

**GUN LIABILITY INSURANCE MANDATES: A CASE STUDY IN HOW
NYSRA V. BRUEN HAMPERS NOVEL GUN VIOLENCE PREVENTION
MEASURES**

*Brian Huang**

* * *

Introduction

On May 26, 2021, a gunman [opened fire](#) at the San Jose rail yards of the Santa Clara Valley Transportation Authority, killing nine people before shooting himself. In the wake of this tragedy, then-Mayor Sam Liccardo [introduced](#) a proposal requiring gun owners to carry liability insurance. [First proposed](#) in 2019 after a mass shooting in a neighboring city, the insurance mandate proposal saw a [renewed push](#) after several mass shootings within San Jose and continued inaction by Congress. On February 8, 2022, San Jose became the [first U.S. jurisdiction](#) to enact such a mandate. Since then, several [jurisdictions](#) have [considered similar mandates](#), including New Jersey, which became [the first state](#) to do so in December 2022.

Predictably, these ordinances have been subject to Second Amendment [challenges](#), which have been affected by the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen* (2022). In *Bruen*, the Court established a new test to determine the constitutionality of gun regulations; however, many judges have criticized the *Bruen* test as [unworkable](#). This Essay examines how district courts have applied the *Bruen* test to liability insurance mandates and, using this case study, discusses how *Bruen* inhibits governments from creating novel solutions—such as insurance regimes—to reduce gun violence.

I. Gun Liability Insurance Ordinances

The idea of mandating gun liability insurance has circulated among [scholars](#), [commentators](#), [federal](#) and [state](#) legislators, and [advocacy groups](#) since the 2012 Sandy Hook Elementary School mass shooting. Despite these efforts, gun liability insurance mandates initially failed to gain widespread legislative support. San Jose's enacted mandate [pushed other jurisdictions](#) to consider similar measures—particularly given legislatures' desire to enact regulations that would withstand *Bruen* scrutiny. However, uncertainty remains

* Brian Huang is a J.D. Candidate at the University of Chicago Law School, Class of 2025. He thanks Sam Hallam, Ben Chanenson, and the *University of Chicago Law Review Online* team for their helpful feedback on this Essay.

regarding the proper way to implement gun liability insurance mandates, as exemplified by the San Jose and New Jersey laws.

The [San Jose ordinance](#) did not impose additional burdens on most gun owners. Gun owners could satisfy the mandate by holding a homeowner's or renter's insurance policy that covers accidental firearm-related death, injury, or property damage—something [already covered](#) by most policies. Under the original terms of the ordinance, those who fail to comply are subject to fines and impoundment of their weapons; however, San Jose [has admitted](#) that it does not have the authority under state or federal law to impound weapons.

New Jersey included its insurance mandate within a larger package of gun regulations designed to survive *Bruen* scrutiny—likely after seeing San Jose's mandate [upheld](#) in federal court. Instead of mirroring San Jose's mandate, however, the [New Jersey mandate](#) differs in ways that make it (at least facially) more burdensome. New Jersey's mandate is not a stand-alone mandate, but rather a requirement to receive a gun permit. Further, the New Jersey statute requires a coverage limit of at least \$300,000 and does not expressly recognize homeowner's or renter's insurance as sufficient (although New Jersey [contended in litigation](#) that these would satisfy the mandate). Opponents of the mandate have also noted that the mandate is [not limited](#) to accidental discharge. Violating the mandate is a criminal offense punishable by prison, fines, and revocation of carry permit.

II. *Bruen*'s Overhaul of Second Amendment Jurisprudence

After the Supreme Court held in [District of Columbia v. Heller](#) (2008) that the [Second Amendment](#) protects the right—albeit not an unlimited one—to bear arms, an overwhelming majority of circuit courts [settled](#) on a two-step framework to adjudicate cases challenging firearm regulations. This [framework](#) directed courts to determine (1) whether a regulation burdens a right protected by the Second Amendment and, if so, (2) whether the government's interests justify the methods used to regulate—an inquiry known as means-end scrutiny. However, some scholars [questioned](#) whether means-end scrutiny adhered to *Heller*'s articulation of the Second Amendment right.

The Supreme Court [definitively answered](#) this question in *Bruen*, which concerned the constitutionality of a 1911 New York law mandating that individuals applying for a concealed carry permit demonstrate a special self-protection need. The Second Circuit had consistently [upheld](#) the law under intermediate scrutiny prior to *Bruen*. However, the Supreme Court held that the existing test

violated *Heller*, which “decline[d] to engage in means-end scrutiny generally” and “specifically ruled out [an] intermediate-scrutiny test.”

Instead, *Bruen* required courts to conduct a historical inquiry into whether challenged regulations are “consistent with [the United States’] historical tradition of firearm regulation.”¹ The Court noted that regulations addressing problems that have historically existed are likely unconstitutional if (1) there are no “distinctly similar historical regulation[s]” or (2) if historical governments chose “materially different means” to address the problem. Notably, this inquiry prevents courts from looking at the entire history of gun legislation; instead, courts must focus on legislation enacted during the Founding era and the mid-1800s (when the Fourteenth Amendment was ratified).

The Court, however, seemed to recognize that a strict historical inquiry may not sufficiently cover every regulation a state may want to enact, particularly “modern regulations that were unimaginable at the founding.” As such, the Court held that such regulations could still satisfy the *Bruen* test if there are “relevantly similar” historical regulations, determined by comparing “how and why the [respective] regulations burden” gun rights.

III. Constitutionality of Liability Insurance Mandates After *Bruen*

Bruen had an [immediate impact](#) on then-ongoing litigation over San Jose’s insurance mandate and prompted New Jersey to [enact](#) its own insurance mandate with the goal of surviving the *Bruen* test (though the mandate was [quickly challenged](#)). The two district courts to hear the cases, despite both applying *Bruen*’s historical traditions test, came to diametrically opposed conclusions regarding the constitutionality of gun liability insurance mandates. This portends a likely circuit split should the respective appellate courts uphold these rulings.

A. San Jose’s Mandate: *National Association for Gun Rights v. San Jose*

In [National Ass’n for Gun Rights v. City of San Jose](#) (N.D. Cal. 2023) (hereinafter *NAGR*), the Northern District of California considered San Jose’s motion to dismiss a consolidated case brought by two organizations seeking, in part, to invalidate the city’s liability insurance mandate. This was the plaintiffs’ second attempt to

¹ The *Bruen* Court retained the first prong of the existing framework—that is, whether the Second Amendment presumptively protects the regulated conduct.

invalidate the mandate—the district court had previously [denied relief](#) and [dismissed](#) the first version of the plaintiffs’ complaint, but with the opportunity to amend and refile.

The *NAGR* court decided the case under the first prong of the *Bruen* test, [holding](#) that the insurance mandate does not regulate activities protected by the Second Amendment. Specifically, the court held that the mandate does not prevent individuals from possessing or using firearms since, in practice, noncompliance “only result[s] in an administrative citation or fine.” Instead, the court defined the activity restricted by the ordinance as “choosing to keep and bear arms at home without the burden of insuring liability for firearm-related accidents,” an activity not protected by the Second Amendment.

The *NAGR* court then stated that liability insurance mandates were supported by the historical tradition of gun regulation. In doing so, the district court looked at (1) historical statutes imposing strict liability for gun accidents; and (2) nineteenth-century surety statutes, which required certain gun owners to post bond if there was reasonable concern that they would cause public harm. The court found that strict liability statutes were analogous to insurance mandates since they attempted to “shift[] the costs of firearm accidents . . . to the [firearm] owners.” Further, the court noted that surety statutes and insurance mandates had similar purposes (preventing future injury and encouraging safer behavior, respectively) that they attempted to achieve through similar methods (by “threat[ening] [] financial consequences . . . for individuals deemed to be high-risk”).

B. New Jersey’s Mandate: *Koons v. Platkin*

In [Koons v. Platkin](#) (D.N.J. 2023), the District of New Jersey examined the constitutionality of New Jersey’s comprehensive gun violence prevention statute, including its enacted gun liability insurance mandate. Despite using the same test and examining the same historical statutes as the Northern District of California, the District of New Jersey held that the New Jersey mandate was unconstitutional.

The district court first held that New Jersey’s insurance mandate did restrict activities protected by the Second Amendment. The *Koons* court defined the restricted activity as the ability to “bear arms in public for self-defense,” a significantly broader scope than that proposed by the *NAGR* court. It also rejected New Jersey’s argument that the mandate was a licensing requirement made permissible by *Bruen*, noting that *Bruen* only allowed licensing requirements to the extent that they ensured gun owners were “law-abiding, responsible

citizens”; however, one does not need to be a law-abiding citizen to obtain insurance.

The most notable differences, however, came in the court’s analysis of the historical tradition prong. Like the *NAGR* court, the *Koons* court looked at surety laws and strict liability requirements—but held that neither were sufficient analogues to insurance mandates. The court held that surety laws were not historical analogues since surety laws, unlike insurance mandates, (1) only “imposed a conditional, partial restriction on an identified arms bearer” which was “temporally limited” (the “how”), and (2) were focused on “prevent[ing] criminal offenses by an identified arms bearer who presented a specific danger . . . not to shift the risk of gun violence away from victims to all arms bearers” (the “why”). On the other hand, while strict liability statutes did shift the risk of gun violence onto arms bearers, they only did so “after an injury.” Importantly, the court also noted that the existence of strict liability statutes demonstrated that insurance mandates were unconstitutional, since it showed that earlier generations addressed gun violence issues “through [materially different means](#).”

IV. How *Bruen* Restricts Novel Solutions like Insurance Mandates

The two district courts’ analyses of the constitutionality of gun liability insurance mandates highlight a major problem with the *Bruen* holding—namely, that the Court provides little guidance to lower courts on how to *administer* the *Bruen* test. Even more troubling, the test requires courts to make certain false assumptions as part of their reasoning. These problems not only make it difficult for lower courts to adjudicate Second Amendment cases consistently, but also make it difficult for governments to enact novel solutions that can both alleviate the gun violence epidemic and adhere to the Court’s Second Amendment jurisprudence.

Gun liability insurance mandates provide a clear example of the issues lower courts face in the wake of *Bruen*. While the U.S. insurance industry has [existed since the colonial era](#), early insurance companies did not provide liability insurance. This is hardly surprising: the insurance industry is notoriously reactive, creating insurance products in response to emerging risks or developments. And because early tort law used a [strict liability standard](#) (where injurers compensate victims regardless of whether the injurers are at fault), there was little need for liability insurance (which protects policyholders against financial risk when they are [found at fault](#) for an injury). During the nineteenth century, however, tort law shifted to a negligence standard for tort liability, portending the need for a new form of insurance to deal with

the emerging risks that came with a negligence regime. And [in the 1880s](#), liability insurance first appeared in the United States in the form of employers' liability insurance. Notably, this meant that the *idea* of mandating liability insurance could not have existed before the 1880s—after the historical period relevant under the *Bruen* test.

Of course, the Supreme Court stated in *Bruen* that novel solutions like liability insurance could still pass the test if governments can find historical analogues to these solutions. However, the standard the Court proposed—comparing the “how and why” of historical and modern laws—makes this task extremely difficult.

First, this standard is so broad that it gives lower courts wide, almost unrestrained, discretion to decide how they will describe the “how and why” of historical statutes. The rift between the *NAGR* and *Koons* courts supports this—each court's depiction of the “how and why” of surety laws seems facially reasonable, yet they lead to wildly different conclusions. The *Bruen* Court, however, does not give any guidance to courts on whether they should favor a broader interpretation, as adopted by the *NAGR* court, or a narrower interpretation, as adopted by the *Koons* court.

This creates immense uncertainty for governments seeking to enact novel regulations. As mentioned, New Jersey adopted its liability insurance mandate after the Northern District of California, in adjudicating the plaintiffs' first complaint, [held](#) that San Jose's mandate was constitutional. Given that New Jersey's goal was to enact gun regulations that would withstand *Bruen* scrutiny, it is likely that the state legislature included the mandate because it believed this novel solution would be upheld in court. Yet, the mandate was still invalidated during litigation, simply because of how narrowly the District of New Jersey construed the “how and why” of potential historical analogues—something New Jersey could not have predicted.

Even if the *Bruen* Court gave more guidance to district courts, the “how and why” standard would still unduly burden governments' attempts to enact novel solutions that weren't options for earlier governments. Why? The “how and why” standard requires courts to implicitly adopt a false assumption—that early governments created solutions with an understanding of *all possible options*, even those that may not have existed at the time.

For example, let's assume, *arguendo*, that the *Koons* court was correct in holding that surety statutes were enacted to, temporally and conditionally, limit a particular gun owner's ability to commit crimes through a court order. Using the “how and why” of surety statutes as a barometer requires courts to assume that historical governments made

a *conscious, informed choice* when deciding on that “how and why.” Put it another way—the *Bruen* test requires courts to assume that historical governments chose to prevent injuries by imposing fines on certain risky gun owners through court order *because they thought this was the best option*. It completely ignores the possibility that early governments only enacted certain statutes, using certain “hows and whys,” *because of the limitations that they faced*—in this case, the lack of a private option (through liability insurance) to hold gun owners accountable, requiring governments to go through the courts (and be subject to the limitations involved with doing so).

This problem goes beyond the “how and why” standard. As previously mentioned, the *Bruen* Court held that regulations are clearly unconstitutional if historical governments addressed a persistent problem through wholly different means. The *Koons* court reasoned that because historical governments purposely chose to reduce gun injuries by making it easier for gun owners to be sued under strict liability statutes, rather than mandating insurance, insurance mandates were necessarily unconstitutional. However, this ignores the plain fact that, at the time, liability insurance mandates *couldn't be enacted* since liability insurance didn't even exist—and in fact couldn't develop until states [started shifting](#) from a strict liability standard to a negligence standard.

This all poses significant issues for any state or local government seeking to enact novel solutions to address gun violence, particularly those that could not have been envisioned by early governments. Governments have to contend not only with an unclear standard, but a standard that makes it extremely difficult for many novel solutions to survive constitutional scrutiny. These factors combined may make governments more wary of enacting novel regulations—even those that likely would be upheld under *Bruen*.

Conclusion

Gun violence is a persistent problem in the United States, one that requires bold, innovative solutions. The Supreme Court itself [has recognized](#) that the right to bear arms could be reasonably regulated. Yet in *Bruen*, the Court created a test that unduly restricts governments' ability to reasonably regulate guns by implementing novel solutions that can both support Second Amendment rights and address the scourge of gun violence across the country.

The Court reasoned that its historical analysis test allows governments to enact novel solutions, so long as they are supported by historical analogues. While perhaps facially accurate, the uncertainty in the Court's test and the assumptions courts must make when

adjudicating these cases, as seen through the insurance mandate decisions, nonetheless limit options for novel solutions. As *Bruen* rightfully [noted](#), the Second Amendment must be “appl[icable] to circumstances beyond those the Founders specifically anticipated”—the Court should keep this principle in mind as it continues to [refine](#) the *Bruen* test.

* * *

Brian Huang is a J.D. Candidate at the University of Chicago Law School, Class of 2025. He thanks Sam Hallam, Ben Chanenson, and the University of Chicago Law Review Online team for their helpful feedback on this Essay.