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

13 **NATIONAL ASSOCIATION FOR GUN**
14 **RIGHTS, INC.**, a nonprofit corporation, and
15 **MARK SIKES**, an individual,

16 Plaintiffs,

17 v.

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

22 Defendants.

Civil Case Number: 5:22-cv-00501-BLF

**BRIEF OF BRADY AS AMICUS CURIAE
IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION AND
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS'
FIRST AMENDED COMPLAINT**

Hearing Date on Motion for Preliminary
Injunction: July 14, 2022
Hearing Time: 9:00 a.m.
Location: Zoom Webinar

Hearing Date on Motion to Dismiss: August 4,
2022
Hearing Time: 9:00 a.m.
Location: Zoom Webinar

Judge: Honorable Beth Labson Freeman

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1 **I. Interests of Amicus Curiae**

2 Brady is the nation’s most longstanding nonpartisan, nonprofit organization dedicated to reducing
3 gun violence through education, research, and legal advocacy. Brady has a substantial interest in ensuring
4 that the Constitution is construed to protect Americans’ fundamental right to live. Brady also has a
5 substantial interest in protecting the authority of democratically elected officials to address the nation’s
6 gun violence epidemic. Brady has filed amicus briefs in many cases involving the regulation of firearms,
7 including *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843, 2022 WL 2251305, 597 U.S.
8 __ (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Bauer v. Becerra*, 858 F.3d 1216,
9 1219 (9th Cir. 2017).¹

10 **II. Introduction**

11 The Supreme Court has decided that law-abiding, responsible citizens have a right to guns, but it
12 is beyond dispute that the right carries inherent, deadly risk. Every year, dozens of San Jose residents are
13 killed or injured in gun accidents—tragedies that, in addition to their human toll, cost the City and its
14 residents millions of dollars. By requiring that anyone who lives in San Jose and owns or possesses a gun
15 (1) carry a homeowners, renters or gun liability insurance policy that covers losses or damages resulting
16 from any accidental use of the firearm, and (2) pay a Gun Harm Reduction Fee to a nonprofit organization
17 that will offer education programs and safety training, the City aims to reduce the risk and subsequent cost
18 and hardships of gun accidents. The Ordinance achieves these goals and reallocates costs without
19 compromising any Second Amendment rights. Sworn law enforcement officers, holders of a concealed
20 carry weapon permit, and certain low-income individuals are exempt from the Ordinance’s requirements.

21 The Ordinance’s fee and insurance requirements do not implicate the Second Amendment because
22 they do not regulate, limit, or control the manner or method in which people may keep or bear arms.
23 Instead, they simply require that gun owners have liability insurance and pay a nominal fee. These are
24 merely economic requirements that provide financial incentives for responsible arms carrying. Ample
25

26
27 ¹ No counsel for a party authored this brief in whole or in part, and no person other than Brady or
28 its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

1 historical precedent, recognized most recently by the United States Supreme Court, indicates that such
2 financial requirements do not directly restrict the right to own or carry firearms and thus fall entirely
3 outside the scope of the Second Amendment.

4 Moreover, even if the Court were to find that the Ordinance implicates the Second Amendment,
5 the evidence shows that it is consistent with the Nation’s historical tradition of firearm regulation. Because
6 its requirements are merely financial, at most the Ordinance imposes financial incentives for responsible
7 arms carrying; it does not condition or restrict the manner of keeping or bearing arms.

8 Further, through private liability insurance, the City has harnessed a proven mechanism for
9 facilitating and spreading the cost of potentially dangerous activities, one that governments have long used
10 to manage societal risks. Likewise, the Ordinance’s Gun Harm Reduction Fee is designed to reduce the
11 incidence of firearm-related accidents, and is consistent with governments’ long-standing practice of
12 charging fees for myriad activities, including those that are constitutionally protected.

13 Because the Ordinance does not implicate the Second Amendment—and also is consistent with
14 historical traditions of firearms regulation, including imposing financial incentives and allocating related
15 costs and risks—the Ordinance is constitutional and should stand. Accordingly, Plaintiffs’ Motion for
16 Preliminary Injunction is unlikely to succeed on the merits and should be denied, and Defendants’ Motion
17 to Dismiss Plaintiffs’ First Amended Complaint should be granted.

18 **III. The Ordinance Does Not Implicate Second Amendment Conduct and Imposes at Most a** 19 **Minor Financial Burden on Gun Ownership.**

20 The City’s sensible solution to the problem of gun accidents is constitutional. First, the
21 Ordinance’s fee and liability insurance requirements do not implicate the Second Amendment at all,
22 because they have no bearing on whether a person can “keep and bear arms.” Second, even if they did,
23 the Ordinance is still plainly constitutional because it is consistent with the Nation’s historical tradition of
24 firearm regulation, including economic requirements that impose, at most, financial incentives for
25 responsible arms carrying. Liability insurance is an economic requirement that governments have long
26 relied upon to compensate accident victims and spread societal costs, and which courts have consistently
27 upheld for as long as liability insurance has existed, nearly 100 years. So too are fees, which governments
28 have used for firearms-related activities since the founding. Accordingly, the Ordinance is constitutional.

1 **A. The Ordinance Does Not Implicate the Second Amendment.**

2 In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court held that the Second
3 Amendment protects conduct that falls within the Amendment’s “plain text.” 2022 WL 2251305, at *8,
4 *11. Determining the scope of the Amendment’s plain text requires looking to “the Second Amendment’s
5 text, as informed by history.” *Id.* at *9. It is only if the text and history confirm that the regulated conduct
6 falls within the Second Amendment’s original scope that the government must “then” show that the
7 regulation “is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at *11.

8 **1. The Insurance Requirement Does Not Implicate the Second Amendment.**

9 The Ordinance requires that gun owners carry liability insurance for firearm accidents. The
10 conduct implicated by that requirement is entirely outside of the original scope of protected Second
11 Amendment activity. This is confirmed by both the Second Amendment’s text and its history.

12 Beginning with the constitutional text, the Second Amendment addresses the right to “keep and
13 bear arms.” In *District of Columbia v. Heller*, the Supreme Court determined that this text “guarantee[s]
14 the individual right to possess and carry weapons in case of confrontation.” 554 U.S. at 592. Accordingly,
15 conduct exercising this right falls within the Second Amendment’s protections—for example, keeping an
16 operable handgun in the home for self-defense, as was at issue in *Heller*, or carrying arms in public, as
17 addressed in *Bruen*. By contrast, the conduct of insuring liability that might arise from a firearm-related
18 accident is an entirely different kind of activity: a financial exercise that does not alter whether someone
19 may keep or bear arms. Individuals purchase liability insurance through a transaction with an insurance
20 company that is unconnected to their purchase of a firearm; insurance does not restrict firearm possession
21 or use; and if a claim is made under the policy, it would only be after a firearm accident occurs, to
22 compensate the injured party financially and protect the gun owner’s financial assets. None of these
23 activities have any effect on Second Amendment activity.

24 Further, the Ordinance does not condition firearm ownership on the procurement of insurance. As
25 enacted, the Ordinance’s enforcement provisions only authorize an administrative citation and fine for
26 violation. Ord. 10.32.240. Plaintiffs’ fear that residents who do not comply with the insurance requirement
27 “may have their gun ‘impounded’” is unfounded. Pls.’ Resp. Defs.’ Mot. Dismiss at 8. No penalties or
28 impoundment can be imposed without due process (§§ 10.32.240-10.32.245), and moreover,

1 “impoundment” is only permitted “to the extent allowed by law”—which California law does not allow.
2 Opp. Mot. Prelim. Inj. at 3. Thus, neither enforcement provision would affect San Jose citizens’ ability to
3 “keep” arms by forcing them to obtain insurance before purchasing a gun, or by forcing them to relinquish
4 their guns for non-compliance without due process.

5 Liability insurance that covers firearm accidents may be *related to* firearms. But by its text—“keep
6 and bear”—the Second Amendment only concerns a defined body of conduct, not the entire universe of
7 gun-related activities. And although the Second Amendment may extend to some peripheral conduct that
8 is necessary to the keeping and bearing of arms, its text does not reasonably encompass the entirely
9 separate transaction of obtaining liability insurance. Simply put, obtaining insurance related to an activity
10 is not the same thing as engaging in the activity itself.

11 Several examples illustrate this point. In the familiar example of health insurance, the Supreme
12 Court explained in *National Federation of Independent Business v. Sebelius* that the purchase of
13 insurance—there, “health insurance”—is “not the same thing” as the insured conduct itself—there, “health
14 care consumption”—“[n]o matter how ‘inherently integrated’” the two may be. 567 U.S. 519, 558 (2012).
15 The Court reasoned that the two “involve different transactions, entered into at different times, with
16 different providers.” *Id.* Similarly, an individual obtaining liability insurance by entering into a contract
17 with an insurance company is simply “not the same thing” as purchasing a gun from a firearms dealer, or
18 owning and using the gun.

19 Other government insurance mandates also raise no serious constitutional concerns even though
20 they make insurance a prerequisite for engaging in constitutionally protected activity. For example,
21 California requires businesses to carry workers’ compensation insurance covering liability for workplace
22 injuries, and this law applies to all types of businesses, including those engaged in Second Amendment
23 activity, such as gun ranges. Yet no one could credibly argue that the workers’ compensation insurance
24 requirement implicates Second Amendment rights merely because it is related to Second Amendment
25 activity.

26 Nor does the conduct of carrying liability insurance possibly fall within the scope of historically
27 protected Second Amendment activity. There is no support for any historical understanding of gun rights
28 including a right to *not carry* liability insurance. Indeed, there has never been a “general constitutional

1 rule that citizens must be exempted from the obligation to internalize the costs of exercising their
 2 constitutional rights.” Stephen G. Gilles & Nelson Lund, *Mandatory Liability Insurance for Firearm*
 3 *Owners: Design Choices and Second Amendment Limits*, 14 Engage 21 (2013). The insurance conduct at
 4 issue here is constitutionally sound because it does not bear on whether someone can purchase, keep, or
 5 use a firearm, and thus, “the challenged law regulates activity falling outside the scope of the right as
 6 originally understood.” *Bruen*, 2022 WL 2251305 at *8 (citing *Kanter v. Barr*, 919 F.3d 437, 441 (7th
 7 Cir. 2019)).

8 **2. The Fee Requirement Does Not Implicate the Second Amendment.**

9 The Constitution’s text and history also demonstrate that the fee requirement does not implicate
 10 the Second Amendment. As with the insurance requirement, the Gun Harm Reduction Fee—which only
 11 requires that gun owners contribute to a designated nonprofit organization—does not infringe residents’
 12 ability to keep or bear arms.

13 The text is confirmed by constitutional history, which also makes clear that mere economic
 14 requirements do not burden Second Amendment rights. Early American governments required many
 15 different kinds of financial payments associated with gun ownership and use. But these economic
 16 requirements “posed no constitutional issues for Americans in the pre-Civil War era,” and only
 17 “intensified” in the period following the Civil War. Saul Cornell, *History and Tradition or Fantasy and*
 18 *Fiction: Which Version of the Past Will the Supreme Court Choose in NYSRPA v. Bruen?*, 49 Hastings
 19 Con. L. Quarterly 145, 154 (2022) (citing historical sources). For example, some of the same 19th-century
 20 laws that required “rifle” and “pistol galleries” to pay annual sums applied equally to “bowling alleys,”
 21 demonstrating that early Americans did not understand the Second Amendment to create any special
 22 constitutional protection from payments related to gun use. *See* Laws of the State of Texas, An Act
 23 Authorizing the Corporate Authorities of the Town of Dangerfield, Fairfield and Springfield, to tax ten
 24 pin alleys, billiard tables and pistol galleries § 1 (1860); 1870 La. Acts 127, Persons, Trades, Professions
 25 and Occupations Subject to Taxation, § 3, pt. 6 (1870).

26 Modern courts have suggested that gun-related fees do not implicate the Second Amendment while
 27 upholding such fees in any event. *See Bauer*, 858 F.3d at 1227 (stating “we need not—and do not—decide
 28 whether [a firearm sale] fee implicates the Second Amendment” because it would survive under either

1 level of scrutiny, while applying the pre-*Bruen* two-part test); *see also Kwong v. Bloomberg*, 723 F.3d
 2 160, 168 (2d Cir. 2013) (declining to “definitively decide” which scrutiny standard applied, because the
 3 fee was constitutional regardless). Indeed, the exercise of this right entails financial costs: there is cost to
 4 purchasing a firearm, cost to store one safely, cost to obtain training to use it.

5 In sum, the Ordinance does not condition or restrict the manner of keeping or bearing arms and
 6 thus does not regulate conduct protected by the Second Amendment. Because it does not, the City does
 7 not need to make any additional showing for this Court to find the Ordinance constitutional.

8 **B. Even If the Ordinance Implicates the Second Amendment, the Financial**
 9 **Requirements Are Constitutional Because They Are Consistent with Historical**
 10 **Regulations.**

11 Even if this Court finds the Ordinance does burden Second Amendment rights in some minimal
 12 way, it is fully “consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 2022 WL
 13 2251305, at *8, *15. Both the Ordinance’s fee and insurance requirements are consistent with historical
 14 gun-related economic requirements, and the insurance requirement in particular is consistent with the
 15 government’s historical role in allocating the costs of gun accidents.

16 **1. The Insurance and Fee Requirements Are Consistent with the Long History**
 17 **of Gun-Related Economic Requirements.**

18 To the extent that the Ordinance does implicate the Second Amendment by imposing a minimal
 19 *economic* burden, it is consistent with many other gun-related economic requirements throughout
 20 American history.

21 In *Bruen*, the Court considered the “surety statutes” that nine jurisdictions enacted in the roughly
 22 20 years leading up to and shortly after the ratification of the Fourteenth Amendment and rejected any
 23 notion that such financial requirements were “a severe constraint” on Second Amendment conduct. 2022
 24 WL 2251305, at *27. These surety statutes required individuals to post, or have a third party post, a bond
 25 before they could carry a firearm. *See* Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public*
 26 *Carry: Placing Southern Antebellum Case Law in Context*, 125 Y.L.J.F. 121, 131 (2015); David B. Kopel,
 27 *The First Century of Right to Arms Litigation*, 14 Geo. J.L. Pub. Pol. 127, 131 fn. 14 (2016). The *Bruen*
 28 Court observed that “[T]he surety laws did not *prohibit* public carry in locations frequented by the general
 community,” WL 2251305, at *26–27, and that “[T]he burden these surety statutes may have had on the

1 right to public carry was likely too insignificant to shed light on” the regulation at issue. *Id.* at *27. At the
2 same time, the Court recognized that the minimal economic burden that these statutes imposed promoted
3 public interests, including the “prevention” of gun harms, and “provid[ing] financial incentives for
4 responsible arms carrying.” *Id.* at *28. Similarly, the Ordinance’s insurance and fee requirements pose
5 only a minimal economic burden in order to prevent gun harms and incentivize responsible gun use. Like
6 surety statutes, such minimal burdens are “insignificant” for Second Amendment purposes.

7 Beyond the surety bonds considered in *Bruen*, American history is full of government-imposed
8 economic burdens associated with gun ownership and use. *See, e.g.*, An Act to Amend and Reduce into
9 one the several Acts in Relation to the Revenue of this State, and for other purposes § 1 (1844) (Mississippi
10 law requiring “two dollars on each dueling or pocket pistol”); 1851 R.I. Pub. Laws 9 § 2 (1851) (“[T]wo
11 hundred dollars per annum on any person who shall own or keep a pistol gallery [or] rifle gallery.”);
12 Ordinances and Joint Resolutions of the City of San Francisco § 13 (1854) (San Francisco ordinance
13 requiring “ten dollars per quarter” required from “[e]very person, house, or firm engaged in keeping a
14 pistol or rifle shooting gallery”); 1856–1857 N.C. Sess. Laws 34, Pub. Laws, An Act Entitled “Revenue,”
15 ch. 34, § 23, pt. 4. (1856–1857) (“On every pistol, except such as are used exclusively for mustering, and
16 on every bowie-knife, one dollar and twenty five cents . . .”). Similar economic burdens have endured to
17 the present day, and modern courts have not hesitated to uphold gun-related fees and costs as
18 constitutional. *See, e.g.*, *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (upholding “fee on firearms
19 transfers”); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) (upholding “residential handgun licensing
20 fee”). Such fees have long been accepted as consistent with the Second Amendment.

21 The upholding of fee requirements naturally aligns with the long history of federal, state, and local
22 governments in America assessing fees since the Nation’s founding. For instance, the Post Office has
23 charged fees for mailing letters from its inception in 1792. Act of Feb. 20, 1792, ch. 7 §§ 9, 10 Stat. 232,
24 235 (establishing the Post-Office and Post Roads within the United States), <https://bit.ly/3utzSCQ> (last
25 visited July 11, 2022) (setting fees to mail letters depending on distance). Fees remain a common method
26 for governments to efficiently target costs for services to individuals who use them the most or who create
27 negative externalities. For example, in California, the Transportation Improvement Fee, collected when
28 Californians register their vehicles, funds the Road Maintenance and Rehabilitation Program; the

1 Childhood Lead Poisoning Prevention Fee, collected from those involved in the stream of commerce of
 2 lead, or products containing lead, funds health care referrals, environmental assessments, and educational
 3 activities; and the Emergency Telephone Users Surcharge, typically charged as part of users' monthly
 4 telephone bills, funds the installation, administration, and supply of communication services for the 911
 5 system. *California Begins Collecting Transportation Improvement Fee*, ForConstructionPros.com (Jan.
 6 2, 2018) <https://bit.ly/3RhC7Tg> (last visited July 11, 2022); California Department of Tax and Fee
 7 Administration, *Childhood Lead Poisoning Prevention Fee*, <https://bit.ly/3ORDR44> (last visited July 11,
 8 2022); California Department of Tax and Fee Administration, *Emergency Telephone Users Surcharge –*
 9 *Frequently Asked Questions*, <https://bit.ly/3yMLDXB> (last visited July 11, 2022). Like these fees, San
 10 Jose's Gun Harm Reduction Fee is an efficient method for San Jose to allocate the costs of firearm harms.

11 Further, any argument that the cost of compliance makes gun ownership prohibitively expensive
 12 is premature at best, because such costs have not yet been determined. In addition, any serious concerns
 13 about cost are mooted by the Ordinance's hardship exception, which exempts "[t]hose persons for which
 14 compliance with this Part would create a financial hardship" from the insurance and fee provisions. Ord.
 15 § 10.32.225 (Exceptions). Under this exception, even those who cannot afford to comply can still own
 16 and use firearms, with *no* financial burden at all.

17 **2. The Insurance Requirement Is Consistent with—and Even an Improvement**
 18 **Upon—the Long History of Governments Allocating the Costs of Gun**
 19 **Accidents.**

20 For as long as there have been guns, there have been gun accidents. In response, American
 21 governments have imposed systems for allocating the costs of those accidents since the Nation's founding.
 22 San Jose's insurance requirement is entirely consistent with the way governments have historically
 23 allocated the inevitable costs of gun-related accidents. In fact, the insurance requirement allocates gun
 24 accident costs in a way that is much *less* burdensome on gun owners than the system in place at the
 25 founding.

26 Early American governments had a simple and harsh way of allocating gun accident costs: through
 27 courts that imposed strict liability on gun owners. American courts inherited this strict-liability approach
 28 from the English common law, where the rule had been that "where one shoots at [a mark] and wounds a
 man, although it be against his will, yet he shall be called a trespasser against his will." *See* Wex S. Malone,

1 *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 La. L. Rev. 1, 13 (1970)
2 (quoting *Tithe*, Y.B. 21 Hen. 7, f. 27, pl. 5). Strict liability continued to be the rule in both England and
3 the United States throughout the founding era; indeed, an American commentator writing as late as the
4 1930s noted that cases involving gun accidents “all indicate the strict accountability to which a person has
5 been held for injury caused to another in the vicinity by a discharge incident to the handling of a firearm.”
6 Fred E. Inbau, *Firearms and Legal Doctrine*, 7 Tul. L. Rev. 529, 549-50 (1932–33). For example, in
7 *Moody v. Ward*, 13 Mass. 299 (1816), Massachusetts’ highest court stated that militia commanders who
8 allowed their troops to engage in “[t]he mischievous and disgraceful practice of firing guns in and near
9 the highways” would be held “legally responsible for all damage sustained by a citizen in consequence of
10 such neglect.” *Id.* at 301. Likewise, in *Cole v. Fisher*, 11 Mass. 137 (1814), the court considered a case in
11 which the defendant had fired his gun at the door of his shop after cleaning it, frightening a nearby horse
12 and causing damage to the carriage the horse was carrying. After taking the “occasion to observe upon the
13 dangers to which travellers and passengers on foot and in carriages are exposed by discharges of guns in
14 or near the highways,” the court stated the strict liability principle that “[t]he party injured, either in his
15 person or property, by the discharge of a gun, even when the act is lawful . . . is entitled to redress in a
16 civil action.” *Id.* at 139.

17 American tort law eventually changed, and in the mid-1800s, courts began applying a negligence
18 standard to gun accidents and other torts. By holding an individual liable only if the plaintiff could prove
19 that the defendant had breached a duty, the new negligence standard was much more forgiving for gun
20 owners than the strict liability standard had been. Comparing the old and new standards in an 1856 case
21 involving an accidental shooting, a Missouri court noted that “the old system of actions” was “much
22 stricter,” because “it was no defence, in such cases, that the act occurred by misadventure, and without
23 the wrong-doer’s intending it.” *Morgan v. Cox*, 22 Mo. 373, 376–77 (1856).

24 As the new negligence standard transformed the way that the government assigned liability
25 through the courts, new private liability insurance sprung up “to insure against the consequences of
26 negligence.” Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*,
27 64 Md. L. Rev. 573, 576 (2005); *id.* at 573 (describing the “symbiotic relationship between tort liability
28 and insurance”). In time, tort law and liability insurance proved to be a powerful combination that was

1 capable of compensating victims, spreading the costs of accidents, and even reducing risk altogether in
 2 ways that were impossible under the old system of strict liability. *See id.*; *see also* Fleming James, Jr.,
 3 *Accident Liability: Some Wartime Developments*, 55 Y.L.J. 365, 365 (1946) (mid-20th century
 4 commentator discussing the recently discovered benefits of this system). As discussed in greater detail
 5 below, American governments learned that they could make even better use of this public-private system
 6 by requiring liability insurance, and did so in areas such as workers' compensation, auto insurance, and
 7 medical malpractice insurance.

8 **3. Mandatory Liability Insurance Has Long Been Held Constitutional.**

9 Since ancient times, people have sought a way to protect themselves from the adverse
 10 consequences of their risky behaviors through what we now call insurance. *See Historical Development*
 11 *of Insurance*, Britannica, <https://bit.ly/2Dd5yRy> (last visited July 11, 2022). Governments have required
 12 liability insurance in several different areas, and have done so for many years. Some of these requirements
 13 have implicated constitutionally protected rights and faced constitutional challenges. However, courts
 14 have had no difficulty in affirming mandatory liability insurance as clearly constitutional.

15 Nearly 100 years ago, in *Ex parte Poresky*, the Supreme Court considered a suit involving a
 16 Fourteenth Amendment challenge to Massachusetts' "compulsory automobile liability insurance" law.
 17 290 U.S. 30, 31 (1933). The Court swiftly denied the claim at issue, citing the other "decisions of this
 18 Court bearing upon the constitutional authority of the state, acting in the interest of public safety, to enact
 19 the statute assailed." *Id.* at 32. Auto insurance has not faced serious constitutional challenge since, and
 20 today, nearly every state requires it.²

21 Similarly, both state and federal courts have upheld medical malpractice insurance requirements
 22 against constitutional challenge. For example, in *McCoy v. Commonwealth of Pennsylvania*, a state court
 23

24
 25 ² Any argument that driving a car is a privilege not a right is specious. The right to move freely, to
 26 use public rights of way, to travel across state lines, and drive in pursuit of a livelihood, though not
 27 expressly enumerated in the first eight amendments, are rights nonetheless, protected under the Fifth,
 28 Ninth, and Fourteenth Amendments.

1 considered “the constitutionality of the mandatory insurance provisions” of a state medical malpractice
2 insurance act under a Fourteenth Amendment challenge. 37 Pa. Cmwlth 530, 533 (1978). The act required
3 doctors to “either purchase insurance or develop a plan of self-insurance,” and required the state licensure
4 board “to suspend or revoke the license of a health care provider upon a failure to comply with the
5 mandatory insurance provisions.” *Id.* at 535. Upholding the statute, the court held that the state had the
6 authority “to recognize the problem of malpractice insurance availability and to deal with it.” *Id.* at 538.
7 Likewise, in *Meier v. Anderson*, when doctors challenged a related provision of the same law, a federal
8 court held that the state’s actions in “controlling the medical malpractice insurance market” were within
9 its constitutional authority. 692 F. Supp. 546, 552–53 (E.D. Pa. 1988), *aff’d*, 869 F.2d 590 (3d Cir. 1989)
10 (internal quotation marks omitted).

11 Moving outside of the context of liability insurance to perhaps the most well-known insurance
12 requirement of all—the individual mandate under the Affordable Care Act—constitutional challenges
13 based in individual constitutional rights never even got off the ground. In the district court litigation that
14 led to the Supreme Court’s decision upholding the individual mandate in *National Federation of*
15 *Independent Businesses v. Sebelius*, the plaintiffs had argued that the “mandate violate[d] their rights to
16 substantive due process under the Fifth Amendment.” *Fla. ex rel. McCollum v. U.S. Dep’t of Health &*
17 *Hum. Servs.*, 716 F. Supp. 2d 1120, 1161 (N.D. Fla. 2010). The district court “flatly rejected” this
18 argument, and the litigants “expressly disclaimed” it on appeal. *Fla. ex rel. Atty. Gen. v. U.S. Dep’t of*
19 *Health & Hum. Servs.*, 648 F.3d 1235, 1361 (11th Cir. 2011) (Marcus, J., concurring); *see also Sebelius*,
20 567 U.S. at 613 (Ginsburg, J., concurring) (“Plaintiffs have abandoned any argument pinned to substantive
21 due process, however, and now concede that the provisions here at issue do not offend the Due Process
22 Clause.”) (citations omitted).

23 In sum, none of these well-established insurance requirements have created serious constitutional
24 issues. The Ordinance’s liability insurance requirement does not, either.

25 4. The Ordinance’s Liability Insurance Requirement Is a Proven Solution to the 26 Difficult Societal Problem of Firearm Accidents.

27 Finally—and specifically concerning the liability insurance requirement—mandatory liability
28 insurance is a particularly suitable solution to the problems posed by gun accidents.

1 Firearm ownership unavoidably creates the risk of accidents. Faced with the challenges of such
2 accidents, San Jose, like many other governments have done in other contexts, turned to liability insurance.
3 Governments have regularly created public-private liability insurance systems, rather than direct
4 regulation, to address problems posed by other risky activities, influence consumer behavior, and
5 encourage safer practices. This has been done successfully, for decades, in the context of automobile
6 safety (auto insurance), workplace safety (workers' compensation insurance), and medical and other
7 professional errors (malpractice insurance), among others. San Jose should be permitted to do the same
8 here, harnessing the power of liability insurance to compensate victims, protect gun-owning
9 policyholders' assets, allocate the risk of accidents, and promote public safety, all while imposing no
10 restrictions or conditions on ownership, possession, or use of firearms.

11 **a. Firearms Create Risks and Costs That Are Not Inherently Well**
12 **Allocated.**

13 Firearm ownership is inherently *risky*. For example, even a responsible gun owner's firearm may
14 go off accidentally, injuring people or property. These firearm accidents occur regularly in San Jose, where
15 an average of 86 people are killed or injured each year by firearm incidents deemed "unintentional" or
16 "undetermined"—that is, accidents. *Incidence and Cost of Firearm Injuries in San Jose, CA*, Pacific
17 Institute for Research and Evaluation 1 (Jan. 19, 2022).

18 Firearm accidents are also *costly*. Police and fire response alone for accidental shootings costs the
19 City an average of \$233,699 annually. *Id.* at 2. When considering other related costs, such as medical and
20 mental health care, lost work, and lost quality of life, accidental shootings have a total societal cost to the
21 City of nearly \$25 million dollars every year, or \$290,000 per person shot. *Id.* at 4–5. Although Plaintiffs
22 may quibble over the exact dollar amount, these costs are massive by any measure.

23 Further, the costs of firearm-related accidents are distributed *unpredictably and unfairly*.
24 Taxpayers are forced to fund over \$1 million of the \$25 million annual cost of accidents, through public
25 services such as emergency response and victim assistance. *Id.* at 5. The remaining millions of dollars in
26 costs fall on victims, family members, and gun owners themselves. Without any system of allocating these
27 costs, it is nearly impossible to know who will be financially responsible when a random accident strikes.
28

1 **b. Liability Insurance Excels at Reallocating Risks.**

2 When the unintended consequences of an individual’s actions harm another person or another
3 person’s property, that injured person or property owner may recover damages. However, issues arise—
4 both for the victim and the person responsible for the harm—when the amount of these damages is beyond
5 what the responsible individual can pay. This is the problem liability insurance was designed to solve.

6 Through liability insurance policies, insurers agree to cover, among other things, claims that third
7 parties bring against the policyholder for accidental injuries the policyholder caused. Through insurance,
8 the cost of such claims is transferred to insurance companies, which in turn spread that cost to their
9 customers through risk-based premiums, instead of being borne out-of-pocket by the person who caused
10 the accident, the victim, or public or private services. *See, e.g.,* Peter Kochenburger, *Liability Insurance*
11 *and Gun Violence*, 46 Conn. L. Rev. 1265, 1271 (2014). Some familiar examples of liability insurance
12 include homeowners insurance, renters insurance, automobile insurance, and commercial general liability
13 insurance. Many existing liability insurance policies provide coverage for firearm-related injuries,
14 including, for example, for injuries resulting from an accidental discharge, and for legal defense costs
15 where the policyholder purposefully fired his weapon, but unintentionally shot someone. *See, e.g., State*
16 *Farm Mut. Auto. Ins. Co. v. Partridge*, 514 P.2d 123, 129 (Cal. 1973) (en banc) (noting that “any resultant
17 damage” from the accidental firing of a gun “would clearly be covered” by the homeowners policy at
18 issue); *Allstate Ins. Co. v. Barnett*, No. C-10-0077 EMC, 2010 WL 3619778, at *7 (N.D. Cal. Sept. 9,
19 2010) (finding a duty to defend when insured claimed he did not intend to shoot victim).

20 One of the reasons government-required liability insurance has been so successful is that the cost-
21 sharing aspects of liability insurance are particularly effective when implemented at a community scale.
22 If only the lowest-risk individuals purchase insurance, and the riskiest individuals go uncovered, many of
23 the benefits of liability insurance are reduced: victims’ ability to recover compensation for their injuries
24 will depend on whether the gun owner has sufficient funds, and uninsured gun owners may bear
25 astronomical medical or legal costs of an accidental shooting. Conversely, if only the highest-risk
26 individuals purchase insurance, because they know they are the most likely to make a claim, insurance
27 companies may charge inflated premiums. Thus, “rates go up . . . , and the victims of many accidents go
28 uncompensated, which spreads the costs throughout society.” Jennifer B. Wriggins, *Mandates, Markets,*

1 *and Risk*, 19.2 Conn. Ins. L. J. 275, 291 (2013). But, by including as many of the individuals in a
 2 community as possible that are participating in a risk in the risk pool, “insurance markets can work better
 3 for the benefit of consumers.” *Id.* at 288. By requiring that most participants in a risky activity obtain
 4 insurance, governments make sure that the costs of the risk are distributed optimally among them.

5 **c. Liability Insurance Provides Financial Incentives for Responsible**
 6 **Ownership and Risk Reduction.**

7 Insurance companies also have a demonstrated ability to influence individual behavior by
 8 providing financial incentives to responsible policyholders. According to insurance scholars, “Once an
 9 insurance institution assumes responsibility for the financial consequences of a given harm, it has an
 10 incentive to prevent that harm.” Tom Baker & Thomas O. Farish, *Liability Insurance and the Regulation*
 11 *of Firearms*, in *Suing the Gun Industry*, at 5 (Timothy D. Lytton ed., 2005). Such incentives tend to reduce
 12 accidents, as demonstrated in the areas of auto insurance, workers’ compensation, and malpractice
 13 insurance.

14 For example, in workers’ compensation, insurance companies offer better rates to businesses that
 15 make their workplaces safer. Occupational Safety and Health Administration, *Business Case for Safety*
 16 *and Health*, <https://www.osha.gov/businesscase/benefits> (last visited July 11, 2022) (noting multiple
 17 studies that find safer workplaces result in lower workers’ compensation costs). Similarly, medical
 18 malpractice insurance identifies risky providers, encourages safer practices, and collects data that
 19 pinpoints the causes of medical errors. Tom Baker & Charles Silver, *How Liability Insurers Protect*
 20 *Patients and Improve Safety*, 68 DePaul L. Rev. 211, 226 (2019) (“Liability insurers and their industry
 21 groups have facilitated and supplemented the work of physicians and their professional societies by
 22 sharing closed claim data, providing analyses, and developing treatment guidelines of their own.”). Car
 23 insurance also offers lower premiums for certain vehicle safety measures and rewards safe drivers. *See*,
 24 *e.g.*, Allstate, *7 Easy Ways to Help Lower Your Car Insurance Premium*, <https://al.st/3Plq99o>, (last visited
 25 July 11, 2022); State Farm, *Be Rewarded With Drive Safe & Save Discounts*, <https://bit.ly/3nR1eir> (last
 26 visited July 11, 2022); Allstate, *Safe Driving Bonus*, <https://al.st/3OXrX99> (last visited July 11, 2022).

27 Here, the Ordinance guarantees that San Jose gun owners will comprise a sizable segment of the
 28 local liability insurance market. With this large population of customers, insurance companies will have

1 a financial interest in limiting their payouts for gun-related accident claims. Just as they have done for
2 other risks that they insure, insurance companies will likely try to reduce their payouts for gun accidents
3 by incentivizing safe practices that reduce risk. For example, much as liability insurance providers have
4 incentivized safer driving and safer workplaces, discussed above, insurance companies can offer premium
5 discounts to incentivize safe gun practices. As noted in the City’s findings, these incentives might
6 encourage firearm owners to “take safety classes, use gun safes, install trigger locks, or utilize chamber-
7 load indicators.” Ord. No. 30716 at 4.

8 Plaintiffs’ argument that this risk cannot be assessed is unavailing. Insurers have priced risk for
9 generations, including for things much more obscure than firearm risks. For example, life insurance
10 companies price the risk of scuba diving, an activity with a relatively low estimated death rate of 164
11 people per million participants. Kristen Moore & Craig Reynolds, *Firearm Risk: An Insurance*
12 *Perspective*, *The Actuary* (June/July 2018) <https://bit.ly/3IvWXdL> (last visited July 11, 2022). By
13 comparison, as many as double that number or more die from firearms in the home. *Id.* Given a financial
14 incentive to price the risk of gun accidents, as the City-wide insurance requirement does, insurers will find
15 a way to do so.

16 **5. The Vast Majority of San Jose Gun Owners Are Already in Compliance with** 17 **the Ordinance’s Insurance Requirement.**

18 The Ordinance’s insurance requirement requires no significant change to the status quo because
19 most people already own qualifying insurance, or can easily obtain it. Homeowners and renters insurance
20 policies already cover liability for accidental harms, including from firearms. *See supra* at 2;
21 Kochenburger at 1275 (surveying policies); *see, e.g.*, ISO, Homeowners 3-Special Form (HO 00 03 05
22 11) (2010) (standard homeowners policy form, which includes “accident[s]” resulting in both “Bodily
23 injury” and “Property damage” under its definition of a covered “Occurrence,” and does not exclude
24 firearms). Further, in an *en banc* decision, the California Supreme Court has confirmed that a claim for
25 damage where a “gun had accidentally fired” would “clearly be covered” under a typical homeowners
26 policy that provides coverage for accidents and does not exclude firearms. *Partridge*, 10 Cal. 3d at 103.

1 Many people already carry such coverage, including **93 percent** of homeowners. *See* Insurance
2 Information Institute, 2021 Insurance Fact Book 90. Although the number of insured renters is smaller,³
3 City residents who do not currently carry homeowners or renters insurance can easily obtain it with an
4 off-the-shelf policy sold by any number of insurance companies authorized to do business in California.

5 Here, the insurance requirement is entirely of a piece with the traditional governmental role of
6 allocating gun accident costs, as well as the historical progression toward using liability insurance to do
7 so. It in no way oversteps the historical bounds of Second Amendment regulation. If anything, it is *less*
8 burdensome on gun owners than the cost-allocation system that governments imposed during the founding
9 era.

10 CONCLUSION

11 For the foregoing reasons, as well as the reasons set forth in Defendants' briefings, Plaintiffs'
12 Motion for Preliminary Injunction should be denied and Defendants' Motion to Dismiss Plaintiffs' First
13 Amended Complaint should be granted.

14
15 Dated: July 11, 2022

Respectfully Submitted,

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27 ³ *See Number of Renters Is on the Rise—But Few of Them Have Insurance*, Insurance Information
28 Institute (Sept. 22, 2014), <https://bit.ly/3NX1xW7>.

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