

1 Alan Gura (Calif. Bar No. 178221)
2 Gura & Possessky, PLLC
3 101 N. Columbus St., Suite 405
4 Alexandria, VA 22314
703.835.9085/Fax 703.997.7665

5 Donald E.J. Kilmer, Jr. (Calif. Bar No. 179986)
6 Law Offices of Donald Kilmer, A.P.C.
7 1645 Willow Street, Suite 150
8 San Jose, CA 95125
408.264.8489/Fax 408.264.8487

9 Jason A. Davis (Calif. Bar No. 224250)
10 Davis & Associates
11 27281 Las Ramblas, Suite 200
12 Mission Viejo, CA 92691
949.310.0817/Fax 949.288.6894

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA

15	Ivan Peña, et al.,)	Case No. 2:09-CV-01185-FCD-KJM
16)	
17	Plaintiffs,)	MEMORANDUM OF POINTS AND
18)	AUTHORITIES IN SUPPORT OF
19	v.)	PLAINTIFFS’ MOTION FOR SUMMARY
20	Wilfredo Cid,)	JUDGMENT [Fed. R. Civ. P. 56]
21)	
22	Defendant.)	
23	_____)	

24 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
25 PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

26 COME NOW the Plaintiffs, Ivan Peña, Roy Vargas, Doña Croston, Brett Thomas, the
27 Second Amendment Foundation, Inc. (“SAF”), and the Calguns Foundation, Inc. (“CGF”), by
28 and through undersigned counsel, and submit their Memorandum of Points and Authorities in
Support of their Motion for Summary Judgment.

1 Dated: September 1, 2009

Respectfully submitted,

2 Alan Gura (Calif. Bar No. 178,221)
3 Gura & Possesky, PLLC
4 101 N. Columbus St., Suite 405
5 Alexandria, VA 22314
703.835.9085/Fax 703.997.7665

Jason A. Davis (Calif. Bar No. 224,250)
Davis & Associates
27281 Las Ramblas, Suite 200
Mission Viejo, CA 92691
949.310.0817/Fax 949.288.6894

6 Donald E.J. Kilmer, Jr. (Calif. Bar No. 179,986)
7 Law Offices of Donald Kilmer, A.P.C.
8 1645 Willow Street, Suite 150
9 San Jose, CA 95125
408.264.8489/Fax 408.264.8487
E-Mail: Don@DKLawOffice.com

10
11 By: /s/Donald E.J. Kilmer, Jr
12 Donald E. J. Kilmer, Jr.

13 Attorneys for Plaintiffs
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1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
2 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

3 **PRELIMINARY STATEMENT**

4 This case presents what is arguably the easiest Second Amendment question that might
5 come before a federal court today, seeing as the question has just been answered by the Supreme
6 Court barely over a year ago: May the government ban handguns of the kind in common use by
7 Americans for ordinary lawful purposes? The answer: no. *District of Columbia v. Heller*, 128 S.
8 Ct. 2783 (2008).
9

10 Several years ago, state lawmakers banned from private retail sale any handgun that does
11 not appear on a special roster. In time, as this program evolved to become ever-more restrictive,
12 it has become all but impossible to sell any newly-designed handguns in California, while many
13 previously-approved handguns have become prohibited for non-substantive, administrative
14 reasons. And of course, the attempt to enumerate every single handgun that might be legally sold
15 has predictably proved too ambitious a task not to yield arbitrary and irrational results.
16
17

18 Whatever else one might say about California's pre-*Heller* handgun rostering program, it
19 is clearly not constitutional. The program is founded on a theory specifically rejected in *Heller* as
20 inconsistent with individual's Second Amendment rights – that common firearms might be
21 banned merely owing to the government's assessment that their possession is not in the public
22 interest. In *Heller*'s wake, the District of Columbia's City Council adopted California's roster as
23 its own. But in the face of a constitutional challenge, the District almost immediately modified
24 the law, explicitly recognizing that California's rostering scheme does not meet constitutional
25 standards. Respectfully, this Court should reach the same conclusion.
26
27

28 As the legislative record demonstrates, the California law consciously sought to alter the
choices made in the mass market for common guns – precisely the sort of conduct proscribed by

1 the Second Amendment. Yet some of the California law's most restrictive policies do not
2 advance, and might even reduce, public safety.

3
4 *Heller* did not eliminate the government's ability to ban weapons that are outside the
5 scope of Second Amendment protection. But as the four handguns at issue in this case
6 demonstrate, California's scheme is intentionally designed to and does ban guns that easily pass
7 the *Heller* test for protected Second Amendment arms. Indeed, the exact same model handgun at
8 issue in *Heller* is banned in California and denied to plaintiff Brett Thomas because it has not
9 been (and cannot be) placed on the "Roster of Handgun Certified for Sale." Ivan Pena is denied
10 permission to own a handgun that had once been "rostered" and approved for sale, but which is
11 now no longer legal to purchase in California because the gun's manufacturer will not pay an
12 annual fee in perpetuity to keep it on the list. Roy Vargas, born with only a left arm, is denied
13 access to a handgun with an ambidextrous magazine release, even though the state would allow
14 him the identical model handgun with a right-handed magazine release he cannot operate. And
15 Dona Croston is denied permission to own a handgun because, effectively, it is the wrong color.
16
17
18

19 Yet Plaintiffs could legally obtain these same handguns if they had out-of-state relatives
20 willing to gift them, if Plaintiffs worked in the entertainment industry, or if they worked for law
21 enforcement. Individuals residing in another state are also allowed to import these guns into
22 California upon relocating here. And Plaintiffs could obtain these guns from other Californians
23 who might already have them in their possession.
24

25 It is impossible to reconcile the roster of arms approved for sale in the Bill of Rights with
26 that conjured by the operation of California law. The latter must yield.

27 ////
28

1 **STATEMENT OF FACTS**

2 *The Handgun Rostering Program*

3
4 The facts of this case are not in dispute. California law provides that “any person in this
5 state who manufactures or causes to be manufactured, imports into the state for sale, keeps for
6 sale, offers or exposes for sale, gives, or lends any unsafe handgun shall be punished by
7 imprisonment in a county jail not exceeding one year.” Statement of Undisputed Facts (“SUF”)

8
9 1. California law presumes that *all* handguns are “unsafe” and therefore, generally barred from
10 importation and sale, unless those handguns have been placed on the state’s special roster of
11 handguns “determined not to be unsafe.” SUF 2.

12 Since 2007, a center-fire¹ semi-automatic² handgun cannot make the roster if it does not
13 have both a chamber loaded indicator and – if it has a detachable magazine – a magazine
14 disconnect mechanism. SUF 3. Since 2006, a rimfire³ semi-automatic handgun must have a
15 magazine disconnect mechanism if it has a detachable magazine. SUF 4. However, handguns
16 rostered prior to the effective dates of these requirements can remain rostered despite lacking
17 these features. SUF 5.

18
19
20 A magazine disconnect mechanism is “a mechanism that prevents a semiautomatic pistol

21
22
23 ¹ Most handguns use center-fire ammunition, which fires a bullet when the center of the
cartridge is struck by the gun’s firing pin, igniting the primer.

24
25 ² A semi-automatic handgun is handgun that fires one bullet each time the trigger is
26 pulled, with the firing of each bullet causing the next round to be loaded into the chamber from a
27 magazine. Most handguns in the United States are semi-automatic. Almost all the rest are
28 revolvers, which hold several rounds in a rotating cylinder and also fire one bullet with each pull
of the trigger. Nothing in the challenged laws, or this litigation, relates to fully-automatic
weapons (machine guns), which are the subject of other specific legislative enactments.

³ Rimfire ammunition, which is fired when struck on its rim by the gun’s firing pin, is
primarily used in the smallest calibers. For technical reasons, chamber load indicators are not
feasible for rimfire ammunition.

1 that has a detachable magazine from operating to strike the primer of ammunition in the firing
2 chamber when a detachable magazine is not inserted in the semiautomatic pistol.” SUF 6. A
3 chamber load indicator (“CLI”) is “a device that plainly indicates that a cartridge is in the firing
4 chamber.” SUF 7. Not all CLIs satisfy the California requirement. Under California law,
5

6 [a] device satisfies this definition if it is readily visible, has incorporated or adjacent
7 explanatory text or graphics, or both, and is designed and intended to indicate to a
8 reasonably foreseeable adult user of the pistol, without requiring the user to refer to a
9 user’s manual or any other resource other than the pistol itself, whether a cartridge is in
the firing chamber.

10 SUF 8.

11 Although a CLI is sufficient if it is “designed and intended to indicate to a reasonable
12 adult user” that the firearm is loaded, [Cal. Penal Code § 12126(c)] in practice the sufficiency of
13 the CLI is determined by a different standard. Defendant tests the sufficiency of CLIs by asking
14 his employees if they understand the CLI – and when the regulatory authority’s employees
15 allegedly fail to understand the CLI, regardless of what the CLI is “designed and intended to
16 indicate to a reasonable adult,” the CLI is ruled inadequate. SUF 9.
17
18

19 Given the rarity of CLIs and magazine disconnect devices, handguns lacking these
20 features are in common use today, and comprise the overwhelming majority of handguns. SUF
21 10.
22

23 This much is obvious upon any cursory survey of firearms as to be within judicial notice,
24 akin to observing that most American cars have power windows. There are, however, some
25 precise statistics. According to one survey, CLIs and magazine disconnect devices are included
26 on no more than 11% and 14% of handguns, respectively. Jon Vernick, et al., “‘I Didn’t Know
27 the Gun Was Loaded’: An Examination of Two Safety Devices That Can Reduce the Risk of
28 Unintentional Firearm Injuries,” 20 Journal of Public Health Policy No. 4 at 433 (1999).

1 Indeed, the rarity of CLIs and magazine disconnect mechanisms was a fact specifically
2 relied upon by the California Legislature in mandating these features as part of the rostering
3 program. California legislators specifically considered that CLIs and magazine disconnects are
4 available on only perhaps 11% and 14% of handguns, respectively, as proposed by the author of
5 the bill mandating these features. SUF 11. Because CLIs and magazine disconnect mechanisms
6 were viewed as beneficial, it was hoped that mandating these features would alter the firearms
7 market. SUF 12. “[It] is arguable that a requirement in California would ‘drive’ the technology of
8 chamber load indicators.” Exhibit B. California Senate Public Safety Committee Report, p. 9.
9 “It might also be assumed that a mandate in California would drive technology in the market for
10 magazine disconnect devices.” *Id.*, p. 10.

11
12
13
14 Since both the magazine disconnect and CLI requirements came into effect on January 1,
15 2007, only *one* new model of semi-automatic handgun has been approved for placement on the
16 California handgun roster. SUF 13.

17 Yet these “safety” features are not foolproof. A handgun safety mechanism may fail or be
18 misused. SUF 14. A chamber loaded indicator is a mechanical device that may fail or be
19 misinterpreted by the user of a handgun. SUF 15. A magazine disconnect mechanism is a
20 mechanical device that may fail. SUF 16. As the state advises handgun purchasers, “Any
21 machine can malfunction. A firearm is no different.” SUF 17.

22
23
24 In fact, to acquire any handgun in California, an individual must pass a written handgun
25 safety test. SUF 18. The test requires knowledge of the basic rules of handgun safety, the first of
26 which is: “Treat all guns as if they are loaded.” SUF 19. The state’s study guide for the handgun
27 safety test further provides:

28
Always assume that a gun is loaded even if you think it is unloaded. Every time a gun is
handled for any reason, check to see that it is unloaded [by following specific instructions

1 for unloading the gun]. If you are unable to check a gun to see if it is unloaded, leave it
2 alone and seek help from someone more knowledgeable about guns.

3 SUF 20.

4 The state's specific instructions for unloading a semi-automatic handgun contained in its
5 gun safety study guide provides that a mechanical safety

6
7 is not foolproof so do not rely on the safety to prevent an accidental discharge. A safety
8 should only be used as an additional safety measure. Never pull the trigger on any firearm
9 with the safety in the "safe" position because thereafter the firearm could fire at any time
without the trigger ever being touched.

10 SUF 21.

11 Although the state's gun safety study guide does not discuss chamber load indicators or
12 magazine disconnect devices, it teaches, in order to pass the mandatory safety test, rules that
13 would have gun owners ignore such devices. The study guide specifically instructs that in order
14 to verify a semi-automatic handgun is unloaded, one must remove the magazine and visually
15 inspect the chamber to verify that it is empty. SUF 22.

16
17 In fact, in a large red box marked "CAUTION," the state's gun safety study guide
18 provides:

19
20 You should NOT assume a semiautomatic pistol is unloaded just because the magazine is
21 removed from the handgun.

22 Do not allow the slide to go forward UNLESS you have:

- 23
24 1. Checked again to be sure the chamber is empty, and
2. Checked again to be sure the magazine has been REMOVED.

25 If you pull the slide back ejecting the cartridge, check the chamber, let the slide go
26 forward, and THEN remove the magazine, you have a loaded, dangerous firearm (a
27 cartridge is in the chamber) even though you have removed the magazine. It is common
and sometimes fatal to make this error.

28 ALWAYS REMOVE THE MAGAZINE FIRST!

SUF 23.

1 In order to purchase a handgun, the buyer must demonstrate that he or she knows how to
2 safely operate the handgun, including following these instructions. SUF 24. Moreover, California
3 law also generally requires that all newly purchased firearms either be accompanied by an
4 approved gun lock or the purchaser's affidavit that she owns an adequate lock box or gun safe.
5 SUF 25.

6
7 Listings on the California handgun roster are valid for one year, and must be renewed
8 annually, including payment of an annual fee, prior to expiration to remain valid. SUF 26.
9 Defendant charges firearms manufacturers, importers, and dealers annual fees, ostensibly to
10 operate the handgun roster program. Any handgun whose manufacturer fails to pay the required
11 fees may be excluded from the roster for that reason alone. SUF 27. The initial and renewal
12 annual listing fees for inclusion on the handgun roster are \$200. SUF 28.

13
14 Other than the California DOJ, only the manufacturer/importer of a handgun model is
15 authorized to submit that handgun model to a DOJ-Certified Laboratory for testing. SUF 29. A
16 handgun can remain on the roster if its manufacturer/importer goes out of business or
17 discontinues the model, provided that the model is not being offered for sale to licensed dealers,
18 and "a fully licensed wholesaler, distributor, or dealer submits a written request to continue the
19 listing and agrees to pay the annual maintenance fee." SUF 30. So long as a handgun is sold to
20 dealers outside of California, the handgun's manufacturer can cause the sale of that handgun to
21 be forbidden inside California by failing to submit the gun for testing in that state or refusing to
22 pay the annual \$200 fee. SUF 31.

23
24
25
26 A manufacturer/importer or other responsible party may submit a written request to list a
27 handgun model that was voluntarily discontinued or was removed for lack of payment of the
28 annual maintenance fee. The request may be approved, and the handgun restored to the "safe

1 gun” roster, provided the fee is paid. SUF 32.

2 The following firearms and transactions are exempted from the handgun rostering
3 requirement: (1) Firearms defined as curios or relics under federal law; (2) The purchase of any
4 firearm by any law enforcement officer – State or Federal; (3) Pistols that are designed expressly
5 for use in Olympic target shooting events, as defined by rule; (4) Certain single-action revolvers,
6 as defined by rule; and (5) The sale, loan, or transfer of any firearm that is to be used solely as a
7 prop during the course of a motion picture, television, or video production by authorized people
8 related to the production. SUF 33.

9
10
11 It is also not illegal in California to import an unrostered handgun when moving into the
12 state without the intention of selling it, nor is it illegal in California to possess or use an
13 unrostered handgun that is otherwise lawful to possess or use. SUF 34. California also exempts
14 private party transfers, intra-familial transfers including gifts and bequests, various loans, and
15 various single-action revolvers. SUF 35.⁴

16
17
18
19 *Defendant’s Enforcement of the “Handgun Roster” Program Against Plaintiffs*

20 Plaintiff Ivan Peña has sought to purchase a Para USA (Para Ordnance) P1345SR /
21 Stainless Steel .45 ACP 4.25", and has identified a willing seller who stands ready to deliver said
22 handgun to him. SUF 36. The Para USA P1345SR that Peña’s wants to buy was listed on
23 California’s Handgun Roster until December 31, 2005, when it was discontinued and its listing
24 not renewed. SUF 37.

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⁴“Single” or “double” action refers to the gun’s trigger function, one “action” being the effect of drawing back the hammer, another “action” being the effect of dropping the hammer. Guns can be designed to operate in single-action, double-action, or effectively both (if a gun has a hammer that might be retracted either manually or by pulling the trigger).

1 Peña cannot lawfully purchase and take possession of the handgun as that handgun is not
2 on the California Handgun Roster. SUF 38. Peña fears arrest, prosecution, fine and incarceration
3 if he completes this handgun purchase. SUF 39.
4

5 Plaintiff Roy Vargas has sought to purchase a Glock 21 SF with an ambidextrous
6 magazine release, and has identified a willing seller who stands ready to deliver said handgun to
7 Plaintiff. SUF 40. However, Vargas cannot lawfully purchase and take possession of the handgun
8 as that handgun is not listed on the California Handgun Roster. SUF 41. Vargas fears arrest,
9 prosecution, fine and incarceration if he completes this handgun purchase. SUF 42.
10

11 Vargas was born without an arm below the right elbow. SUF 43. The Glock 21 SF-STD
12 with a standard magazine release is listed on the California Handgun Roster. SUF 44. However,
13 the Glock 21 SF with ambidextrous magazine release is superior for left-handed shooters such as
14 Mr. Vargas, as opposed to the approved version of the Glock 21. SUF 45. Glock's efforts to add
15 the Glock 21 SF with ambidextrous magazine release to the California Roster have failed. SUF
16 46.
17

18
19 However, Defendant permits Glock customers to have their Glock 21 SF-STD handguns
20 fitted with an ambidextrous release at the Glock factory. SUF 47. As state officials wrote Glock
21 in response to the gunmaker's pleas to include the ambidextrous Glock 21 SF on the roster:

22
23 A California owner of a Glock handgun model with a standard magazine release who
24 wishes to have his or her handgun model retrofitted with an ambidextrous magazine
25 release may send the firearm to Glock. Glock could then retrofit the handgun and return it
26 to its owner. No further testing of the retrofitted handgun would be required.

27 Exhibit H. In other words, California permits the sale of a Glock 21 SF-STD, and the alteration
28 of that handgun by Glock to add an ambidextrous magazine release, but will not allow consumers
to purchase new Glock 21 SFs with an ambidextrous magazine release in the first place.

Plaintiff Doña Croston has sought to purchase a Springfield Armory XD-45 Tactical 5"

1 Bi-Tone stainless steel/black handgun in .45 ACP, model number XD9623, and has identified a
2 willing seller who stands ready to deliver said handgun to her. SUF 48. Croston cannot lawfully
3 purchase and take possession of the handgun as that handgun is not on the California Handgun
4 Roster. SUF 49. Croston fears arrest, prosecution, fine and incarceration if she completes this
5 handgun purchase. SUF 50.

7 Other models of this identical gun – but in different colors – are listed on the handgun
8 roster and are thus available to Ms. Croston: the XD-45 Tactical 5" .45 ACP in black (model
9 XD9621), the XD-45 Tactical 5" .45 ACP in OD Green (model XD9622), and the XD-45
10 Tactical 5" .45 ACP in Dark Earth (XD9162). SUF 51. However, the particular Bi-Tone XD-45
11 that Ms. Croston would possess was not released until after California required newly-listed guns
12 to have a chamber load indicator and magazine disconnect device. SUF 52. Springfield Armory
13 could not get the XD-45 in .45 ACP and Bi-Tone finish registered given the new listing
14 requirements. SUF 53. The XD-45 Bi-Tone in .45 has a loaded chamber indicator, but the
15 California Department of Justice has decided it does not qualify under Penal Code § 12126(c).
16 SUF 54. The XD-45 also lacks a magazine disconnect device. SUF 55.

20 The handgun at issue in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), was a
21 High Standard 9-shot revolver in .22 with a 9.5" Buntline-style⁵ barrel. SUF 56. Plaintiff Brett
22 Thomas has sought to purchase an identical High Standard 9-shot revolver in .22 with a 9.5"
23 Buntline-style barrel, and has identified a willing seller who stands ready to deliver said handgun
24 to Thomas. SUF 57. Thomas cannot lawfully purchase and take possession of the handgun as that
25 handgun is not on the California Handgun Roster. SUF 58. Thomas fears arrest, prosecution, fine
26

28 ⁵ A “Buntline” is a Western-style extra-long barrel revolver, named for 19th-century
novelist Ned Buntline who was said to commission such guns for famous personalities of the
day.

1 and incarceration if he completes this handgun purchase. SUF 59.

2 Plaintiff Second Amendment Foundation, Inc. (“SAF”) is a non-profit membership
3 organization incorporated under the laws of Washington with its principal place of business in
4 Bellevue, Washington. SUF 60. SAF has over 650,000 members and supporters nationwide,
5 including many in California. SUF 61. The purposes of SAF include education, research,
6 publishing and legal action focusing on the Constitutional right to privately own and possess
7 firearms, and the consequences of gun control. SUF 62.

8
9
10 Plaintiff The Calguns Foundation, Inc. is a non-profit organization incorporated under the
11 laws of California with its principal place of business in Redwood City, California. SUF 63. The
12 purposes of Calguns include supporting the California firearms community by promoting
13 education for all stakeholders about firearm laws, rights and privileges, and securing the civil
14 rights of California gun owners, who are among its members and supporters. SUF 64.

15
16 SAF and Calguns expend their resources encouraging exercise of the right to bear arms,
17 and advising and educating their members, supporters, and the general public about the legality
18 of particular firearms. The issues raised by, and consequences of, Defendant’s policies, are of
19 great interest to SAF and Calguns’ constituencies. Defendant’s policies regularly cause the
20 expenditure of resources by SAF and Calguns as people turn to these organizations for advice
21 and information. SUF 65, 66. Defendant’s policies bar the members and supporters of SAF and
22 Calguns, living in California, from obtaining numerous, if not most, handguns. SUF 67
23
24
25

26 **SUMMARY OF ARGUMENT**

27 This case begins and ends with the fact that California will not roster handguns lacking
28 certain features which are missing from many, if not the vast majority, of handguns of the kind in

1 common use throughout the United States. That it has become impossible to market any new
2 handguns in California is telling. The challenged laws constitute a massive ban on handguns
3 whose possession and use is secured by the Second Amendment.
4

5 In unsuccessfully defending its blanket handgun ban, the District of Columbia argued that
6 it could unilaterally determine which arms were too dangerous to be allowed ordinary citizens,
7 and that handguns as a class of weapons failed to meet its criteria. This argument was rejected
8 both by the D.C. Circuit and the Supreme Court. The government’s disdain for particular arms
9 does not enable it to ban them if their possession is protected by the Second Amendment. The
10 test is whether the arms at issue are of the kind that would be in common use for lawful purposes.
11

12 Defendant’s handgun rostering program also violates basic principles of equal protection,
13 in that it arbitrarily makes distinctions between otherwise identical firearms, inherently making
14 arbitrary distinctions among the people who would possess them, and bars some classes of
15 people from possessing handguns that are perfectly permissible to others. These practices cannot
16 survive Fourteenth Amendment scrutiny.
17
18

19 20 **ARGUMENT**

21 I. THE SECOND AMENDMENT PROTECTS THE POSSESSION OF ARMS IN 22 COMMON USE FOR LAWFUL PURPOSES, INCLUDING HANDGUNS.

23 “[T]he sorts of weapons protected [by the Second Amendment are] those ‘in common use
24 at the time.’” *Heller*, 128 S. Ct. at 2817 (quoting *United States v. Miller*, 307 U. S. 174, 179
25 (1939)). “[T]he Second Amendment does not protect those weapons not typically possessed by
26 law-abiding citizens for lawful purposes.” *Heller*, 128 S. Ct. at 2815-16. Handguns plainly satisfy
27 this test. “It is enough to note, as we have observed, that the American people have considered
28 the handgun to be the quintessential self-defense weapon . . . Whatever the reason, handguns are

1 the most popular weapon chosen by Americans for self-defense in the home, and a complete
2 prohibition on their use is invalid.” *Heller*, 128 S. Ct. at 2818.

3
4 There is little question that Defendant, as a state actor, is bound by Second Amendment
5 rights by operation of the Fourteenth Amendment. As of this writing, the question of the Second
6 Amendment’s incorporation is one of first impression before this Court, though it is squarely
7 raised in several cases pending before the Ninth Circuit and the Supreme Court. While it cannot
8 be taken for granted that the higher courts will opine on the matter any time soon, helpfully, the
9 State of California has filed an amicus brief with the Supreme Court arguing that the Second
10 Amendment is, indeed, incorporated and urging the Court to grant certiorari to clarify that fact.
11 Br. of State of California, Supreme Court Nos. 08-1497, 08-1521. A comprehensive argument for
12 incorporation appears in Plaintiffs’ Motion for Summary Judgment, *Sykes v. McGinness*, E.D.
13 Cal. 09-01235, at pp. 9-14. As the parties are apparently in agreement on this point, it does not
14 require further elucidation here.

15
16 Defendant is still free to ban “dangerous and unusual weapons,” *Heller*, 128 S. Ct. at
17 2817, including “sophisticated arms that are highly unusual in society at large.” *Id.* And
18 Defendant can ban those weapons which do not meet the historic legal definition of “arms” as
19 used in the Second Amendment – “any thing that a man wears for his defence, or takes into his
20 hands, or useth in wrath to cast at or strike another.” *Heller*, 128 S. Ct. at 2791 (citing 1 A New
21 and Complete Law Dictionary (1771); N. Webster, American Dictionary of the English Language
22 (1828) (reprinted 1989)).⁶ But handguns have been held to pass the common use test by the
23 Supreme Court. They are protected Second Amendment arms that cannot be banned – even if the
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⁶ “[A]ll firearms constituted ‘arms.’” *Heller*, 128 S. Ct. at 2791 (citing 1 J. Trusler, *The Distinction Between Words Esteemed Synonymous in the English Language* 37 (1794)).

1 state believes they are excessively dangerous.

2 II. DEFENDANT’S HANDGUN ROSTERING PROGRAM VIOLATES THE SECOND
3 AMENDMENT IN THAT IT BANS PROTECTED HANDGUNS.

4 The handguns banned by Defendant’s rostering program – including guns without CLIs
5 and/or magazine disconnect mechanisms, guns that have not been (and cannot be) submitted by
6 their manufacturer for government testing, and guns that would be perfectly acceptable by the
7 government but for lack of an annual listing fee – are all nonetheless handguns of the kind in
8 common use protected by the Second Amendment. None of these characteristics render a firearm
9 “dangerous or unusual” or establish that it is not of the kind in common use for lawful purposes.
10

11
12 The CLIs and magazine disconnect mechanisms required for rostering are rare features,
13 found on perhaps only 11% and 14% of all handguns in the marketplace. Considering
14 California’s particularly harsh and entirely arbitrary enforcement of its CLI requirement, that
15 number of qualified CLI’s is surely lower than even 11% of the market.
16

17 Many guns are still protected by the Second Amendment even if they have not been
18 manufactured for many years prior to the advent of the California Handgun Roster, or have been
19 manufactured by a company that does not wish to sell its products in one particular state. And
20 plainly, a gun model deemed “not unsafe” does not somehow alter its characteristics and become
21 “unsafe” simply because a check has not been cashed in Sacramento within the year.
22

23 The four handguns denied Plaintiffs by operation of Defendant’s handgun rostering
24 program are plainly within the Second Amendment’s protection. That the handgun roster law is
25 incompatible with Supreme Court precedent is illustrated by the roster’s operative banning of
26 Brett Thomas’s High Standard revolver – the exact same gun the Supreme Court ordered
27 Washington, D.C. not to ban barely over a year ago. This gun might not appear on the state’s list
28 of approved handguns, but according to the Supreme Court, it appears in the Second

1 Amendment.

2 The handguns denied Ivan Pena and Dona Croston are likewise plainly within the Second
3 Amendment's protection. They cannot be considered "dangerous and unusual" by any stretch of
4 imagination. Croston's gun appears on Defendant's approved list, albeit in different colors, but is
5 unavailable in the black/stainless finish because it was not made available for testing in that
6 particular color before the CLI and magazine disconnect requirements came into effect. It is not
7 as though Croston's gun failed any safety testing; California regulators refuse to test the gun
8 because it does not contain features missing from the overwhelming majority of American
9 handguns – as acknowledged by the California Legislature in enacting the requirements. Ivan
10 Pena's gun was once deemed safe enough for sale, but is only unavailable because its listing was
11 not renewed. The gun did not suddenly become dangerous on January 1, 2006, when its listing
12 expired because the manufacturer would not pay a fee and fill out a piece of paper.
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16 The situation with respect to Roy Vargas's is absurd. Physically handicapped individuals
17 enjoy no lesser interest in self-defense and the Second Amendment right to arms that serves it.
18 However, such individuals are disproportionately hurt by artificial, unconstitutional limitations
19 on the range of handgun available to them. It makes no sense that Vargas cannot simply purchase
20 a Glock 21 SF with an ambidextrous magazine release, but that he can purchase the right-handed
21 version of this exact same gun, and undergo the additional burden and expense of having the
22 Glock factory make a custom modification for him – resulting in the exact same handgun that
23 Defendant will not place on the roster.
24
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26 There is also no escaping the fact that the magazine disconnect and CLI requirements
27 contravene the state's own policies with respect to gun safety. The state mandates that all
28 handgun purchasers pass a handgun safety test that specifically teaches people not to rely on

1 gimmicks like magazine disconnects and CLIs. The state makes it absolutely clear that all guns
2 must be treated as loaded, that the absence of a magazine is not to be interpreted as a sign that the
3 gun is unloaded, that the only way to know guns are unloaded is to physically inspect the
4 chamber. Even then, treating all guns as loaded promotes safe handling practices. And on top of
5 the mandatory instruction on such practices, and the requirement that handgun purchasers
6 demonstrate safe handling techniques, the state mandates that each handgun sale be accompanied
7 by the sale of a lock or a guarantee that room exists in a safe for the gun.
8
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10 The state's instructions with respect to safe gun handling and unloading are unassailable.
11 Whatever the merits of the state's safe storage requirements, they do not ban a single gun, while
12 making the magazine disconnect and CLI requirements redundant. It is irresponsible to rely on
13 magazine disconnects and CLIs for gun safety, which is perhaps why the market has obviously
14 rejected these features, and why the Defendant has such a difficult time agreeing to a standard of
15 what actually constitutes a CLI.
16

17 California's legislature, operating in a pre-*Heller* environment, approached the handgun
18 issue backwards from a constitutional, post-*Heller* perspective. The legislature sought to declare
19 almost all handguns "unsafe" for failing to conform to its design preferences, or for the
20 manufacturer's inability or unwillingness to pay for and participate in the state's regulatory
21 scheme. Consciously, the state sought to "drive" the market towards its preferred outcomes. But
22 *Heller* stands for the proposition that it is the regulatory environment that must accommodate
23 itself to the choices made by the lawful, constitutionally-protected market for arms, and not the
24 other way around.
25
26

27 III. DEFENDANT'S HANDGUN ROSTERING PROGRAM VIOLATES THE
28 FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION.

The Equal Protection Clause "is essentially a direction that all person similarly situated

1 should be treated alike.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)
2 (citation omitted). Strict scrutiny applies to government classifications that “impinge on personal
3 rights protected by the Constitution.” *Id.*, 473 U.S. at 440 (citations omitted). “Where
4 fundamental rights and liberties are asserted under the Equal Protection Clause, classifications
5 which might invade or restrain them must be closely scrutinized.” *Hussey v. City of Portland*, 64
6 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Virginia Board of Elections*, 383 U.S. 663,
7 670 (1966)). Indeed, “classifications . . . that impinge upon the exercise of a ‘fundamental’ right”
8 are presumptively unconstitutional unless the government can demonstrate that the law satisfies
9 strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (footnote omitted).
10
11

12 Although *Heller* did not announce a specific standard of review for cases raising Second
13 Amendment concerns, the Supreme Court did conclude that “[b]y the time of the founding, the
14 right to have arms had become fundamental for English subjects.” *Heller*, 128 S. Ct. at 2798
15 (citation omitted). The Supreme Court thus specifically rejected rational basis as the standard of
16 review for Second Amendment claims, and strongly suggested that the standard of review would
17 be a rigorous one:
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20 Obviously, [rational basis] could not be used to evaluate the extent to which a legislature
21 may regulate a specific, enumerated right, be it the freedom of speech, the guarantee
22 against double jeopardy, the right to counsel, or the right to keep and bear arms.

23 *Heller*, 128 S. Ct. at 2818 n. 27 (citing *United States v. Carolene Products Co.*, 304 U. S. 144,
24 152, n. 4 (1938)).

25 Requiring strict scrutiny in evaluating Second Amendment questions does not spell the
26 end of all gun laws because the government will often have a compelling state interest in the
27 area, that may be constitutionally addressed. Strict scrutiny is context-sensitive and is “far from
28 the inevitably deadly test imagined by the Gunther myth.” Adam Winkler, *Fatal in Theory and*

1 *Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vanderbilt L.
2 Rev. 793, 795 (2006). The Fifth Circuit has long employed a version of strict scrutiny in Second
3 Amendment cases, allowing those laws that are
4

5 limited, narrowly tailored specific exceptions or restrictions for particular cases that are
6 reasonable and not inconsistent with the right of Americans generally to individually keep
and bear their private arms as historically understood in this country,...

7 *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001). Under that standard, that court has
8 upheld the more basic federal gun laws. *See, e.g. Emerson* (upholding gun prohibition for people
9 covered by restraining orders); *United States v. Patterson*, 431 F.3d 832, 835 (5th Cir. 2005)
10 (drug addicts); *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) (felons); *United States*
11 *v. Darrington*, 351 F.3d 632, 635 (5th Cir. 2003) (felons). “[I]t remains certain that the federal
12 government may not restrain the freedom to bear arms based on mere whimsy or convenience.”
13 *United States v. Everist*, 368 F.3d 517, 519 n.1 (5th Cir. 2004). However, where a classification
14 plainly fails rational basis review, the Court’s analysis need go no further. *Zobel v. Williams*, 457
15 U.S. 55, 60-61 (1982).
16
17
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19 The sort of classifications created by the handgun roster are unacceptable under any sort
20 of scrutiny reserved for enumerated rights. First, there are the classifications among different
21 guns. Why is the Springfield Armory XD-45 acceptable in almost any finish, but will not even be
22 considered for testing in Bi-Tone? If guns failing to include CLIs and magazine disconnects are
23 unacceptably dangerous, why permit the continued manufacture and introduction of old,
24 allegedly “unsafe” models? Croston is being denied the gun of her choice not because of any
25 intrinsic quality it possesses, but because Croston prefers to have the gun in a particular color.
26
27

28 The requirement that an annual fee be paid by a manufacturer to keep a gun rostered is
similarly problematic. Pena’s access to his preferred handgun is cut-off simply because the model

1 is discontinued or at least, no longer the subject of an annual tribute. But “[a] state may not
2 impose a charge for the enjoyment of a right granted by the Federal Constitution.” *Murdock v.*
3 *Pennsylvania*, 319 U.S. 105 (1943).
4

5 In California, unrostered guns are permitted by private importation or as intra-family
6 gifts, just not as retail purchases. The roster thus privileges people who move into the state, or
7 who have family out-of-state. Yet all people, not just relatives, may transfer unrostered handguns
8 inside the state. These classifications make no sense. Any of the Plaintiffs might live next door to
9 individuals who lawfully obtained the same handguns denied by the roster law, prior to moving
10 to the state, or as a gift from an out-of-state relative.
11

12 California’s wide exemptions for law enforcement personnel, allowing them to purchase
13 unrostered guns for personal use, is completely irrational. If a gun is unacceptably dangerous, it is
14 odd to allow it to those perhaps most likely to use it. And if the harm to be ameliorated is the
15 unauthorized use of guns by people not knowledgeable in their use, police weapons, including
16 those owned privately by police officers, are no less likely to be stolen or mishandled by
17 unauthorized users.
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20 The exceptions for curios and relics seems particularly egregious. Brett Thomas’s High
21 Standard revolver is not quite old enough to be exempt from the rostering law as a curio or relic,
22 though in perhaps ten years, it would qualify. Ironically, Mr. Heller’s particular gun might qualify
23 today based on the fact of its involvement in an historic Supreme Court case. 27 C.F.R. § 478.11.
24 But then, if Thomas prevails here, his gun, too, by that virtue, might also be transformed into an
25 exempted curio or relic.
26

27 Then there are the exceptions for movie and television production, which are not merely
28 irrational, but also underscore the fact that unrostered handguns are so common in American

1 culture such that audiences would not expect to see in realistic depiction of American life only
2 those guns approved by Defendant.

3
4 The distinctions between different guns on the basis of whether they have an acceptable
5 chamber loaded indicator are also unconstitutional given the wholly arbitrary manner in which
6 California regulators determine whether a CLI is sufficient – asking around at the office whether
7 random regulatory employees understand the CLI’s message. While the California Legislature
8 might have established “minimal guidelines,” *City of Chicago v. Morales*, 527 U.S. 41, 60
9 (1999) defining a CLI based on design intent and characteristics, Cal. Penal Code § 12126(c), the
10 regulatory practice is untethered from the legislative standard and in the end amounts to “because
11 we said so.” Of course, since the government does not ban revolvers or exceedingly popular
12 rimfire rounds such as the .22, CLIs will always be missing from significant numbers of
13 handguns.
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16 These and other senseless distinctions are inevitable considering the audacious mission of
17 the handgun roster law: to make a complete list of all lawful handguns, and substitute the design
18 and feature preferences of legislators and regulators for that of a market comprising hundreds of
19 millions of people over the course of generations. That this project intrudes into the exercise of a
20 fundamental right calls for its abandonment.
21

22 The D.C. City Council reluctantly came to the same conclusion. Having adopted the
23 California roster as their own, with all the usual public assurances that their law was
24 constitutional, District officials re-considered upon being served with a very similar motion for
25 summary judgment. On June 17, 2009, in United State District Court for the District of
26 Columbia, the District gave notice that it was adopting an emergency regulation, abandoning its
27 reliance on the California roster, by creating a “District roster” that, while still unconstitutional,
28

1 eliminated many of the burdens associated with the laws challenged in that (and this) action. The
2 District based its emergency rule-making, in part, on the following findings:

3 1) recognition that California permits sale of firearms that have superficial differences to
4 those firearms on its roster; 2) recognition that some handguns that have been placed on
5 the California roster as safe handguns have been removed for administrative reasons not
6 related to the handguns' safety; and 3) review of similar safe gun rosters maintained by
7 Maryland and Massachusetts.
8
9

10 Exhibit L .

11 The new "District Roster" consists not only of the California and Massachusetts rosters,
12 but also that of Maryland. 24 DCMR 2323.1. The addition of the Maryland roster is significant,
13 as that state allows anyone to petition for additions to the roster, it does not require an annual
14 maintenance fee for guns to remain rostered, and it does not require handguns to have either a
15 magazine disconnect device nor CLI. Not surprisingly, the Maryland roster contains
16 approximately twice the number of handguns as does the California roster. Exhibit M.

17
18 Moreover, the new District roster expressly includes models removed from the California
19 roster for lack of payment, as well as guns that have only minor cosmetic differences from those
20 listed. 24 DCMR 2323.2, 2323.3. Exhibit M.

21
22 On June 25, 2009, the District imported another critical piece of Maryland's law into its
23 own: an exemption from rostering requirements of all handguns manufactured prior to 1985.

24
25 Exhibit N & Exhibit O.

26 All of these improvements made by Washington, D.C. to address its adoption of the
27 California roster have resulted in a bloated regulatory regime that, in the end, does not actually
28 ban very many handguns – and would allow all of the handguns at issue in this case to sold in

1 California.⁷ It appears unlikely that the California Legislature will be able to avoid summary
2 judgment by timely repealing or significantly modifying its roster law.
3

4
5 **CONCLUSION**

6 The facts in this case are well-established, as are the controlling legal principles: the State
7 of California cannot ban handguns of the kind in common use for lawful purposes, regardless of
8 its policy preferences. Nor are the design requirements here consistent with other California laws
9 aimed at improving gun safety, which condition the public to ignore these mandatory features in
10 the name of safety. Finally, the classifications riddling the rostering scheme are irrational and
11 beyond defense. The Court should enter summary judgment for Plaintiffs.
12

13 Respectfully Submitted on Sept. 1, 2009.
14

15 Alan Gura (Calif. Bar No. 178221)
16 Gura & Possessky, PLLC
17 101 N. Columbus St., Suite 405
18 Alexandria, VA 22314
19 703.835.9085/Fax 703.997.7665

20 Jason A. Davis (Calif. Bar No. 224250)
21 Davis & Associates
22 27281 Las Ramblas, Suite 200
23 Mission Viejo, CA 92691
24 949.310.0817/Fax 949.288.6894

25 Donald E.J. Kilmer, Jr. (Calif. Bar No. 179986)
26 Law Offices of Donald Kilmer, A.P.C.
27 1645 Willow Street, Suite 150
28 San Jose, CA 95125
408.264.8489/Fax 408.264.8487

By: /s/ Donald E.J. Kilmer, Jr.
Donald E. J. Kilmer, Jr., Attorney for Plaintiffs

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⁷ Under its earlier interpretation of the California handgun roster, the D.C. Police allowed registration of a Glock 21 SF with ambidextrous magazine release.