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14 **UNITED STATES DISTRICT COURT**  
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN JOSE DIVISION**

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

20 Plaintiffs,

21 v.

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

25 Defendants.  
26  
27  
28

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

**PLAINTIFFS' RESPONSE TO BRIEF OF  
BRADY AS AMICUS CURAIE**

Motion: Mot. Preliminary Injunction

1                   **PLAINTIFFS’ RESPONSE TO BRIEF OF BRADY AS AMICUS CURIAE**

2           **I.       Introduction**

3           The City of San Jose (the “City”) instituted a first-of-its-kind law compelling gun owners to  
4 make a donation to a City-chosen non-profit and to purchase insurance. These requirements implicate  
5 the Second Amendment because they only apply to gun owners, only because they are gun owners,  
6 and force them to choose between either making the mandated payments, paying fines for violating  
7 the Ordinance, or forgoing the right to own a gun.

8           The Ordinance fails the Second Amendment analysis in *New York State Rifle & Pistol Assoc.,*  
9 *Inc. v. Bruen*, 142 S.Ct. 2111 (2022). In *Bruen*, the Supreme Court held that a court must consider  
10 whether a regulation has historical analogs close in time to the ratification of the Second Amendment  
11 in 1791 showing that it is consistent with the Founders’ understanding of the Second Amendment.  
12 The Court also held that when the issue the regulation seeks to address existed at the Founding, the  
13 Founders’ solution to that issue, if any, will be informative. Brady not only fails to identify  
14 comparable historical gun regulations, it acknowledges that the same harms the Ordinance addresses  
15 also existed at the Founding and that the Founders chose to address them by vastly different means.  
16 The City’s unprecedented Ordinance therefore violates the Second and Fourteenth Amendments.

17           **II.       The Ordinance Implicates the Second Amendment Because It Regulates the Way**  
18                   **People Can Exercise Their Second Amendment Rights.**

19           Brady claims that neither the Ordinance’s “fee” requirement nor its insurance requirement,  
20 which are solely target gun owners, require a Second Amendment analysis. Brady Brf. 2-6. Brady  
21 claims the Ordinance has “no bearing on whether a person can ‘keep and bear arms.’” Brf. 2:21.  
22 Brady’s contentions are contrary to *Bruen* and Ninth Circuit authority.

23           The Supreme Court’s analysis in *Bruen* asks first whether “the Second Amendment’s plain text  
24 covers an individual’s conduct[.]” *Bruen*, 142 S.Ct. at 2126. If so, “the Constitution presumptively  
25 protects that conduct” and the burden shifts to the government to justify its regulation. *Id.* “If the  
26 government can prove that the regulated conduct falls beyond the Amendment’s original scope, ‘then  
27 the analysis can stop there.’” *Id.* (quoting *United States v. Greeno*, 679 F.3d 510, 518 (2012)).  
28

1 Here, the regulated conduct that triggers the application of the Ordinance’s requirements is the  
2 mere ownership of a gun, which is squarely protected by the Second Amendment. “[T]he ‘textual  
3 elements’ of the Second Amendment’s operative clause—‘the right of the people to keep and bear  
4 Arms, shall not be infringed’—‘guarantee the individual right to possess and carry weapons in case of  
5 confrontation.’” *Bruen* at 2134 (quoting *Heller*, 554 U.S. at 592).

6 By contrast, an example of a case falling outside the scope of the Second Amendment  
7 altogether is a law regulating the possession of a gun while committing a drug trafficking offense.  
8 *U.S. v. Greeno*, 679 F.3d 510 (6th Cir. 2012). Possessing a weapon to commit a crime is not within  
9 the original intention of the Second Amendment’s scope. *Id.* The *Bruen* Court also noted that, in more  
10 borderline and “inconclusive” cases where the “regulated activity is not categorically unprotected,”  
11 courts generally continue with the Second Amendment analysis. *Bruen*, 142 S.Ct. at 2126.

12 The Ninth Circuit similarly applies a Second Amendment analysis to laws burdening Second  
13 Amendment rights. In *Jones v. Bonta*, the 9<sup>th</sup> Circuit concluded that the district court abused its  
14 discretion when it found a gun law imposed no burden on Second Amendment rights. *Jones v. Bonta*,  
15 34 F.4th 704, 715 (9th Cir. 2022). The Court explained that laws may be found constitutional (using  
16 the more deferential and now obsolete *pre-Bruen* intermediate scrutiny analysis) because their burdens  
17 are slight—but this does not mean that there is no need for a Second Amendment analysis. *Id.* at 723.  
18 Consistent with the Supreme Court’s analysis, a Second Amendment analysis can only be avoided  
19 where a law does not regulate activity protected by the Second Amendment. *Id.*

20 The Second Amendment thus governed laws “that regulate either the way people can obtain or  
21 use firearms, or auxiliary features of those firearms.” *Id.* at 725. Specific examples include, among  
22 other things, “using firearm purchase fees to fund law enforcement programs”. *Jones v. Bonta*, 34  
23 F.4th 704, 725 (9th Cir. May 11, 2022). (citing *Bauer v. Becerra*, 858 F.3d 1216, 1221-22 (9th Cir.  
24 2017)) (emphasis added). Such laws implicated the Second Amendment “because they regulate *the*  
25 *way people can exercise* their Second Amendment rights.” *Id.* (emphasis added). In *Heller v. District*  
26 *of Columbia*, 801 F.3d 264, 273-74 (D.C. Cir. 2015) (“*Heller III*”), the D.C. Circuit also found that  
27 “additional registration requirements” including, among other things, fees and a requirement that one  
28 undergo a firearms safety course, in fact burdened Second Amendment rights. *Id.* at 270.

1 Like the Ordinance’s “fee,” its mandatory insurance requirement burdens conduct protected by  
2 the Second Amendment – indeed, its very purpose is to manipulate how people exercise their Second  
3 Amendment rights. As the Ordinance itself points out, insurance works with “risk-adjusted premiums  
4 to reward good driving and incentivize use of [measures the insurance company deems to be safety  
5 measures].” Ordinance §10.32.200.11. As the City puts it, “Liability insurance can reduce the number  
6 of gun incidents by encouraging safer behavior....” Ordinance §10.32.200.12. Brady endorses this  
7 notion: its heading for section III.B.4.c states “Liability insurance provides financial incentives for  
8 responsible ownership and risk allocation.” Brady Brf. 14:5-6. Put simply, the conduct of gun owners  
9 has a direct correlation with how much money the owner has to pay for insurance and the insurance  
10 requirement is designed to change how gun owners use their guns. Under Ninth Circuit precedent, the  
11 “way people can...use firearms” implicates the Second Amendment. *Bonta*, 34 F.4th at 725.

12 Further, both the “fee” and the insurance requirement are enforced by citations and fines for  
13 non-compliance, as Brady acknowledges. Brady Brf. at 3:25-26. Brady argues that because the  
14 Ordinance’s impoundment provision is illegal under California law, the Ordinance does not  
15 “condition firearm ownership on the procurement of insurance.” Brady Brf. 3:24. Nevertheless, gun  
16 owners must either 1) give up their right to possess a gun; 2) pay the “fee” and for insurance; or 3) pay  
17 a fine. Either way, because of the Ordinance, gun owners must choose between exercising their  
18 constitutional rights and paying money. It cannot be said that such a choice does not implicate the  
19 Second Amendment. The Second Amendment is not a second-class right: Substitute gun ownership  
20 for political speech, praying, or voting, and it is plain that the Ordinance’s conditions and threat of  
21 penalties for non-compliance at least requires a Second Amendment analysis.

22 Brady cites to *National Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012) to argue  
23 that insurance is not the same as engaging in the protected activity. Brady Brf. 4:11-18. In *Sebelius*,  
24 however, the Court examined an extraordinary assertion of government power, not the extent of a  
25 protected right, much less the Second Amendment. Specifically, the Court rejected the argument that  
26 because the federal government has the constitutional Commerce Clause power to regulate the  
27 commercial transaction of obtaining health care, it also had the derivative power to compel every  
28 person to perpetually buy insurance to ensure they could pay for a future health care need. Here, by

1 contrast, San Jose does not have some other greater power to regulate gun ownership from which it  
2 derives a power to compel gun insurance. As in the cited portion of *Sebelius*, the court must enforce  
3 the Constitution’s limits on government power. The first question for the Court is whether the  
4 Ordinance, by targeting gun owners for special requirements relating to their ownership of guns,  
5 regulates activity within the scope of the Second Amendment. *Bruen*, 142 S.Ct. at 2126; *Bonta*, 34  
6 F.4th at 725.

7 In sum, San Jose’s Ordinance imposes a nonprofit donation requirement and an insurance  
8 requirement, under threat of penalties, on everyone who possesses a gun, and only people who possess  
9 a gun, merely because they possess a gun. As a threshold matter, a Second Amendment analysis must  
10 be applied, consistent with *Bruen* and *Bonta*, because gun ownership is indisputably protected by the  
11 Second Amendment right to keep and bear arms.

### 12 **III. Brady Failed to Find Adequate Historical Comparisons to the Ordinance.**

13  
14 The historical inquiry in *Bruen* begins with the “perceived societal problem,” *Bruen*, 142 S.Ct.  
15 at 2131 (citing *Heller*, 554 U.S. at 628), and the means by which it has been addressed. Claimed  
16 historical analogs to modern regulations would need to be “relevantly similar.” *Bruen*, 142 S.Ct. at  
17 2132. “[C]ourts should not uphold every modern law that remotely resembles a historical analogue,  
18 because doing so risks endorsing outliers that our ancestors would never have accepted.” *Id.* at 2133  
19 (quote omitted). The “government [is to] identify a well-established and representative historical  
20 *analogue*, not a historical *twin*.” *Id.* (Italic in *Bruen*, underline added). “[I]f earlier generations  
21 addressed the societal problem, but did so through materially different means, that...could be  
22 evidence that a modern regulation is unconstitutional.” *Id.* at 2131.

23 In *Heller*, the societal problem was firearm violence in densely populated areas. *Id.* The Court  
24 found no analogous historical bans on firearms in the home; therefore, the challenged law’s ban was  
25 unconstitutional. *Id.* Similarly, in *Bruen*, the Court did not find historical comparisons to New York’s  
26 proper-cause requirement for carrying a gun, therefore, it was unconstitutional. *Id.* at 2156.

27 Here, the government seeks to address the societal problems of firearm deaths, with an  
28 emphasis on deaths due to suicide or unsafe firearm use. *See* Ordinance, §10.32.200. These societal

1 harms are not unique to modern times. Rather, firearm deaths due to suicide and accidental discharge  
 2 existed during the founding era. *See, e.g., Appeal of Cressman*, 42 Pa. 147, 148 (Pa. 1862) (decedent  
 3 died due to accidental discharge of gun); *Scott County v. Fluke*, 34 Iowa 317 (1872) (person took own  
 4 life with a firearm). Brady both acknowledges that this problem existed at the Founding and, further,  
 5 concedes that the law at the time provided a solution for both deterrence and compensation for  
 6 injuries. Brady Brf. 9:1-23. The Ordinance, by seeking to solve the same issue through an  
 7 unprecedented compulsory nonprofit donation and universal insurance mandate, is not supported by  
 8 this historical approach to firearm regulation at the time of the Second Amendment’s adoption.

9 **A. Brady Does Not Identify Historically Established Analogous Fees on Guns.**

10 Brady first argues that a “minimal economic burden” on guns is consistent with American  
 11 history. In *Bruen*, at note 9, the Court addressed the potential for unconstitutionally high fees, though  
 12 that issue was not before the Court, 142 S.Ct. at 2138, n.9, much less a compulsory donation  
 13 masquerading as a city fee. It is well-settled that the government can impose a fee to reimburse itself  
 14 for its actual administrative expenses. *See Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).  
 15 However, the “fee” in the Ordinance, a mandatory nonprofit donation, does not reimburse San Jose for  
 16 any service the City provides. Accordingly, this authority does not save the Ordinance.

17 Brady also cites four historical statutes which, it says, are analogs to San Jose’s Ordinance.  
 18 Brady Brf. 7:7-20. However, among those statutes, two (Rhode Island and San Francisco) applied to  
 19 “galleries,” not citizens. *Id.* As for the other two, the Mississippi statute does not state whether the  
 20 “two dollars on each dueling or pocket pistol” is a tax, fee, or a fine or to whom the statute applied.  
 21 There is not enough context to determine what the law accomplished. Finally, with regard to the North  
 22 Carolina statute, the statute read in full:

23 On every pistol, except such as are used exclusively for mustering, and on  
 24 every bowie-knife, one dollar and twenty five cents; on dirks and  
 25 swordcanes, sixty five cents: Provided, however, That of said arms, only  
 26 such shall be taxable, as at some time within the year have been used,  
 worn or carried about the person of the owner, or of some other, by his  
 consent.<sup>1</sup>

27  
 28 <sup>1</sup> 1856-1857 N.C. Sess. Laws 34, Pub. Laws, An Act Entitled “Revenue,” ch. 3, §23, pt. 4, available at  
[https://firearmslaw.duke.edu/search-results/?\\_sfm\\_law\\_year=1856+1856&\\_sft\\_jurisdictions=north-carolina#2050](https://firearmslaw.duke.edu/search-results/?_sfm_law_year=1856+1856&_sft_jurisdictions=north-carolina#2050)

1 It is not clear that the North Carolina statute, insofar as it directly taxes the carrying and any use of a  
2 gun, is constitutional. In any event, these irrelevant examples do not demonstrate that a “fee”  
3 comprising a mandatory donation to a non-profit imposed on all gun owners was “well-established” or  
4 “representative” in historical law near the time of the Second Amendment’s adoption. *Bruen*, 142  
5 S.Ct. at 2133. Even if these laws were similar to the Ordinance, the fact that only one or two states  
6 had such laws is not sufficient to inform the nation’s understanding of the Second Amendment;  
7 outliers are insufficient under *Bruen. Id.* (“courts should not “uphold every modern law that remotely  
8 resembles a historical analogue,” because doing so “risk[s] endorsing outliers that our ancestors would  
9 never have accepted.” (citing *Drummond v. Robinson*, 9 F.4th 217, 226 (CA3 2021))).

10 Brady cites other fees imposed on citizens, such as mail, automobiles, lead products,  
11 telephones, etc. Brady Brf. 7:21. These are unrelated to guns, the ownership of which is expressly  
12 protected by a Constitutional right, and cannot be considered historical comparisons. For example,  
13 while the Fifth Amendment has been interpreted to include a right to travel, it does not guarantee the  
14 right to travel by car, whereas the Second Amendment guarantees the right to keep and bear arms.

15 **B. Brady’s Historical Examples of Insurance Are Not Examples of Insurance**  
16 **Mandates On the Exercise of a Constitutional Right.**

17 Brady argues that the surety statutes referenced in *Bruen* provide historical support for the  
18 Ordinance. Brady Brf. 6:19-7:6. In the mid-19<sup>th</sup> century, many jurisdictions required individuals to  
19 post bond before carrying weapons in public. *Bruen*, 142 S.Ct. at 2148. However, those surety laws  
20 “typically targeted only those threatening to do harm.” *Id.* They required bond for those who were  
21 “likely to ‘breach the peace.’” *Id.* (quoting Mass. Rev. Stat., ch. 134, §16(1836)). These surety laws  
22 demonstrate that, historically, a government’s default position was not to burden all citizens’ right to  
23 carry a firearm. Rather, the government only imposed that burden once cause has been shown *specific*  
24 *to the individual*. Here, the City essentially presumes that every gun owner is dangerous, making *all*  
25 owners pay a “fee” to a nonprofit organization. Not only is there no showing that a gun owner is a  
26 danger, there is no requirement that the gun owner receive any services from the nonprofit.

27 Brady makes four further arguments, none of which address the questions this Court is  
28 supposed to analyze.

1           1. *Historical Strict Liability Laws Are Not Mandatory Insurance Laws.*

2           First, Brady argues that the insurance requirement is an “improvement upon” the history of  
3 allocating the costs of gun accidents. Brady Brf. 8:17. However, an “improvement upon” a past  
4 practice suggests the new law is different than the past practice. Brady’s history of gun accident  
5 liability, Brady Brf. 9:1-23, demonstrates that at the time of the Founders there was a wholly different  
6 legal mechanism, presumably consistent with the Second Amendment, that addressed the same exact  
7 issue to which the Ordinance is addressed. The founders’ solution was individual responsibility by the  
8 party that actually caused an accident, adjudicated in court, rather than preemptively imposing  
9 financial responsibility on the unoffending class of all gun owners. “[I]f earlier generations addressed  
10 the societal problem, but did so through materially different means, that...could be evidence that a  
11 modern regulation is unconstitutional.” *Bruen*, 142 S.Ct. at 2131.

12           Brady makes the claim that insurance emerged in the time of negligence torts. Brady Brf. 9:24-  
13 10:4. However, between the two law review articles it cites, only one references a gun, which was a  
14 1944 example of a child being furnished with a BB gun. Fleming James, Jr., *Accident Liability: Some*  
15 *Wartime Developments*, 55 Y.L.J. 365, n. 88 (1946); *see also* Kenneth S. Abraham, *Liability*  
16 *Insurance and Accident Prevention: The Evolution of an Idea*, 64 Md. L. Rev. 573 (2005). The  
17 emergence of insurance as a concept hardly establishes a historical practice at the time of the Second  
18 Amendment’s adoption of mandatory insurance for firearms that covers accidental and suicide deaths.  
19 To the contrary, historically, insurance companies would often not pay for suicide by firearm. *Phillips*  
20 *v. Louisiana Equitable Life Ins. Co.*, 26 La. Ann. 404 (La. 1987); *Shank v. The United Brethren*  
21 *Mutual Aid Soc.*, 84 Pa. 385 (1877).

22           2. *Mandatory Insurance in Other Contexts Does Not Provide Historical Examples of*  
23 *Mandatory Gun Insurance.*

24           Brady provides examples of mandatory automobile insurance, mandatory medical malpractice  
25 insurance, and mandatory health insurance as examples of historical insurance mandates being upheld  
26 by the courts. Brady Brf. 10-11. However, analogues must be “relevantly similar,” 142 S.Ct. at 2132,  
27 and none of these are analogous to mandatory insurance for gun ownership. They also began  
28

1 “[n]early 100 years ago,” or 1933, not at the time of the founders, Brady Brf. 10:15, and therefore do  
2 not illuminate the understanding of the Second Amendment in 1791.

3 Brady also argues that liability insurance is a “proven solution.” However, this analysis is only  
4 relevant to the obsolete intermediate scrutiny analysis, specifically whether a regulation is  
5 “substantially related to the achievement of an important governmental interest.” *Bruen*, 142 S.Ct. at  
6 2126 (quotation omitted). However, the Supreme Court eliminated this second step as “one step too  
7 many.” *Id.* at 2127. Therefore, whether liability insurance will achieve the government’s identified  
8 objective is irrelevant. This Court should not entertain this red herring because a first-of-its kind  
9 regulation cannot be a “proven solution.”

10 Finally, Brady asserts that the majority of San Jose gun owners are already in compliance with  
11 the Ordinance through home or renter’s insurance. But not every gun owner has a home with an  
12 insurance policy that satisfies the Ordinance, not all renters have renter’s insurance, and the degree of  
13 anticipated compliance (or non-compliance) is not the test for constitutionality.

#### 14 **Conclusion**

15 The Ordinance is a “first of its kind” law requiring citizens exercising their Second  
16 Amendment rights to donate a “fee” to a non-profit and purchase insurance, imposing burdens without  
17 a historical analogue. The Ordinance is therefore unconstitutional and should be enjoined.

18 Dated: July 28, 2022

By: /s/ David Warrington

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