”—including any interest San Diego
16 may claim in advancing “public safety”—“the right of law-abiding, responsible
17 citizens to use arms in defense of hearth and home.” *Id.* at 635.

22 And “[j]ust as the First Amendment protects modern forms of communications,
23 ... and the Fourth Amendment applies to modern forms of search, ... the Second
24 Amendment extends, *prima facie*, to all instruments that constitute bearable arms,
25 even those that were not in existence at the time of the founding.” *Heller*, 554 U.S. at
26 582 (internal citations omitted); *accord Caetano v. Massachusetts*, 577 U.S. 411, 416
27
28

1 (2016) (Alito, J., concurring). “*Heller* defined the ‘Arms’ covered by the Second
2 Amendment to include ““any thing that a man wears for his defence, or takes into his
3 hands, or useth in wrath to cast at or strike another.”” *Id.* (quoting *Heller* at 581)
4 (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). Thus,
5 “[a] weapon may not be banned unless it is both dangerous *and* unusual.” *Caetano* at
6 417. To be “dangerous” in this sense requires substantially more than a firearm’s mere
7 potential to cause injury, and a firearm is not “unusual” so long as it is “commonly
8 possessed by law-abiding citizens for lawful purposes *today*.” *Id.* at 420.

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12 “The *Heller* test is a test that any citizen can understand. *Heller* asks whether a
13 law bans a firearm that is commonly owned by law-abiding citizens for lawful
14 purposes. It is a hardware test.” *Miller v. Bonta*, __ F.Supp.3d __, 2021 WL 2284132
15 at *16 (S.D. Cal. June 4, 2021). That is, if the arm is commonly owned by law-abiding
16 citizens for lawful purposes, it is protected by the federal Constitution, full stop.

17 18 **2. This Right Has Always Secured the Ability to *Self-Manufacture*** 19 **Firearms in Common Use for Lawful Purposes**

20 The nature and scope of the Second Amendment’s protection must be defined
21 by its founding-era origins, because “[c]onstitutional rights are enshrined with the
22 scope they were understood to have when the people adopted them, whether or not
23 future legislatures or (yes) even future judges think that scope too broad.” *Heller*, 554
24 U.S. at 634-35; *id.* at 598-599, 600-01, 627 (focusing on the meaning of the
25 amendment’s text at the time of its ratification); *McDonald*, 561 U.S. at 768-69
26 (same); *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (quoting *Heller* at 625)

1 (“Courts must look at the “historical understanding of the scope of the right.”); *accord*
2 *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018) and *Hirschfeld v. Bureau of*
3 *Alcohol, Firearms, Tobacco & Explosives (BAFTE)*, 5 F.4th 407, 418 (4th Cir. 2021).

4
5 Throughout American history and our nation’s traditions of robustly exercising
6 the right to keep and bear arms, people have been free to personally manufacture,
7
8 construct, or otherwise assemble arms in common use for lawful purposes, including
9 lawful self-defense and defense of others, such that the ability to do so has become
10 firmly entrenched and now enshrined under the Second Amendment. This rich history
11 and tradition are detailed in the Complaint, Cmplt. ¶¶ 37-47, incorporated herein, and,
12 succinctly stated, confirm that the relevant historical record plainly shows our earliest
13 governments and societal institutions significantly relied upon and indeed incentivized
14
15 citizens to build their own firearms for the benefit of themselves and society as a
16
17 whole in securing both the individual and collective welfare through the same
18
19 quintessentially lawful firearm uses for which so many law-abiding citizens use
20 firearms today—i.e., in the lawful defense of oneself, others, and property. *Id.*

21 Necessarily following from this right to self-manufacture firearms in common
22 use is the right to possess, own, purchase, receive, and use the constituent parts
23
24 required to construct such a firearm, including the NFOs targeted by the Ban. The
25 Second Amendment jurisprudence, including that of the Ninth Circuit, dictates this,
26
27 through its recognition that “the Second Amendment protects ancillary rights
28 necessary to the realization of the core right to possess a firearm for self-defense.”

1 *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017); *Luis v. United*
2 *States*, ___ U.S. ___, 136 S.Ct. 1083, 1097 (2016) (Thomas, J., concurring) (quoting
3 *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014))
4 (“Constitutional rights thus implicitly protect those closely related acts necessary to
5 their exercise ... The right to keep and bear arms, for example ‘implies a
6 corresponding right to obtain the bullets necessary to use them.’”). Much as the right
7 to keep and bear arms “wouldn’t mean much without the training and practice that
8 make it effective,” *Ezell v. City of Chicago*, 651 F.3d 684, 704 (9th Cir. 2011), the
9 right to self-manufacture “wouldn’t mean much” without the right to own, possess,
10 and use the constituent parts necessary to engage in such activity—and, of course, the
11 firearm itself as end product of this protected activity—for lawful purposes.
12

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16 Notably, ATF itself has historically recognized the individual right to self-
17 manufacture firearms for personal use in having never attempted to bar or even
18 directly regulate the activity, *see e.g.*, [https://www.atf.gov/firearms/qa/does-](https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use)
19 [individual-need-license-make-firearm-personal-use](https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use) (“a license is not required to make
20 a firearm solely for personal use”), *and* it would continue to leave this activity
21 completely unregulated even under its proposed new rules which preserve an *express*
22 exception for the building of homemade firearms for personal use (*without* serial
23 numbers), 86 Fed. Reg. at 27725, 22732 (“nothing in this rule would restrict persons
24 not otherwise prohibited from possessing firearms from making their own firearms at
25 home without markings solely for personal use (not for sale or distribution)).” And
26
27
28

1 California obviously recognizes this right as well through its own regulatory scheme.

2 **3. The Proper Test for the Constitutional Analysis**

3
4 The *Heller* opinion does not prescribe any tiers of scrutiny for analyzing the
5 constitutionality of such restrictions. It expressly rejects any use of “rational basis”
6 scrutiny, *Heller*, 554 U.S. at 628, n. 27, and emphasizes that any “judge-empowering
7 interest-balancing inquiry” is inappropriate because the Second Amendment is “the
8 very *product* of an interest balancing by the people” already solidified at the time of
9 the founding, which is not subject to second-guessing based on “future judges’
10 assessments of its usefulness,” *id.* at 634. And, in any event, “[i]f a regulation
11 ‘amounts to a destruction of the Second Amendment right,’ it is unconstitutional
12 under any level of scrutiny.” *Young*, 992 F.3d at 784 (quoting *Silvester v. Harris*, 843
13 F.3d 816, 821 (9th Cir. 2016)).

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16
17 Further, because the high court has expressly rejected any “rational basis”
18 testing, “some degree of heightened scrutiny applies” in any “interest balancing.”
19 *Teter v. Connors*, 460 F.Supp.3d 989, 1001 (D. Hawaii 2020). Courts must “strictly
20 scrutinize any “law that implicates the core of the Second Amendment right and
21 severely burdens that right.”” *Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018)
22 (quoting *Silvester*, 843 F.3d at 821). “Under strict scrutiny, restrictions ‘may be
23 justified only if the government proves that they are narrowly tailored to serve
24 compelling state interests.”” *In re National Security Letter*, 863 F.3d 1110, 1121 (9th
25 Cir. 2017) (quoting *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)).
26
27
28

1 Even under intermediate scrutiny, the State must affirmatively prove with
 2 “substantial evidence” that the restriction is “narrowly tailored to serve a significant
 3 governmental interest,” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).
 4 The Supreme Court has repeatedly said this. *See e.g., Ward v. Rock Against Racism*,
 5 491 U.S. 781, 791 (1989) (same); *F.C.C. v. League of Women Voters of California*,
 6 468 U.S. 364, 380 (1984) (same). So has the Ninth Circuit. *See e.g., Doe v. Harris*,
 7 772 F.3d 563, 576-77 (9th Cir. 2014) (quoting *Ward* in articulating this standard);
 8 *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (A law will
 9 survive intermediate scrutiny only if, *inter alia*, it “is designed to serve a substantial
 10 government interest” and “is narrowly tailored to serve that interest”); *Minority*
 11 *Television Project, Inc. v. F.C.C.*, 736 F.3d 1192, 1204 (9th Cir. 2013) (same).³

16 **4. The Ban is Unconstitutional Under Any Standard**

17 By enacting the Ordinance, the City of San Diego willfully and affirmatively
 18 disregarded the Supreme Court’s well-known and binding *Heller*, *McDonald*, and
 19 *Caetano* decisions, which establish that the Second Amendment fully protects the
 20 right to self-manufacture, keep, and bear all such arms in common use for lawful
 21 purposes based on the amendment’s text and the history and tradition of our Nation.
 22

23 In fact, while California law establishes a regulatory path for the self-

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 26 ³ First Amendment jurisprudence is a proper analogue here. *See Heller*,
 27 554 U.S. at 582, 591, 595, 606, 625-26, 635 (analogizing to the First
 28 Amendment in analyzing the Second Amendment); *McDonald*, 561 U.S. at
 759, 779, 782 (same); *Jackson*, 746 F.3d at 961 (we are “guided by First
 Amendment principles” in analyzing restraints on the Second Amendment).

1 manufacture of firearms, as well as the acquisition and ownership of the precursor
2 parts and materials necessary to the self-manufacture of firearms, the Ban expressly
3 bans the possession, purchase, sale, receipt, and transportation of the parts and
4 materials necessary to undertake the constitutionally protected conduct of self-
5 manufacturing arms for self-defense, defense of others, and other lawful purposes.
6

7
8 The Ban's broad sweep captures the full spectrum of protected conduct
9 associated with self-manufacturing California-compliant AR-15-platform semi-
10 automatic rifles, just like those that the individual Plaintiffs and all similarly situated
11 individuals desire and intend to self-construct for lawful purposes using both the
12 NFOs they currently own but which are now subject to confiscation and additional
13 NFOs they would acquire but which they are now barred from ever again acquiring.
14

15
16 It is well-established that AR-15 semiautomatic rifles are in common use and
17 are not "dangerous" or "unusual" so as to be subject to such a prohibition. *Staples v.*
18 *United States*, 511 U.S. 600, 603 (1994) ("The AR-15 is the civilian version of the
19 military's M-16 rifle, and is, unless modified, a semiautomatic weapon."); *Miller*,
20 2021 WL 2284132 at *6 (finding such rifles are "commonly owned by law-abiding
21 citizens" and that "the overwhelming majority of citizens who own and keep the
22 popular AR-15 rifle and its many variants do so for lawful purposes, including self-
23 defense at home"). The Supreme Court recognized the AR-15 as a common firearm
24 possessed by *regular individuals* (not military or law enforcement) over 25 years ago.
25
26 *Staples* at 603. In fact, "the modularity and standardization of the AR-15, its ubiquity,
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1 commonality, and widespread ownership in common ammunition sizes . . . and the
2 interchangeability of parts, including magazines, makes it ideal.” *Miller* at *108.

3
4 Thus, this Ban prohibiting law-abiding citizens from acquiring and possessing
5 the component parts necessary to construct and use such arms for lawful purposes in
6 the exercise of their constitutionally protected right to keep and bear arms is
7
8 unconstitutional—full stop, end of story. Further analysis, or “interest-balancing,” is
9 neither necessary nor appropriate. *Heller*, 554 U.S. at 634; *Young*, 992 F.3d at 784.

10 While it is clear that any interest-balancing must be conducted through the lens
11 of strict scrutiny because the Ban so “severely burdens” the Second Amendment right,
12 *Pena*, 898 F.3d at 977, it undoubtedly fails even the more lenient form of scrutiny. To
13 carry its tailoring burden under intermediate scrutiny, Defendants must show that the
14 Ban does not burden “substantially more” protected conduct “than necessary” to
15 further the interest. *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d
16 1062, 1068 (9th Cir. 2020); *Doe v. Harris*, 772 F.3d at 577. Further, Defendants must
17
18 “demonstrate that the recited harms are real ... and that the regulation will in fact
19 alleviate these harms in a direct and material way.” *Id.* (quoting *Turner Broad. Sys.,*
20 *Inc. v. FCC*, 520 U.S. 180, 195 (1997)). To do this, they must “identify the interests
21 served by the restriction” and “provide evidence” that the targeted conduct “endangers
22 those interests.” *United Broth. of Carpenters and Joiners of America Local 586 v.*
23 *N.L.R.B.*, 540 F.3d 957, 967 (9th Cir. 2008). Defendants can do none of this and
24
25 haven’t even tried. This is a flat ban on constitutionally protected conduct and
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1 property interests that lacks any tailoring *at all*—much less anything *narrow*.

2 Any general public safety or crime reduction interest Defendants may cite
3 cannot suffice to justify such a sweeping criminal prohibition against the exercise of
4 fundamental constitutional rights. It's *always* true that *some* people will misuse or
5 abuse the rights secured for us all, including the right to self-manufacture firearms in
6 common use for lawful purposes, but that is certainly no reason to eliminate
7 everyone's right to do so. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245
8 (2002) (internal quotations and citations omitted) ("The prospect of crime, however,
9 by itself does not justify laws suppressing protected speech. . . . Among free men, the
10 deterrents ordinarily to be applied to prevent crime are education and punishment for
11 violations of the law, not abridgment of the rights of free speech."). This is especially
12 true when the Ban targets numerous law-abiding citizens like Plaintiffs, who have
13 only ever exercised and only ever intended to exercise the self-manufacturing right for
14 self-defense and other lawful purposes, by constructing California-*compliant* firearms.
15

16 That the Ban bars all such individuals from exercising these rights *even though*
17 they would necessarily have to follow a state regulatory process that includes the
18 requirement of *passing a criminal background check* punctuates just how overbroad
19 and unnecessary the prohibitions are. Any true public safety or crime reduction
20 interests could be met by *tailoring* the scope of the prohibitions to *at least* permit San
21 Diegans to acquire and possess NFOs in connection with the self-construction of a
22 firearm *approved* under the State's regulatory scheme. In that way, Defendants might
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1 have been able to carry their burden of proving the restraints do not burden
2 “substantially more” protected conduct “than necessary” and that the restraints “in fact
3 alleviate these harms in a direct and material way.” *Kirchmeyer*, 961 F.3d at 1068. But
4 no, Defendants have enacted a total ban, running roughshod over everyone’s rights.
5

6 And the existence of other channels for the lawful acquisition of firearms, such
7 as through lawful purchases or other transfers, is also no answer. A regulation
8 eliminating one of the rights secured by the Second Amendment cannot be excused or
9 overlooked on the basis that it does not eliminate *all* the rights secured thereunder.
10 Were it otherwise, the District of Columbia would have won the day with its argument
11 in *Heller* that its handgun ban was fine because residents could still possess long guns,
12 but the Supreme Court flatly rejected this justification. *Heller*, 554 U.S. at 629.
13

14 Success on the merits of Plaintiffs’ Second Amendment claim is thus inevitable,
15 and they need only show a “reasonable certainty” of prevailing on the merits. *South*
16 *Bay United Pentecostal Church*, 508 F.3d at 767. This they have done.
17

18
19
20 **5. The Ban Also Unquestionably Effects an Unconstitutional Taking**

21 The Ban effectively mandates that all ordinary law-abiding San Diego residents
22 dispossess themselves of all their unserialized “unfinished frames” or “unfinished
23 receivers” (and the many other NFOs that fall within the Ban’s sweepingly broad
24 definition of these terms) without any compensation for the loss of this property.
25

26 “[W]here government requires an owner to suffer a permanent physical
27 invasion of her property—however minor—it must provide just compensation.”
28

1 *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005); *Cedar Point Nursery v.*
2 *Hassid*, ___ U.S. ___, 141 S.Ct. 2063, 2074 (2021) (“government-authorized
3 invasions of property—whether by plane, boat, cable, or beachcomber—are physical
4 takings requiring just compensation”). The same is true of “regulations that
5 completely deprive an owner of ‘all economically beneficial us[e]’ of her property,”
6
7 *id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)),
8 and that otherwise result in “the complete elimination of a property’s value” or other
9 “permanent physical invasion” of the property, *Lingle* at 539. The Ban effects a taking
10 under any formulation of these rules because San Diegans are forced to dispossess
11 themselves of the targeted property, depriving them of both its use and possession,
12 essential sticks in the “‘bundle’ of property rights,” *Horne v. Dept. of Agriculture*, 576
13 U.S. 350, 361-62 (2015), without any compensation. Starkly, the only benefit they
14 realize in giving up their property is *avoiding criminal prosecution* by the City.
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18 Such a taking is plainly unconstitutional and cannot be permitted. At the very
19 least, it must be said that Plaintiffs hold a “reasonable certainty” of prevailing on the
20 merits of this claim so as to warrant preliminary relief pending ultimate resolution of
21 the merits. *South Bay United Pentecostal Church*, 508 F.3d at 767.
22
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24 **B. The Remaining Factors All Further Compel Preliminary Relief**

25 “It is well established that the deprivation of constitutional rights
26 ‘unquestionably constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990,
27 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); 11A Charles
28

1 Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995) (“When an
2 alleged deprivation of a constitutional right is involved, most courts hold that no
3 further showing of irreparable injury is necessary.”). A deprivation of constitutional
4 right “if-only-for-a-minute” exacts irreparable harm. *Monterey Mech. Co. v. Wilson*,
5 125 F.3d 702, 715 (9th Cir. 1997); *Ezell*, 651 F.3d at 700 (a deprivation of the right to
6 arms is “irreparable,” with “no adequate remedy at law”).
7
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9 Here, the deprivation is indisputable, and so is the irreparability of the harm.
10 Much more than “a minute” is at stake, as these prohibitions are already in effect and
11 they will remain in effect indefinitely because they are *permanent*. Irreparable harm is
12 not just likely, it is certain, it has already occurred, and will persist *indefinitely* unless
13 and until injunctive relief is obtained against the operation of the Ban.
14
15

16 And fundamentally, the State “cannot suffer harm from an injunction that
17 merely ends an unlawful practice or reads a statute as required to avoid constitutional
18 concerns.” *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *see also Valle*
19 *del Sollnc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (“[I]t is clear that it would
20 not be equitable ... to allow the state ... to violate the requirements of federal law.”).
21 The illegality of the Ban and the significant, irreparable harm it forces upon countless
22 law-abiding San Diegans are clear, and any potential harm to the City is
23 comparatively minimal, if any exists at all. And whatever theoretical harm Defendants
24 may be able to conjure would necessarily be of miniscule significance in comparison
25 to the undeniably significant, and concrete, deprivation of constitutional rights—
26
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28

1 particularly with the lack of any evidence that any of the targeted law-abiding citizens
2 has ever or will ever attempt to engage in any criminal activities with any NFOs.

3
4 When the government action substantially impacts the exercise of constitutional
5 rights, necessarily, “[t]he public interest ... tip[s] sharply in favor of enjoining” the
6 law. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). Thus, for all
7 the same reasons already discussed, this factor also weighs in Plaintiffs’ favor and
8 further compels preliminary injunctive relief pending resolution of the merits.

9
10 **C. Waiver of Bond is Proper and Appropriate Under These Circumstances**

11
12 The Court may properly dispense with requirement of any preliminary
13 injunction bond when “the balance of ... equities weighs overwhelmingly in favor of
14 the party seeking the injunction,” *East Bay Sanctuary Covenant v. Trump*, 349
15 F.Supp.3d 838, 869 (N.D. Cal. 2018) (quoting *Elliott v. Kiesewetter*, 98 F.3d 47, 60
16 (3d Cir. 1996)), when “there is no realistic likelihood of harm to the defendant from
17 enjoining his or her conduct,” *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir.
18 2009) (internal quotations omitted), and where the plaintiffs have a “likelihood of
19 success on the merits,” *People of the State of Cal. ex rel. Van De Kamp v. Tahoe*
20 *Regency Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985). All these factors are
21 true here, as illustrated above, thus rendering a waiver both proper and appropriate.

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25 **V. CONCLUSION**

26 For these reasons, Plaintiffs respectfully request issuance of a temporary
27 restraining order or, alternatively, a preliminary injunction after further proceedings.

28 Dated September 24, 2021

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