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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA

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

24 Come now Plaintiffs Ivan Peña, Roy Vargas, Doña Croston, Brett Thomas,
25 the Second Amendment Foundation, Inc., and the Calguns Foundation, Inc., by and
26 through undersigned counsel, and submit their Memorandum of Points and
27 Authorities in Support of their Motion for Summary Judgment.
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Respectfully submitted,

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TABLE OF AUTHORITIES

Cases

Andrews v. State,
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Carey v. Pop. Serv. Int’l,
431 U.S. 678 (1977). 16

City of Chicago v. Morales,
527 U.S. 41 (1999) 28

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 24

District of Columbia v. Heller,
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Ezell v. City of Chicago,
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Griswold v. Connecticut,
381 U.S. 479 (1965). 16

Harper v. Virginia Board of Elections,
383 U.S. 663 (1966). 24

Hussey v. City of Portland,
64 F.3d 1260 (9th Cir. 1995) 24

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010). 16, 25

Parker v. District of Columbia,
478 F.3d 370 (D.C. Cir. 2007). 18

Reliable Consultants, Inc. v. Earle,
517 F.3d 738 (5th Cir. 2008). 16

Richmond Newspapers v. Virginia,
448 U.S. 555 (1980). 16

United States v. Carolene Products Co.,
304 U.S. 144 (1938). 25

1 *United States v. Chester*,
 2 628 F.3d 673 (4th Cir. 2010) 26

3 *United States v. Marzzarella*,
 4 614 F.3d 85 (3d Cir. 2010). 16

5 *United States v. Masciandaro*,
 6 638 F.3d 458 (4th Cir. 2011). 25, 26

7 *United States v. Miller*,
 8 307 U. S. 174 (1939). 15, 18

9 *Virginia v. Am. Booksellers Ass’n*,
 484 U.S. 383 (1988) 16

10 *Williams v. Morgan*,
 11 478 F.3d 1316 (11th Cir. 2007). 16

12 *Wilson v. County of Cook*,
 13 2012 IL 112026. 17, 19

14 Statutes, Rules and Regulations

15 15 U.S.C. § 7901. 16

16 15 U.S.C. § 7901(a)(1). 16

17 15 U.S.C. § 7901(b)(2). 16

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23 27 C.F.R. § 478.11 27

24 Cal. Penal Code § 16380. 28

25 Cal. Penal Code § 16380(c). 12

26 Cal. Penal Code § 31910(b)(7) 8

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1 Other Authorities

2 A New and Complete Law Dictionary (1771).. 17

3 Bureau of Alcohol, Tobacco, Firearms & Explosives,

4 *Annual Firearms Manufacturing and Export Report*,

5 available at [http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-](http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf)

6 [report.pdf](http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf) (last visited Oct. 24, 2013). 3, 20

7 California Law Revision Commission, *Nonsubstantive*

8 *Reorganization of Deadly Weapons Statutes:*

9 *Disposition of Existing Law*, available at

10 [http://www.clrc.ca.gov/pub/Misc-Report/M300-](http://www.clrc.ca.gov/pub/Misc-Report/M300-Tables/UpdatedDispoTable.pdf)

11 [Tables/UpdatedDispoTable.pdf](http://www.clrc.ca.gov/pub/Misc-Report/M300-Tables/UpdatedDispoTable.pdf) (last visited

12 October 24, 2013). 4

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11 N. Webster, *American Dictionary of the*

12 *English Language* (1828) (reprinted 1989). 17

1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
2 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

3 INTRODUCTION

4 May the State of California demand that handguns contain unusual or even
5 unavailable technologies as a condition of their lawful sale, or effectively prohibit
6 gun sales based on arbitrary classifications, such as a gun's finish or color? Because
7 the Second Amendment prohibits the state from banning firearms of the kind in
8 common use for traditional lawful purposes, the answer to this question must be
9 "no." *District of Columbia v. Heller*, 554 U.S. 570 (2008).
10

11 Plaintiffs do not begrudge the state prohibiting truly dangerous and unusual
12 firearms not suited to traditional lawful uses, nor do Plaintiffs challenge the state's
13 authority to require that firearms function in a safe manner, that is, reliably, in the
14 manner that reasonably knowledgeable firearms users would expect. But the
15 Second Amendment's guarantee that individuals have access to the traditional tools
16 of self-defense means little if the state can dictate rare or even hypothetical features
17 into firearm designs, or prohibit firearms for arbitrary reasons having nothing to do
18 with their design or actual function.
19
20

21 Several years ago, state lawmakers banned from retail sale any handgun
22 that does not appear on a special roster. Originally, lawmakers aimed the rostering
23 program at arguably "unsafe" handguns, barring the sale of handguns prone to
24 malfunction, or misfire when dropped. In time, however, the character of the roster
25 program changed, crossing the line from a means of excluding poorly manufactured
26 guns to demanding positive and specific changes to handgun designs. As this
27 program evolved to become ever-more restrictive, it has become impossible to sell
28

1 handguns are “unsafe” and therefore, generally barred from importation and sale,
2 unless those handguns have been placed on the state’s special roster of handguns
3 “determined not to be unsafe.” SUF 5.

4
5 a. Chamber Loaded Indicators and Magazine
6 Disconnect Mechanisms

7 Since 2007, a center-fire¹ semi-automatic² handgun cannot make the roster if
8 it does not have both a chamber loaded indicator (“CLI”) and, if it has a detachable
9 magazine, a magazine disconnect mechanism. SUF 6. Since 2006, a rimfire³ semi-
10 automatic handgun must have a magazine disconnect mechanism if it has a
11 detachable magazine. SUF 7. However, handguns rostered prior to the effective
12 dates of these requirements can remain rostered despite lacking these features.
13 SUF 8.

14
15 A magazine disconnect mechanism is “a mechanism that prevents a
16 semiautomatic pistol that has a detachable magazine from operating to strike the

17 ¹Most handguns use center-fire ammunition, which fires a bullet when the
18 primer at the bottom-center of the cartridge case is struck and thus ignited by the
19 gun’s firing pin.

20 ²A semiautomatic handgun is a handgun that fires only one bullet each time
21 the trigger is pulled, with the energy of the just-fired bullet causing the ejection of
22 the spent case and loading of the next cartridge into the firing chamber.

23 Most handguns sold in the United States today are semiautomatic. See
24 Bureau of Alcohol, Tobacco, Firearms & Explosives, *Annual Firearms*
25 *Manufacturing and Export Report* (“ATF Report”), available at [http://www.atf.gov/](http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf)
26 [files/statistics/download/afmer/2011-final-firearms-manufacturing-export-](http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf)
27 [report.pdf](http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf) (last visited Oct. 24, 2013). Almost all the rest are revolvers, *id.*, which
28 hold several rounds in a rotating cylinder and also fire only one bullet each time the
trigger is pulled. This suit does not address fully automatic firearms, also known as
machine guns.

³Rimfire ammunition incorporates the primer into the bottom rim of the case
which ignites the gun powder upon striking that rim. Rimfire ammunition is
primarily used in small caliber firearms. For technical reasons, CLIs are not
feasible for integration in firearms using rimfire ammunition.

1 primer of ammunition in the firing chamber when a detachable magazine is not
2 inserted in the semiautomatic pistol.” SUF 9. A chamber load indicator (“CLI”) is “a
3 device that plainly indicates that a cartridge is in the firing chamber.” SUF 10.
4

5 Not all CLIs satisfy California’s requirement.

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

10 SUF 11. Although a CLI is sufficient if it is “designed and intended to indicate to a
11 reasonable adult user” that the firearm is loaded, Cal. Penal Code § 16380, in
12 practice the sufficiency of the CLI is determined by a different standard. Defendant
13 tests the sufficiency of CLIs by asking his employees if they understand the CLI –
14 and when the regulatory authority’s employees allegedly fail to understand the CLI,
15 regardless of what the CLI is “designed and intended to indicate to a reasonable
16 adult,” the CLI is ruled inadequate. SUF 12.⁴
17

18 Given the rarity of CLIs and magazine disconnect devices, handguns lacking
19 these features are in common use today, and comprise the overwhelming majority of
20 handguns currently for sale in other states. SUF 13.
21

22
23
24 ⁴ During the pendency of this case, California reorganized and renumbered
25 its Penal Code. This memo and the SUF cite the law under its current renumbered
26 scheme, while some of the evidentiary material submitted will refer to the older
27 code sections. See California Law Revision Commission, *Nonsubstantive*
28 *Reorganization of Deadly Weapons Statutes: Disposition of Existing Law*, available
at: <http://www.clrc.ca.gov/pub/Misc-Report/M300-Tables/UpdatedDispoTable.pdf>
(last visited October 24, 2013). A copy is provided in the concurrently filed Request
for Judicial Notice.

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

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

21 In fact, to acquire any handgun in California, an individual must pass a
22 written handgun safety test. SUF 20. The test requires knowledge of the basic rules
23 of handgun safety, the first of which is: “Treat all guns as if they are loaded.” SUF
24 21. The state’s study guide for the handgun safety test further provides:

26 Always assume that a gun is loaded even if you think it is unloaded. Every
27 time a gun is handled for any reason, check to see that it is unloaded [by
28 following specific instructions for unloading the gun]. If you are unable to

1 check a gun to see if it is unloaded, leave it alone and seek help from someone
2 more knowledgeable about guns.

3 SUF 22.

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

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

10 SUF 23.

11 The state's gun safety study guide does not discuss chamber load indicators
12 or magazine disconnect devices. Yet it teaches, in order to pass the mandatory
13 safety test, rules that would have gun owners ignore such devices. The study guide
14 specifically instructs that in order to verify a semi-automatic handgun is unloaded,
15 one must remove the magazine and visually inspect the chamber to verify that it is
16 empty. SUF 24.

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

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

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

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

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

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ALWAYS REMOVE THE MAGAZINE FIRST!

SUF 25.

In order to purchase a handgun, the buyer must demonstrate that he or she knows how to safely operate the handgun, including following these instructions.

SUF 26. Moreover, California law also generally requires that all newly purchased firearms either be accompanied by an approved gun lock or the purchaser’s affidavit that she owns an adequate lock box or gun safe. SUF 27.

b. Microstamping

As of May 17, 2013, all semi-automatic handguns not already rostered cannot be submitted for roster listing unless they employ so-called “microstamping technology.” To comply, handguns must be:

designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired, provided that the Department of Justice certifies that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions.

SUF 28.

“The Attorney General may also approve a method of equal or greater reliability and effectiveness in identifying the specific serial number of a firearm from spent cartridge casings discharged by that firearm than that which is set forth in this paragraph . . .” SUF 29.

The microstamping requirement of Cal. Penal Code § 31910(b)(7) became effective on May 17, 2013 because on that date, the California Department of

1 Justice issued Information Bulletin No.: 2013-BOF-03, wherein Defendant Lindley
2 announced that the Department had determined that the technology described in
3 Cal. Penal Code § 31910(b)(7) is now available to more than one manufacturer
4 unencumbered by any patent restrictions. SUF 30.

5
6 Defendant admits that no handguns for sale in the United States have the
7 microstamping technology required by California's roster law. Exh. O, Response to
8 Request for Admission No. 4. No firearms manufacturer has submitted any
9 microstamping-compliant handguns, Exh. P, Response to Interrogatory Request No.
10 8, and Defendant has no information as to whether any manufacturer will ever
11 produce microstamping handguns, Exh. O, Response to Request for Admission No.
12 5. Accordingly, the microstamping requirement imposes a *de facto* ban on the sale of
13 all new semiautomatic handgun models in California. SUF 31.

14
15 c. Maintenance Fees

16 Listings on the California handgun roster are valid for one year, and must be
17 renewed annually, including payment of an annual fee, prior to expiration to
18 remain valid. SUF 32. Defendant charges firearms manufacturers, importers, and
19 dealers annual fees, ostensibly to operate the handgun roster program. Any
20 handgun whose manufacturer fails to pay the required fees may be excluded from
21 the roster for that reason alone. SUF 33. The initial and renewal annual listing fees
22 for inclusion on the handgun roster are \$200. SUF 34.

23
24
25 Other than the California DOJ, only the manufacturer/importer of a handgun
26 model is authorized to submit that handgun model to a DOJ-Certified Laboratory
27 for testing. SUF 35. A handgun can remain on the roster if its manufacturer/
28

1 importer goes out of business or discontinues the model, provided that the model is
2 not being offered for sale to licensed dealers, and “a fully licensed wholesaler,
3 distributor, or dealer submits a written request to continue the listing and agrees to
4 pay the annual maintenance fee.” SUF 36. So long as a handgun is sold to dealers
5 outside of California, the handgun’s manufacturer can cause the sale of that
6 handgun to be forbidden inside California by failing to submit the gun for testing in
7 that state or refusing to pay the annual \$200 fee. SUF 37.

9 A manufacturer/importer or other responsible party may submit a written
10 request to list a handgun model that was voluntarily discontinued or was removed
11 for lack of payment of the annual maintenance fee. The request may be approved,
12 and the handgun restored to the “safe gun” roster, provided the fee is paid. SUF 38.

14 d. Exemptions

15 The following firearms and transactions are exempted from the handgun
16 rostering requirement: (1) firearms defined as curios or relics under federal law; (2)
17 the purchase of any firearm by any law enforcement officer – state or federal; (3)
18 pistols that are designed expressly for use in Olympic target shooting events, as
19 defined by rule; (4) certain single-action revolvers, as defined by rule; and (5) the
20 sale, loan, or transfer of any firearm that is to be used solely as a prop during the
21 course of a motion picture, television, or video production by authorized people
22 related to the production. SUF 39.

25 It is also not illegal in California to import an unrostered handgun when
26 moving into the state without the intention of selling it, nor is it illegal in California
27 to possess or use an unrostered handgun that is otherwise lawful to possess or use.
28

1 SUF 40. California also exempts private party transfers, intra-familial transfers
2 including gifts and bequests, and various loans. SUF 41.⁵

3
4 2. *Defendant's Enforcement of the "Handgun Roster" Program Against
Plaintiffs*

5 Plaintiff Ivan Peña sought to purchase a Para USA (Para Ordnance)
6 P1345SR / Stainless Steel .45 ACP 4.25", and has identified a willing seller who
7 stands ready to deliver said handgun to him. SUF 42. The Para USA P1345SR that
8 Peña wants to buy was listed on California's Handgun Roster until December 31,
9 2005, when it was discontinued and its listing not renewed. SUF 43.

11 Peña cannot lawfully purchase and take possession of the handgun as that
12 handgun is not on the California Handgun Roster. SUF 44. Peña fears arrest,
13 prosecution, fine and incarceration if he completes this handgun purchase. SUF 45.

15 Plaintiff Roy Vargas has sought to purchase a Glock 21 SF with an
16 ambidextrous magazine release, and has identified a willing seller who stands
17 ready to deliver said handgun to Plaintiff. SUF 46. However, Vargas cannot
18 lawfully purchase and take possession of the handgun as that handgun is not listed
19 on the California Handgun Roster. SUF 47. Vargas fears arrest, prosecution, fine
20 and incarceration if he completes this handgun purchase. SUF 48.

22 Vargas was born without an arm below the right elbow. SUF 49. The Glock
23 21 SF-STD with a standard magazine release is listed on the California Handgun
24 Roster. SUF 50. However, the Glock 21 SF with ambidextrous magazine release is
25

26
27 ⁵"Single" or "Double" action refers to the gun's trigger function. If the trigger
28 only drops the hammer (with the firing pin) after it is cocked, then the firearms is
considered a "Single" action. If the trigger can also draw back the hammer and
release it, the firearm is considered a "Double" action.

1 superior for left-handed shooters such as Mr. Vargas, as opposed to the approved
2 version of the Glock 21. SUF 51. Glock's efforts to add the Glock 21 SF with
3 ambidextrous magazine release to the California Roster have failed. SUF 52.
4

5 However, Defendant permits Glock customers to have their Glock 21 SF-STD
6 handguns fitted with an ambidextrous release at the Glock factory. SUF 53. As
7 state officials wrote Glock in response to the gunmaker's pleas to include the
8 ambidextrous Glock 21 SF on the roster:

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

13 Exhibit F. In other words, California permits the sale of a Glock 21 SF-STD, and
14 the alteration of that handgun by Glock to add an ambidextrous magazine release,
15 but will not allow consumers to purchase new Glock 21 SFs with an ambidextrous
16 magazine release in the first place.
17

18 Plaintiff Doña Croston has sought to purchase a Springfield Armory XD-45
19 Tactical 5" Bi-Tone stainless steel/black handgun in .45 ACP, model number
20 XD9623, and has identified a willing seller who stands ready to deliver said
21 handgun to her. SUF 54. Croston cannot lawfully purchase and take possession of
22 the handgun as that handgun is not on the California Handgun Roster. SUF 55.
23 Croston fears arrest, prosecution, fine and incarceration if she completes this
24 handgun purchase. SUF 56.
25

26 Other models of this identical gun – but in different colors – are listed on the
27 handgun roster and are thus available to Ms. Croston: the XD-45 Tactical 5" .45
28

1 ACP in black (model XD9621), the XD-45 Tactical 5" .45 ACP in OD Green (model
2 XD9622), and the XD-45 Tactical 5" .45 ACP in Dark Earth (XD9162). SUF 57.
3 However, the particular Bi-Tone XD-45 that Ms. Croston would possess was not
4 released until after California required newly-listed guns to have a chamber load
5 indicator and magazine disconnect device. SUF 58. Springfield Armory could not get
6 the XD-45 in .45 ACP and Bi-Tone finish registered given the new listing
7 requirements. SUF 59. The XD-45 Bi-Tone in .45 has a loaded chamber indicator,
8 but the California Department of Justice decided it does not qualify under Cal.
9 Penal Code § 16380(c). SUF 60. The XD-45 also lacks a magazine disconnect device.
10 SUF 61.

13 The handgun at issue in *Heller* was a High Standard 9-shot revolver in .22
14 with a 9.5" Buntline-style⁶ barrel. SUF 62. Plaintiff Brett Thomas has sought to
15 purchase an identical High Standard 9-shot revolver in .22 with a 9.5" Buntline-
16 style barrel, and has identified a willing seller who stands ready to deliver said
17 handgun to Thomas. SUF 63. Thomas cannot lawfully purchase and take possession
18 of the handgun as that handgun is not on the California Handgun Roster. SUF 64.
19 Thomas fears arrest, prosecution, fine and incarceration if he completes this
20 handgun purchase. SUF 65.

22 Plaintiffs Ivan Peña and Brett Thomas are law-abiding citizens, shooting
23 enthusiasts and gun collectors, as are other members and supporters of Plaintiffs
24 Second Amendment Foundation, Inc. ("SAF") and Calguns Foundation, Inc.
25

26
27 ⁶ A "Buntline" style is a Western-style extra-long barreled revolver. It is
28 named for the 19th Century novelist Ned Buntline who was said to commission such
guns for famous personalities of the day.

1 (“CGF”). Peña, Thomas, Croston, and other SAF and CGF members and supporters
2 would acquire new semiautomatic handguns of the kind in common use throughout
3 the United States, for traditional lawful purposes including self-defense, but cannot
4 do so owing to the operation of California microstamping scheme. SUF 66.

5
6 Moreover, even if Plaintiffs could procure the handguns they intend to
7 purchase consistent with California law, the handgun rostering scheme
8 substantially limits commerce in (and therefore Plaintiffs’ access to) these
9 handguns, since no dealer can stock these firearms. This results in a significant loss
10 of choice and price competition. SUF 67. Plaintiffs would also suffer increased costs
11 in transporting and transferring their firearms from out-of-state dealers that they
12 would not suffer if the firearms were available for sale in California. SUF 68.

13
14 SAF is a non-profit membership organization incorporated under the laws of
15 Washington with its principal place of business in Bellevue, Washington. SUF 69.
16 SAF has over 650,000 members and supporters nationwide, including many in
17 California. SUF 70. The purposes of SAF include education, research, publishing
18 and legal action focusing on the Constitutional right to privately own and possess
19 firearms, and the consequences of gun control. SUF 71.

20
21 CGF is a non-profit organization incorporated under the laws of California
22 with its principal place of business in San Carlos, California. SUF 72. The purposes
23 of Calguns include supporting the California firearms community by promoting
24 education for all stakeholders about firearm laws, rights and privileges, and
25 securing the civil rights of California gun owners, who are among its members and
26 supporters. SUF 73.
27
28

1 SAF and CGF expend their resources encouraging exercise of the right to
2 bear arms, and advising and educating their members, supporters, and the general
3 public about the legality of particular firearms. The issues raised by, and
4 consequences of, Defendant's policies, are of great interest to SAF and Calguns'
5 constituencies. Defendant's policies regularly cause the expenditure of resources by
6 SAF and Calguns as people turn to these organizations for advice and information.
7
8 SUF 74, 75. Defendant's policies bar the members and supporters of SAF and
9 Calguns, living in California, from obtaining numerous, if not most, handguns. SUF
10 76. At a minimum, Defendants' policies make firearms less accessible to the public,
11 reduce the opportunity for selection and purchase, lessen price competition, and
12 impose additional expenses on the purchase of firearms. SUF 77.

14 SUMMARY OF ARGUMENT

15 This case begins and ends with the fact that California will not roster
16 handguns lacking features which are missing from many, if not the vast majority, of
17 handguns of the kind in common use throughout the United States. Indeed, no new
18 semiautomatic handgun models can be sold in California at all. The challenged
19 requirements constitute a massive ban on handguns whose possession and use is
20 secured by the Second Amendment.

21
22 In unsuccessfully defending its blanket handgun ban, the District of
23 Columbia argued that it could unilaterally determine which arms were too
24 dangerous to be allowed ordinary citizens, and that handguns as a class of weapons
25 failed to meet its criteria. The Supreme Court rejected this argument. The
26 government's disdain for particular arms does not enable it to ban them if their
27
28

1 possession is protected by the Second Amendment. The test is whether the arms at
2 issue are of the kind that would be in common use for lawful purposes.

3
4 Defendant's handgun rostering program also violates basic principles of equal
5 protection, in that it arbitrarily makes distinctions between otherwise identical
6 firearms, inherently making arbitrary distinctions among the people who would
7 possess them, and bars some classes of people from possessing handguns that are
8 perfectly permissible to others. These practices cannot survive Fourteenth
9 Amendment scrutiny.

10 ARGUMENT

11
12 I. The Second Amendment Protects the Acquisition of Arms of the Kind in
13 Common Use for Traditional Lawful Purposes.

14 "[T]he sorts of weapons protected [by the Second Amendment are] those 'in
15 common use at the time,'" *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*,
16 307 U. S. 174, 179 (1939)), "the sorts of lawful weapons that [citizens] possessed at
17 home." *Id.* "[T]he Second Amendment does not protect those weapons not typically
18 possessed by law-abiding citizens for lawful purposes." *Id.* at 625. Handguns plainly
19 satisfy this test:

20
21 It is enough to note, as we have observed, that the American people have
22 considered the handgun to be the quintessential self-defense weapon . . .
23 [H]andguns are the most popular weapon chosen by Americans for self-
24 defense in the home, and a complete prohibition on their use is invalid.

25 *Id.* at 629.

26 The Second Amendment is binding on state actors through the Fourteenth
27 Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).
28

1 Because there is a right to keep and bear firearms, there is, necessarily, a
2 right to acquire them. “[C]ertain unarticulated rights are implicit in enumerated
3 guarantees . . . fundamental rights, even though not expressly guaranteed, have
4 been recognized by the Court as indispensable to the enjoyment of rights explicitly
5 defined.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980). “The right
6 to keep arms, necessarily involves the right to purchase them . . .” *Andrews v. State*,
7 50 Tenn. 165, 178 (1871). A complete ban on gun commerce would violate the
8 Second Amendment right at its core. *United States v. Marzzarella*, 614 F.3d 85, 92
9 n.8 (3d Cir. 2010). The government can no more ban the sale of protected guns than
10 it can ban the sale of protected books, *Virginia v. Am. Booksellers Ass’n*, 484 U.S.
11 383, 393 (1988); contraceptives, *Carey v. Pop. Serv. Int’l*, 431 U.S. 678 (1977);
12 *Griswold v. Connecticut*, 381 U.S. 479 (1965), or perhaps the sale of sex toys,
13 *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008); but see *Williams v.*
14 *Morgan*, 478 F.3d 1316 (11th Cir. 2007).⁷

15 Of course, Defendant is still free to ban “arms” that are nonetheless
16 “dangerous and unusual weapons,” *Heller*, 554 U.S. at 627 (citations omitted),
17 including “sophisticated arms that are highly unusual in society at large.” *Id.*
18 “Historically, weapons like machine guns, sawed-off shotguns, grenade launchers,
19
20
21
22
23

24 ⁷Congress, too, has recognized that the Second Amendment extends to the
25 acquisition of firearms. In enacting the Protection of Lawful Commerce in Arms Act,
26 15 U.S.C. § 7901, et seq., Congress began by referencing the Second Amendment, 15
27 U.S.C. § 7901(a)(1), and thereafter declared among the Act’s purposes “[t]o preserve
28 a citizen’s access to a supply of firearms and ammunition for all lawful purposes,”
and “[t]o guarantee a citizen’s rights, privileges, and immunities, as applied to the
States, under the Fourteenth Amendment to the United States Constitution,” 15
U.S.C. §§ 7901(b)(2), (3).

1 and other high-powered weapons have fallen into this category due to their extreme
2 nature.” *Wilson v. County of Cook*, 2012 IL 112026, at ¶ 46.

3
4 And while “all firearms constituted ‘arms,’” *Heller*, 554 U.S. at 581 (citation
5 omitted), Defendant can ban those weapons which do not meet the historic legal
6 definition of “arms” as used in the Second Amendment – “any thing that a man
7 wears for his defence, or takes into his hands, or useth in wrath to cast at or strike
8 another.” *Id.* (citing 1 A New and Complete Law Dictionary (1771); N. Webster,
9 American Dictionary of the English Language (1828) (reprinted 1989)).

10
11 But the acquisition of handguns of the kind in common use for lawful
12 purposes, the sort of handguns that law-abiding citizens would expect to keep,
13 cannot be prohibited– even if the state would prefer people use different (or no)
14 firearms. In making this point, the Supreme Court notably did not reference any
15 “standard of review” or means-ends balancing test. “It is enough” that handguns, as
16 a general class of arms, are in common use for traditional lawful purposes. *Heller*,
17 554 U.S. at 629.

18
19 Nor did the Supreme Court utilize such tests in resolving *Heller’s* challenge
20 to Washington, D.C.’s bans on the possession of functional firearms in the home,
21 and handgun carrying within the home. With respect to Washington’s complete ban
22 on the possession of functional firearms within the home, the Court simply offered
23 that the ban “makes it impossible for citizens to use [guns] for the core lawful
24 purpose of self-defense and is hence unconstitutional.” *Id.* at 630. This same
25 process, identifying whether a regulation conflicts with a “core protection” of the
26 Amendment without resort to interest-balancing, resolved *Heller’s* challenge to a
27
28

1 requirement that he obtain an unavailable permit to move a handgun inside his
2 home. The D.C. Circuit found the restriction violated the Second Amendment’s core:

3
4 It is sufficient for us to conclude that just as the District may not flatly ban
5 the keeping of a handgun in the home, obviously it may not prevent it from
6 being moved throughout one’s house. Such a restriction would negate the
7 lawful use upon which the right was premised—i.e, self-defense.

8 *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff’d sub nom*,
9 *Heller*.⁸ The Supreme Court affirmed using the same approach, concluding the city
10 had no discretion to refuse issuance of the permit: “Assuming that *Heller* is not
11 disqualified from the exercise of Second Amendment rights, the District must
12 permit him to register his handgun and must issue him a license to carry it in the
13 home.” *Heller*, 554 U.S. at 635.

14 In its methodology, *Heller* repeatedly demonstrated a simple fact that is too-
15 often forgotten: not every constitutional question is answered with balancing tests.
16 Sometimes, interpretation is enough. At other times, categorical rules will apply.
17 Means-ends scrutiny can play a role, but not where the problem is fairly basic. Just
18 as some First Amendment cases turn on the question of whether something
19 constitutes protected speech, and some Fourth Amendment cases turn on whether
20 conduct constitutes a “search” or a “seizure,” *Heller* demonstrates that in the Second
21 Amendment, categorical prohibitions on types of “arms” are resolved by the
22 common-use test, derived from *Miller*. Were balancing tests required to discern
23 whether handguns are protected “arms” under the Second Amendment, *Heller*
24 would have utilized them.
25
26

27
28 _____
⁸Heller did not request a public-carry permit. *Id.*

1 Illinois' Supreme Court, considering a challenge to a so-called "assault
2 weapons" ban, acknowledged the categorical nature of examining a prohibition on a
3 class of arms. Remanding the case for further development, that court explained,
4
5 it cannot be ascertained at this stage of the proceedings whether these arms
6 with these particular attributes as defined in this Ordinance are well suited
7 for self-defense or sport or would be outweighed completely by the collateral
8 damage resulting from their use, making them "dangerous and unusual" as
9 articulated in *Heller*.

10 *Wilson*, 2012 IL 112026, at ¶ 49.

11 This case addresses not so-called "assault weapons," a discrete if
12 inconsistently-defined subset of firearms purportedly possessing uniquely
13 dangerous functions, but handguns—which the Supreme Court has already held are
14 categorically within the Second Amendment's protection. Indeed, the rostering
15 scheme begins with the now-unconstitutional presumption that *all* handguns are
16 "unsafe" until declared otherwise by the state, including *all* new semiautomatic
17 handgun models (since none contain microstamping). The state's burden of showing
18 that somehow, all handguns that do not fit the legislature's complex rostering
19 requirements are outside the Second Amendment's protection as defined in *Heller* is
20 impossible.

21 II. Defendant's Handgun Rostering Program Violates the Second Amendment
22 By Restricting Access to Handguns of the Kind in Common Use for
23 Traditional Lawful Purposes.

24 The handguns banned by Defendant's rostering program – guns that do not
25 microstamp (e.g., all new gun models for the foreseeable future if not forever), guns
26 not incorporating CLIs and/or magazine disconnect mechanisms, guns that have not
27 been (and cannot be) submitted by their manufacturer for government testing, and
28

1 guns that would be perfectly acceptable by the government but for lack of an annual
2 listing fee – are all nonetheless handguns of the kind in common use protected by
3 the Second Amendment. None of these characteristics render a firearm “dangerous
4 or unusual” or militarily “sophisticated,” or establish that it is not of the kind in
5 common use for lawful purposes.
6

7 The Supreme Court required no particular evidence to discern that handguns
8 are in common use for traditional lawful purposes – “that the American people have
9 considered the handgun to be the quintessential self-defense weapon.” *Heller*, 554
10 U.S. at 629. Looking further, the federal government’s latest manufacturing report
11 reveals that in 2011, the latest year for which numbers are available, the nation
12 produced 3,170,990 handguns, of which 2,598,133—81.9%—were not revolvers, and
13 thus, virtually all semi-automatic. See ATF Report, *supra* n.2. Of these, only
14 427,448 were chambered in calibers up to .22, which would be rimfire pistols. The
15 remainder, 68.5% of all handguns manufactured in the United States in 2011,
16 utilized center-fire ammunition calibers. *Id.* Thus, not only are handguns generally
17 arms of the kind in common use for traditional lawful purposes. SUF 1. Semi-
18 automatic handguns with detachable magazines, including those utilizing center-
19 fire ammunition, are in common use for traditional lawful purposes. SUF 2, 3.
20
21

22 The CLIs and magazine disconnect mechanisms required for rostering are
23 rare features, found on perhaps only 11% and 14% of all handguns in the
24 marketplace. Considering California’s particularly harsh and entirely arbitrary
25 enforcement of its CLI requirement, that number of qualified CLI’s is surely lower
26 than even 11% of the market.
27
28

1 Furthermore, microstamping guns currently command exactly 0% of the
2 market for handguns in the United States. As much as California’s legislature
3 would like for these guns to exist, they do not exist. Nor will they probably ever
4 exist. Defendant, certainly, is not expecting them to show up any time soon.
5
6 Likewise, many guns are still protected by the Second Amendment even if they
7 have not been manufactured for many years prior to the advent of the California
8 Handgun Roster, or have been manufactured by a company that does not wish to
9 sell its products in one particular state. And plainly, a gun model deemed “not
10 unsafe” does not somehow alter its characteristics and become “unsafe” simply
11 because a check has not been cashed in Sacramento within the year.

13 The four specific handguns denied Plaintiffs are plainly within the Second
14 Amendment’s protection. New handguns manufactured and offered for sale in the
15 other 49 states without microstamping technology are similarly protected. That the
16 handgun roster law is incompatible with Supreme Court precedent is illustrated by
17 the roster’s banning of Brett Thomas’s High Standard revolver. This is the exact
18 same make and model gun the possession of which the Supreme Court ordered
19 Washington, D.C. to allow Mr. Heller. This gun might not appear on the state’s list
20 of approved handguns, but according to the Supreme Court, it appears in the
21 Second Amendment.
22

24 The handguns denied Ivan Peña and Doña Croston are likewise plainly
25 within the Second Amendment’s protection. They cannot be considered “dangerous
26 and unusual” by any stretch of imagination. Croston’s gun appears on Defendant’s
27 approved list, albeit in different colors, but is unavailable in the black/stainless
28

1 finish because it was not made available for testing in that particular color before
2 the CLI and magazine disconnect requirements came into effect. It is not as though
3 Croston’s gun failed any safety testing; California regulators refuse to test the gun
4 because it does not contain features missing from the overwhelming majority of
5 American handguns – as acknowledged by the California Legislature in enacting
6 the requirements. Ivan Peña’s gun was once deemed safe enough for sale, but is
7 only unavailable because its listing was not renewed. The gun did not suddenly
8 become dangerous on January 1, 2006, when its listing expired because the
9 manufacturer would not pay a fee and fill out a piece of paper.
10
11

12 The situation with respect to Roy Vargas’s handgun is absurd. It makes no
13 sense that Vargas cannot simply purchase a Glock 21 SF with an ambidextrous
14 magazine release, but that he can purchase the right-handed version of this exact
15 same gun, and undergo the additional burden and expense of having the Glock
16 factory make him a custom modification– resulting in the exact same handgun that
17 Defendant will not place on the roster.
18

19 The empirical evidence regarding handguns in common-use is conclusive, but
20 it also bears noting that nothing about the lack of CLIs, magazine disconnect
21 devices, or microstamping makes handguns “dangerous and unusual.” Indeed, the
22 magazine disconnect and CLI requirements contravene the state’s own gun safety
23 policies. The state mandates that all handgun purchasers pass a handgun safety
24 test that specifically teaches people not to rely on gimmicks like magazine
25 disconnects and CLIs. The state makes it absolutely clear that all guns must be
26 treated as loaded, that the absence of a magazine is not to be interpreted as a sign
27
28

1 that the gun is unloaded, that the only way to know guns are unloaded is to
2 physically inspect the chamber. Even then, treating all guns as loaded promotes
3 safe handling practices. And on top of the mandatory instruction on such practices,
4 and the requirement that handgun purchasers demonstrate safe handling
5 techniques, the state mandates that each handgun sale be accompanied by the sale
6 of a lock or a guarantee that room exists in a safe for the gun.
7

8 The state's instructions with respect to safe gun handling and unloading are
9 unassailable. Whatever the merits of the state's safe storage requirements, they do
10 not ban a single gun, while making the magazine disconnect and CLI requirements
11 redundant. It is irresponsible to rely on magazine disconnects and CLIs for gun
12 safety, which is perhaps why the market has obviously rejected these features, and
13 why the Defendant has such a difficult time agreeing to a standard of what actually
14 constitutes a CLI.
15

16 The application of these requirements leads to absurd results. Why is the
17 Springfield Armory XD-45 acceptable in almost any finish, but will not even be
18 considered for testing in Bi-Tone? If guns failing to include CLIs and magazine
19 disconnects are unacceptably dangerous, why permit the continued manufacture
20 and introduction of old, allegedly "unsafe" models? Croston is being denied the gun
21 of her choice not because of any intrinsic quality it possesses, but because Croston
22 prefers to have the gun in a particular color.
23
24

25 Since microstamping is, for all intents and purposes, more a piece of science
26 fiction than commercial reality, it can hardly be said that guns *lacking* this concept
27 are "dangerous and unusual." Microstamping may not be dangerous, but it is not
28

1 merely “unusual”—it is non-existent. And plainly, administrative failures—the lack
2 of a fee to support a gun’s continued listing, or the lack of a manufacturer to support
3 the rostering of an historic firearm such as Heller’s—have nothing to do with
4 whether a gun is “dangerous and unusual.”
5

6 California’s legislature, operating in a pre-*Heller* environment, approached
7 the handgun issue backwards from a constitutional, post-*Heller* perspective. The
8 legislature sought to declare almost all handguns “unsafe” for failing to conform to
9 its design preferences, or for the manufacturer’s inability or unwillingness to pay
10 for and participate in the state’s regulatory scheme. Consciously, the state sought to
11 “drive” the market towards its preferred outcomes. But *Heller* stands for the
12 proposition that it is the regulatory environment that must accommodate itself to
13 the choices made by the lawful, constitutionally-protected market for arms, and not
14 the other way around.
15

16
17 III. Defendant’s Handgun Rostering Program Violates the Fourteenth
18 Amendment’s Equal Protection Clause.

19 The Equal Protection Clause “is essentially a direction that all person
20 similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living*
21 *Center*, 473 U.S. 432, 439 (1985) (citation omitted). Strict scrutiny usually applies to
22 government classifications that “impinge on personal rights protected by the
23 Constitution.” *Id.*, 473 U.S. at 440 (citations omitted). “Where fundamental rights
24 and liberties are asserted under the Equal Protection Clause, classifications which
25 might invade or restrain them must be closely scrutinized.” *Hussey v. City of*
26 *Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Virginia Board of*
27 *Elections*, 383 U.S. 663, 670 (1966)).
28

1 The Supreme Court rejected rational basis as a standard of review for Second
2 Amendment claims, holding that the standard of review in Second Amendment
3 cases is no less rigorous than for evaluating other enumerated rights:
4

5 Obviously, [rational basis] could not be used to evaluate the extent to which a
6 legislature may regulate a specific, enumerated right, be it the freedom of
7 speech, the guarantee against double jeopardy, the right to counsel, or the
8 right to keep and bear arms.

9 *Heller*, 554 U.S. at 629 n. 27 (citing *United States v. Carolene Products Co.*, 304 U.S.
10 144, 152 n.4 (1938)). Second Amendment rights are fundamental. *McDonald*, 130 S.
11 Ct. at 3042.

12 That does not mean that there is a one-size-fits-all standard for Second
13 Amendment claims, in those contexts where means-ends scrutiny is relevant (and it
14 is not relevant to resolve, under the common-use test, Plaintiffs' primary claim,
15 supra). "[A]s has been the experience under the First Amendment, we might expect
16 that courts will employ different types of scrutiny in assessing burdens on Second
17 Amendment rights, depending on the character of the Second Amendment question
18 presented." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

19 "Borrowing from the Court's First Amendment doctrine, the rigor of this
20 judicial review will depend on how close the law comes to the core of the Second
21 Amendment right and the severity of the law's burden on the right." *Ezell v. City of*
22 *Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (citations omitted).

23 Labels aside, we can distill this First Amendment doctrine and extrapolate a
24 few general principles to the Second Amendment context. First, a severe
25 burden on the core Second Amendment right of armed self-defense will
26 require an extremely strong public-interest justification and a close fit
27 between the government's means and its end. Second, laws restricting
28 activity lying closer to the margins of the Second Amendment right, laws that
merely regulate rather than restrict, and modest burdens on the right may be

1 more easily justified. How much more easily depends on the relative severity
2 of the burden and its proximity to the core of the right.

3 *Id.*

4 Thus, while courts typically reduce the level of scrutiny given laws
5 addressing criminal misconduct or irresponsibility, see, *e.g.*, *United States v.*
6 *Chester*, 628 F.3d 673 (4th Cir. 2010) (intermediate scrutiny for domestic abuser),
7
8 or conduct that the court believes to fall outside the Second Amendment’s “core”
9 purpose, see, *e.g.*, *Masciandaro* (possessing handgun in park), courts employ higher
10 levels of scrutiny where the conduct being impacted is closer to the Second
11 Amendment’s perceived “core,” and/or exercised by responsible, law-abiding adults.
12 “[W]e assume that any law that would burden the ‘fundamental,’ core right of
13 self-defense in the home by a law-abiding citizen would be subject to strict
14 scrutiny.” *Masciandaro*, 638 F.3d at 470; *Ezell*, 651 F.3d at 708 (greater than
15 intermediate “if not quite strict scrutiny” for regulating traditional gun ranges).
16

17 To the extent Defendant’s practices implicate equal protection concerns, the
18 proper standard of review would be strict scrutiny. After all, at issue is the
19 acquisition of handguns, by law-abiding, responsible adults, for self-defense within
20 the home.

22 The sort of classifications created by the handgun roster and microstamping
23 requirements are unacceptable under any sort of scrutiny reserved for enumerated
24 rights. In California, unrostered guns are permitted by private importation or as
25 intra-family gifts, just not as retail purchases. The roster thus privileges people who
26 move into the state, or who have family out-of-state. Yet all people, not just
27 relatives, may transfer unrostered handguns inside the state. These classifications
28

1 make no sense. Any of the Plaintiffs might live next door to individuals who
2 lawfully obtained the same handguns denied by the roster law, prior to moving to
3 the state, or as a gift from an out-of-state relative.
4

5 California's wide exemptions for law enforcement personnel, allowing them to
6 purchase unrostered guns for personal use, is completely irrational. If a gun is
7 unacceptably dangerous, it is odd to allow it to those perhaps most likely to use it.
8 And if the harm to be ameliorated is the unauthorized use of guns by people not
9 knowledgeable in their use, police weapons, including those owned privately by
10 police officers, are no less likely to be stolen or mishandled by unauthorized users.
11

12 The exceptions for curios and relics seems particularly egregious. Brett
13 Thomas's High Standard revolver is not quite old enough to be exempt from the
14 rostering law as a curio or relic, though in perhaps ten years, it would qualify.
15 Ironically, Mr. Heller's particular gun might qualify today based on the fact of its
16 involvement in an historic Supreme Court case. 27 C.F.R. § 478.11. But then, if
17 Thomas prevails here, his gun, too, by that virtue, might also be transformed into
18 an exempted curio or relic.
19

20 Then there are the exceptions for movie and television production, which are
21 not merely irrational, but also underscore the fact that unrostered handguns are so
22 common in American culture that audiences would not expect to see only those guns
23 approved by Defendant in realistic depictions of American life.
24

25 The distinctions between different guns on the basis of whether they have an
26 acceptable chamber loaded indicator are also unconstitutional given the wholly
27 arbitrary manner in which California regulators determine whether a CLI is
28

1 sufficient – asking around at the office whether random regulatory employees
2 understand the CLI’s message. While the California Legislature might have
3 established “minimal guidelines,” *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999)
4 defining a CLI based on design intent and characteristics, Cal. Penal Code § 16380,
5 the regulatory practice is untethered from the legislative standard and in the end
6 amounts to “because we said so.” Of course, since the government does not ban
7 revolvers or exceedingly popular handguns that fire rimfire rounds such as the .22,
8 CLIs will always be missing from significant numbers of handguns.

9
10
11 These and other senseless distinctions are inevitable considering the
12 audacious mission of the handgun roster law: to make a complete list of all lawful
13 handguns, and substitute the design and feature preferences of legislators and
14 regulators for that of a market comprising hundreds of millions of people over the
15 course of generations. That this project intrudes into the exercise of a fundamental
16 right calls for its abandonment.

17
18 The D.C. City Council reluctantly came to the same conclusion. Having
19 adopted the California roster as their own, with all the usual public assurances that
20 their law was constitutional, District officials re-considered upon being served with
21 a very similar motion for summary judgment. On June 17, 2009, in the United
22 States District Court for the District of Columbia, the District gave notice that it
23 was adopting an emergency regulation, abandoning its reliance on the California
24 roster, by creating a “District roster” that, while still unconstitutional, eliminated
25 many of the burdens associated with the laws challenged in that (and this) action.
26 The District based its emergency rule-making, in part, on the following findings:
27
28

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

7 Exhibit J .

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

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

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

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

1 California Legislature will be able to avoid summary judgment by timely repealing
2 or significantly modifying its roster law.

3
4 CONCLUSION

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

13 Dated: October 25, 2013

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