

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE KIMBERLY J. MUELLER, JUDGE

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IVAN PENA, et al.,

Plaintiffs.

vs.

No. CV. S-09-1185

STEPHEN LINDLEY, Chief of
the California Department
of Justice Bureau of
Firearms,

Defendant.

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REPORTER'S TRANSCRIPT

CROSS MOTIONS FOR SUMMARY JUDGMENT

MONDAY, DECEMBER 16, 2013

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Reported by: KIMBERLY M. BENNETT, CSR #8953

RPR, CRR, RMR

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SACRAMENTO, CALIFORNIA

DECEMBER 16, 2013, 10:05 A.M.

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THE CLERK: Calling Civil Case 09-1185; Pena, et al. versus Cid. This is on for cross-motions for summary judgment.

THE COURT: Good morning. Appearances, please.

MR. GURA: Good morning, Your Honor. Alan Gura for plaintiffs.

THE COURT: Good morning, Mr. Gura.

MR. KILMER: Don Kilmer for the plaintiffs, Your Honor.

THE COURT: Good morning, Mr. Kilmer.

MR. HAKL: Good morning, Your Honor. Anthony Hakl, Deputy Attorney General, on behalf of defendants. And I've got a throat lozenge in this morning, I'm working on a cold.

THE COURT: Good morning, Mr. Hakl.

The Court has hot tea for that reason as well. We'll take breaks as needed.

I have several questions. I think we can get through what we need to in an hour at the outside. Let me ask all of my questions, and then if there is something you think not fully covered by the briefing or our discussion, then you could briefly argue at the end, a few minutes each.

First, Mr. Gura, Mr. Kilmer, are you dividing the

1 argument in a certain way?

2 MR. GURA: We don't plan to. I suppose, if something
3 arises where Mr. Kilmer knows more than I do, but I'm
4 prepared to handle the argument.

5 THE COURT: To take the lead. All right.

6 And you may remain seated there. That's fine with the
7 Court.

8 Just so I understand exactly -- I've looked at the
9 complaint. I've looked at the motions. In terms of the
10 focus of the plaintiffs' case at this stage, are you focusing
11 on the entire Act when it comes to the facial challenge and
12 the later amendments with respect to any as-applied
13 challenges? Is there a way to distinguish the facial and the
14 as-applied? And is that the right way to do it?

15 MR. GURA: Should I sit or stand, Your Honor?

16 THE COURT: Whatever you're most comfortable with.
17 The key is that you speak into a microphone so the court
18 reporter can hear you.

19 MR. GURA: Sure. Well, we argue that this rostering
20 requirement violates the Second Amendment on its face, but
21 also as applied. To the extent that the Court might devise
22 some way of thinking that it may have some appropriate
23 application, we can't think of any, but sometimes courts and
24 other parties see things differently, then at the very least
25 we think that the defects that we've identified in the

1 roster, the things that we're challenging, the requirements
2 to have chamber load indicators, magazine disconnects, the
3 administrative requirements that make it impossible to place
4 guns on the roster unless the manufacturer/importer is
5 compliant, the fact that things fall off the roster for
6 administrative reasons such as nonpayment, the microstamping
7 requirement we are challenging, we are also challenging the
8 scheme as a whole because we think it's riddled with too many
9 exceptions.

10 The theory of this --

11 THE COURT: I understand all that. Is there a way to
12 just, in a sentence -- are the facial and the as-applied
13 challenges the same?

14 MR. GURA: We believe they are, but we have to
15 preserve our arguments. If the Court wants -- believes that
16 some of these aspects are constitutional and others are not,
17 then we'll take whatever relief we can get.

18 THE COURT: All right. And then to the extent you're
19 challenging the listing fee, the annual \$200 fee, that's as a
20 prerequisite to rostering, not as exceeding what's needed to
21 cover administration. Do I have that right?

22 MR. GURA: The real problem with the fee -- we haven't
23 even addressed the issue of whether the \$200 is something
24 that's fairly tailored to whatever the state spends the money
25 on. But the basic problem with it is, is that once a handgun

1 is paid for and is listed on the roster, that this fee has to
2 come in every year, and if it doesn't, then suddenly the
3 handgun becomes unsafe. And we believe that a handgun,
4 whether it's safe or unsafe, doesn't change based upon the
5 fact that a fee has been paid or not. There could be a
6 consumer who wishes to purchase that handgun, the handgun is
7 still, perhaps, available in the stream of commerce, and the
8 fact that a manufacturer/importer doesn't send in the check
9 deprives the person of that access, that's unconstitutional.

10 THE COURT: I understand that argument.

11 And your position is that even if the manufacturer is
12 making a concerted determination that it no longer wishes the
13 gun to be rostered, that the individual who wants to purchase
14 the gun, that individual's rights trump the manufacturer's in
15 the commercial sell context. Is that right?

16 MR. GURA: That's correct, Your Honor. Once an
17 article has been manufactured, it's in the stream of commerce
18 in the United States, people buy and sell it in the ordinary
19 course of commerce, then people should be able to purchase
20 it, even if you have a manufacturer that, for example, just
21 likes to change the model number every year, and they like to
22 always find some new reason to change things up in the
23 catalog, or perhaps the manufacturer has chosen that they're
24 not against Californians having this gun, but for whatever
25 reason they wish to focus their efforts on marketing and

1 supplying other markets, or for whatever reason, people --

2 THE COURT: What if the considered determination is
3 they don't want it sold in California such that it could be
4 subject to the statute?

5 MR. GURA: Well, I don't believe that a manufacturer
6 could -- has any right to prevent an article that's already
7 been manufactured from being sold. Once they've sold it to a
8 wholesaler, and it's gone to a dealer, and it's entered the
9 stream of commerce, if they don't have any sort of
10 contractual right to recall it from the dealership, then I
11 suppose people can buy it.

12 THE COURT: All right. I understand.

13 MR. GURA: Thanks.

14 THE COURT: For both of you now, I have questions
15 about standing. Even though it's not really addressed in the
16 briefing, it is raised as an affirmative defense. Even if
17 the parties don't think it's an issue, it's a threshold
18 question this Court needs to address, and I need to satisfy
19 myself that there is standing.

20 So, starting with you, Mr. Gura, just so I'm clear,
21 looking at the established tests for evaluating standing,
22 exactly what is the injury or injuries that plaintiffs suffer
23 that confer standing?

24 MR. GURA: The injuries are several, Your Honor. The
25 leading case here, I believe, is Carey versus Population

1 Services from the Supreme Court in the late 1970s, I believe
2 it's 1976, and the whole line of cases that flow from there.

3 And what Carey held was -- in Carey, you had a
4 situation where only licensed pharmacists could sell
5 contraceptives, you couldn't get mail order contraceptives.
6 And the Supreme Court held that there was standing, in fact,
7 to challenge that law, because whenever you limit the
8 distribution of an article, you invariably stifle
9 competition, you raise prices, you limit access, you limit
10 choice, and all of those things hurt the consumers who have
11 the right to make family planning decisions.

12 More recently there was a Fifth Circuit case called
13 NRA versus BATFE, which came out last year. And here it was
14 about handguns. The plaintiffs in that case challenged the
15 federal ban on licensed dealers selling handguns to adults
16 aged 18 to 20 years old. And the federal government came in
17 with a standing challenge that was rejected both at the
18 district court and by the Fifth Circuit; although, the Fifth
19 Circuit rejected the claim on its merits.

20 And there what the courts said is, look, people have
21 the right to -- they're asserting they have a right to
22 purchase these handguns, and if that's the case, then a
23 prohibition on the sale of those handguns to them injures
24 them because it limits their access, it limits their ability,
25 it raises prices. And, perhaps at a more basic level, it

1 simply prevents them from engaging in the desired
2 transaction.

3 When you have somebody who stands ready to engage in a
4 transaction, that transaction is thwarted by government
5 action, they refrain from engaging in that transaction
6 because it would subject them or others to criminal
7 liability, they're injured for Article III purposes. And
8 that injury is redressable by the court, and it's fairly
9 traceable to the law.

10 Here you have a law that says these guns cannot be
11 sold or imported into the state for sale, they cannot be
12 offered for sale. Obviously that, we would contend, number
13 one, it prevents people from engaging in their desired
14 transactions. And it also, to the extent that even if they
15 could somehow theoretically purchase these guns, it certainly
16 limits choice and it raises prices by limiting the number of
17 outlets available.

18 I would add, Your Honor, that it's not just a simple
19 matter of the way that California law is structured for
20 people to actually buy these guns from out-of-state sellers,
21 because the way that the computer system is set up, and I'm
22 sure Mr. Hakl can talk about this, the dealer record of sale
23 system requires that California ID. And so it's not like
24 someone can just come here from another state with a gun and
25 say, here, I'm offering to sell you this, and let's do a

1 private party transaction.

2 The only way I think a private party transaction could
3 work in this area is if you had two Californians who are
4 already -- one of them had the gun, and then they could sell
5 to -- you know, through the dealer to the other individual.
6 But there is no way in which you can import into the state
7 for sale, or just show up with this gun from other places.

8 THE COURT: We'll get into the private party
9 transactions in just a moment.

10 But are you conceding that the individual plaintiffs,
11 in fact, have no real risk of prosecution, because the
12 statute applies to sellers?

13 MR. GURA: The individuals are harmed because they
14 can't -- they can't -- well, they couldn't import the handgun
15 for sale. They couldn't cause it to be imported for sale to
16 themselves. They also can't --

17 THE COURT: So, that's how they would risk
18 prosecution?

19 MR. GURA: But they also simply can't engage in the
20 transaction.

21 For example, in the NRA case, and also in the Carey
22 case, the arguments were that the sellers couldn't -- I mean,
23 we saw this argument in --

24 THE COURT: What in the statute says that the buyer
25 would be prosecuted if it's a simple --

1 MR. GURA: The buyer -- I don't see that the buyer can
2 be prosecuted, but the buyer has standing because the buyer
3 is injured by not being able to purchase.

4 THE COURT: But not by risk of prosecution. You
5 concede that.

6 MR. GURA: Yes, Your Honor, as far as -- we concede
7 that.

8 THE COURT: Mr. Hakl, any response to what you've
9 heard on standing? Any authority the Court should consult in
10 satisfying itself on that point?

11 MR. HAKL: Your Honor is correct, we have not briefed
12 standing or argued it in our papers. As I understand
13 plaintiffs' claim, it's that they are unable to purchase the
14 handguns that they desire from the individuals that they want
15 to purchase them from. That's the alleged injury.

16 THE COURT: And you're satisfied that that --

17 MR. HAKL: I'm satisfied that they can't purchase the
18 guns that they want from the individuals that they want, from
19 whom they wish. There may be alternative channels that they
20 can get these particular guns. But the claim is that they've
21 identified transactions that they want to engage in, that
22 they think are constitutionally protected, and they can't do
23 that. And that is fine for me for purposes of individual
24 standing.

25 THE COURT: All right.

1 MR. HAKL: There is a separate issue of organizational
2 standing, which some courts have wrestled with. We have not
3 argued that, but that is a reasonable question in light of
4 some of the cases out there. As far as I know, I think,
5 Mr. Gura -- maybe the NRA case is the big organizational
6 standing case that Your Honor might want to consult.

7 But that's -- so when it comes to standing, there is
8 an individual issue and an organizational issue, but we've
9 got six parties here, so -- but we haven't argued that in our
10 briefs, Your Honor.

11 MR. GURA: Your Honor, if I may.

12 THE COURT: I know that, but it's a question the Court
13 asks.

14 MR. GURA: Two points, Your Honor.

15 First of all, with respect to organizational standing,
16 there are actually two kinds of standing an organization may
17 have.

18 One of them is organizational standing, which is the
19 type of harm the organization itself receives to its mission
20 by virtue of a law.

21 The other kind of standing, which I think is plainly
22 established here, is associational standing; that is, an
23 organization has the right to assert the rights of its
24 members whose rights are injured. And we have members in
25 California from these organizations. There is no dispute

1 that the membership is interested in acquiring these
2 handguns, their participation in the case is not strictly
3 necessary. And so under -- I think it's Hunt versus
4 Washington Apple Growers, and that line of cases.

5 The Ezell case in the Seventh Circuit, Your Honor,
6 dealt with this on behalf of SAF. And there is a little
7 discussion of that specifically in the Ezell case, if the
8 Court is interested in that.

9 And then, Your Honor, Mr. Kilmer reminds me that he
10 actually does have some particular experience with the
11 criminal prosecution in this context. And I would defer to
12 him, if we may let him explain.

13 THE COURT: Very briefly.

14 MR. KILMER: Yes, very briefly --

15 THE COURT: Can you slow down and make certain you're
16 speaking into the microphone.

17 MR. KILMER: There actually is a case docketed in this
18 district, Your Honor, United States versus McGowan. The
19 current case is currently on hold. But I'm defense counsel
20 for one of the defendants in that case. And it's a case
21 where the United States Government actually brought criminal
22 charges of conspiracy in cases where these off-roster guns
23 were being sold through licensed dealers by exempt parties,
24 police officers, to members of the public. So, there is a
25 very real threat of prosecution. There is actually a case

1 pending in this district.

2 THE COURT: M-C-G-O-W-A-N?

3 MR. KILMER: It's United States versus McGowan. I'm
4 happy to e-mail the case number to the Court.

5 THE COURT: Any reason I couldn't take judicial notice
6 of that criminal action, Mr. Hakl?

7 MR. HAKL: There is no reason why you couldn't take
8 judicial notice of the case for -- I'm not familiar with the
9 case, other than what's been in the newspaper a little bit, I
10 think, on that case.

11 THE COURT: It would be the fact of the charges being
12 filed.

13 MR. HAKL: The fact of the charges, no objection to
14 that, Your Honor.

15 THE COURT: All right. All right. Let's move on to
16 some provisions of the law.

17 And, Mr. Hakl, beginning with you, that private party
18 transaction, your position is that each of the individual
19 plaintiffs could obtain the firearm they want through a
20 private party transaction. Do I have that right?

21 MR. HAKL: That's correct.

22 THE COURT: And so explain, taking into account what
23 you've heard, how they can do that without any risk of
24 prosecution. Is importation one way they can do that? And
25 doesn't that raise the risk of prosecution even if, as the

1 seller, they are not at risk, isn't the buyer at risk?

2 MR. HAKL: Generally speaking, the roster is focused
3 on bringing new handguns to market. There are exceptions.
4 For example, if Mr. Gura owned a handgun that I wanted to
5 purchase, and he wanted to sell it to me, he and I could go
6 to a licensed firearms dealer and basically engage in a
7 transaction whereby his handgun would be transferred to me,
8 and it doesn't need to be on the roster to do that.

9 THE COURT: And no one in that transaction, including
10 the dealer, would risk prosecution?

11 MR. HAKL: Correct.

12 The plaintiffs' response to that is they're not aware
13 of anyone out there who has this particular gun that they
14 could locate in California and engage in a private party
15 transaction, and that they shouldn't have to be able to do
16 that.

17 THE COURT: Is there language on the face of the
18 statute that allows the Court to confirm that interpretation?

19 MR. HAKL: Yeah. It's in our brief where we lay out
20 the background section of the Unsafe Handgun Act. I do
21 provide the citation to the particular statute that allows
22 for a private party transaction.

23 THE COURT: All right. I thought I had read the
24 statutes, but I will -- sometimes statutes need multiple
25 readings.

1 MR. HAKL: I can just flip through here --

2 THE COURT: The flip side of the question, it is your
3 position that the UHA --

4 MR. HAKL: I found the private party transaction.

5 THE COURT: All right.

6 MR. HAKL: It's Section 32110(a).

7 THE COURT: Of?

8 MR. HAKL: The California Penal Code.

9 THE COURT: It is the Penal Code. All right.

10 Any disagreement that that's a relevant statute here?

11 MR. GURA: No disagreement that the statute is
12 relevant, Your Honor. But as far as standing is concerned,
13 we disagree that the availability of private party
14 transactions is relevant, because even if you can find
15 somebody who has a gun at home, that's very different than
16 being able to buy it at a store, and it's very different than
17 having access to something in the regular stream of commerce.

18 And the cases, Carey versus Population Services, NRA,
19 and, in fact, I forgot to mention a third case, Your Honor,
20 which I consider to be interesting in this field, Doe versus
21 Bolton, an abortion case from the mid-seventies, I believe
22 one of the issues in that case was a limitation as to which
23 types of hospitals could perform abortions. And there, of
24 course, there was standing on the part of the plaintiffs, who
25 would be the ones obtaining the abortions, even though the

1 restriction was on limiting the number of sellers, as you
2 were, of the services.

3 So, it's -- we believe it's well recognized that when
4 the government constricts choice, limits access, bars avenues
5 for people to exercise conduct, then it's harming them.

6 THE COURT: I understand those positions.

7 Moving on beyond standing now, and looking at the
8 statute, is "responsible party" defined anywhere, Mr. Hakl,
9 in terms of who can pay the fee if the manufacturer is not?

10 MR. HAKL: I think the only -- only a manufacturer can
11 submit a firearm and pay the fee for rostering.

12 THE COURT: But "responsible party" is not defined in
13 the statute?

14 MR. HAKL: Not that I'm aware of.

15 THE COURT: Is it clarified in any legislative
16 history?

17 MR. HAKL: Not that I'm aware of, Your Honor.

18 THE COURT: All right.

19 Anything on that, Mr. Gura?

20 MR. GURA: Yes, Your Honor. This is in Subsection S
21 of -- let me read to you first, then I'll scroll up and get
22 the number. The law defines "responsible party" as
23 "includes, but is not limited to, firearm manufacturers/
24 importers and law enforcement agencies." And that is under
25 the definition of key terms, Title 11 of the California Code

1 of Regulations, Section 4049.

2 THE COURT: All right.

3 MR. HAKL: I think it's in the regulations, Your
4 Honor, not the statute.

5 THE COURT: Right. That would be the suggestion.

6 And then, Mr. Hakl, again for you, is a gun ever
7 delisted once it's on the roster for any reason other than
8 failure to pay the annual fee?

9 MR. HAKL: I suppose it could be, Your Honor. I'm
10 not -- if, for example, it were to come to the attention of
11 the department in some way that the roster -- that the
12 firearm doesn't comply with some requirement, I think it can
13 be removed.

14 In terms of the firearms in this case, the only one
15 that's been removed from the roster has been because the fee
16 -- as far as we can tell, the fee hasn't been paid. But
17 there are other ways that it could come off the roster, I
18 believe.

19 THE COURT: All right. And a follow-up question,
20 before I hear from Mr. Gura if he has anything, just so I'm
21 clear in terms of understanding the operation of the law, a
22 semiautomatic handgun rostered before 2007 is grandfathered,
23 and not subject to the CLI, the MDM, and the microstamping
24 requirements, right?

25 MR. HAKL: There are handguns that were on the roster

1 when the various provisions became in effect, and they
2 remained on the roster after that.

3 THE COURT: Those are semiautomatics.

4 MR. HAKL: There are handguns that were grandfathered.

5 THE COURT: Semiautomatics.

6 MR. HAKL: Yes.

7 THE COURT: I want to get into some of the numbers in
8 just a bit, but any response to anything you've just heard?
9 Any dispute?

10 MR. GURA: Not exactly a dispute, Your Honor. We
11 believe that the DOJ is allowed to retest a certain
12 percentage of firearms every year, and on occasion I believe
13 that they've done that.

14 MR. HAKL: And, Your Honor, if it helps Your Honor, I
15 do have representatives from the Bureau of Firearms here that
16 do know quite a bit about the actual technical operation of
17 the --

18 THE COURT: This isn't an evidentiary hearing.

19 MR. HAKL: All right.

20 THE COURT: I mean, at this point I'm not
21 contemplating asking for supplemental briefing. This is
22 summary judgment, so you're stuck with the record that you
23 have.

24 MR. HAKL: I understand.

25 THE COURT: If you need to consult with them before

1 answering a question, let me know.

2 Just, finally, on the law itself, I don't know if it
3 matters, but is California at this point the only state with
4 the microstamping requirement that's actually in effect by
5 virtue of the department's declaration?

6 MR. HAKL: As far as I know, but I know it's been
7 considered by Congress, it's been considered by other states.
8 But I'm -- I just got a nod from my colleague in the back
9 that it doesn't look like it's been passed by other states,
10 but it's been considered at the federal level, bills have
11 been introduced --

12 THE COURT: Do you agree with that, Mr. Gura, just in
13 terms of the way the law is developing, and whether or
14 not there are any other --

15 MR. GURA: I'm not aware of any other laws that have
16 microstamping.

17 THE COURT: All right. Are there any other challenges
18 of the nature currently before this Court that have been
19 brought against the UHA?

20 MR. GURA: Your Honor, not that I'm aware of.

21 THE COURT: All right.

22 MR. HAKL: I know that -- go ahead, Mr. --

23 THE COURT: Attacking the provisions that are --

24 MR. GURA: I'm not aware of any.

25 We had a case in DC that we filed that was very

1 quickly resolved when DC changed its law to avoid the
2 lawsuit. That was years ago.

3 THE COURT: I'm aware of that.

4 Mr. Hakl.

5 MR. HAKL: No lawsuits like this one, Your Honor.

6 Massachusetts has a rostering scheme. There was a lawsuit --

7 THE COURT: I'm talking about the California law.

8 MR. HAKL: I'm sorry. No. No other -- this is the
9 case, Your Honor.

10 THE COURT: All right.

11 Turning now to this Court's scrutiny of the law,
12 assuming that I do scrutinize the law, starting with you,
13 Mr. Gura, can you help me understand your position? Courts
14 often defer to legislatures, so what's the best authority for
15 providing this Court with guidance on how to take account of
16 any deference due?

17 Assume for sake of argument that I decide intermediate
18 scrutiny is the proper level of scrutiny.

19 MR. GURA: Your Honor, the leading case as far as
20 deference would be Heller. And Heller clarified, once again,
21 and brought the Second Amendment into the rest of the Bill of
22 Rights, and held that there is no presumption of
23 constitutionality, as we learned way back in Footnote 4 of
24 Carolene Products, for laws that implicate the Bill of
25 Rights. It's a fundamental right, we know that from

1 McDonald. And so there is no presumption of
2 constitutionality, and deference should be limited.

3 It's interesting that --

4 THE COURT: Is there deference to legislative
5 findings? If the legislature has engaged in fact finding, do
6 I defer to those?

7 MR. GURA: Your Honor, we don't believe that the Court
8 should. The legislature will always find that its laws are
9 reasonable and just and wise. And the legislature would
10 never pass a law on any subject for which it wouldn't assert
11 that it's wholesome and useful and doesn't violate the
12 Constitution.

13 The Court exercises an independent judgment. This is
14 a co-equal branch of the government. And this is where
15 constitutionality gets tested. And so while the legislative
16 findings should be considered, of course, we don't think that
17 they should necessarily be ignored, I don't know that the
18 Court should simply stop and say, well, there's been a
19 finding and therefore that's as far as it goes.

20 Intermediate scrutiny requires still the government to
21 bear the burden of proving that there is a substantial fit
22 between an important regulatory in trust and the regulation
23 at stake. And so if the fit is not good enough, then
24 obviously the law is not going to survive constitutional
25 review, even under intermediate scrutiny.

1 And courts have been very inconsistent, I'll -- I must
2 admit, Your Honor. In the Second Amendment field, we've seen
3 intermediate scrutiny cases that have been more or less
4 deferential. Some of the ones that have been -- in
5 particular in the Fourth Circuit I recall a variety of cases,
6 and we can offer supplemental briefing if you want, but I'm
7 sure it's fairly easy to locate, cases where repeatedly the
8 Fourth Circuit had remanded to the district court for
9 additional fact finding and additional support to sustain
10 some laws that one would not imagine to be unconstitutional,
11 things like the domestic violence prohibition, things like
12 the -- I believe there was something else relating to -- with
13 a 922 recently. And I have the cases, we can brief it. But
14 the court said, look, it's nice that, obviously, Congress
15 felt it had a good reason to do this, but we actually do need
16 facts, we do need some evidence, we do need some
17 justification, and there is going to need to be a substantial
18 fit.

19 We submit that, obviously, the state has an interest
20 in reducing gun violence and gun accidents, there is no
21 dispute about that. However, to ban all new semiautomatic
22 models because they lack microstamping is not a substantial
23 fit to achieving those goals. Nor is it a substantial fit to
24 the state's interests to say that all of these firearms
25 henceforth shall have chamber loaded indicators or magazine

1 disconnect devices, when the state's own handgun safety
2 manual teaches people that the way you can tell that a
3 handgun is unloaded is by emptying it, and looking at it, and
4 verifying that it's unloaded. And that's --

5 THE COURT: I understand that argument.

6 Accidental -- the concern -- the substantial public
7 interest in preventing accidental deaths extends to the
8 deaths of children who aren't reading those manuals.

9 MR. GURA: Sure. But children may also not understand
10 anything about what a chamber loaded indicator is, children
11 may not know or care about whether or not a magazine is in or
12 outside the handgun.

13 In any event, the rights of law-abiding Americans are
14 not reduced to what is fit for children who should always be
15 supervised when it comes to firearms, if they have access to
16 them at all.

17 We are dealing with a right that is designed for, to
18 be enjoyed by, responsible, law-abiding adult citizens. And
19 to so drastically curtail the market for handguns in common
20 use because of these requirements we submit would fail
21 intermediate scrutiny, even if that were the test.

22 THE COURT: I understand those arguments.

23 So, Mr. Hakl, it's not disputed that we have here
24 law-abiding citizens who wish to use the firearms identified
25 in protection of hearth and home, that's not -- I don't see

1 great evidence on that point, but it's not disputed either,
2 correct?

3 MR. HAKL: Correct.

4 THE COURT: All right. So, assuming -- I mean, I -- I
5 understand your position that intermediate scrutiny may not
6 be the right test, but assume for sake of argument that the
7 Court does apply that level of scrutiny, just help me
8 understand your reading of Chovan. Why would that be
9 incorrect? Because the holding in Chovan doesn't use the
10 words "substantial burden," it just says "burden," right, any
11 burden on the right is sufficient.

12 MR. HAKL: Chovan actually talks about burden in two
13 places. It talks about it to get through, what they call,
14 step one, does it burden the Second Amendment right. And
15 then go through that analysis. And if you get to step two,
16 the Court directs that you're supposed to apply what they
17 refer to as an appropriate level of scrutiny. They don't say
18 any particular kind.

19 THE COURT: But it's not rational basis, right?
20 Post-Heller.

21 MR. HAKL: Assuming that the -- assuming the Second
22 Amendment right recognized in Heller is implicated in step
23 one, it would not be rational basis at step two of the Chovan
24 inquiry, that's correct.

25 THE COURT: So, it's either intermediate or strict.

1 Is there any other? Appropriate is fairly open ended. Is
2 there some other level of scrutiny?

3 MR. HAKL: The courts talk a lot about the familiar
4 tiers of scrutiny; rational basis, intermediate, strict.
5 Looking at all the cases very carefully, one court's
6 intermediate scrutiny isn't necessarily the exact same as
7 others court's intermediate scrutiny. I think, frankly,
8 there is a lot of play in the intermediate scrutiny standard.

9 But I -- but, yeah, if intermediate scrutiny -- well,
10 first, before we get to the intermediate scrutiny question,
11 to answer your question about burden, at step one they talk
12 about -- the Ninth Circuit talked about burden.

13 At step two, in determining the appropriate level of
14 scrutiny, they -- the Court directed that we consider two
15 things, and that's where it's whether the -- I think it's
16 the -- there is a substantial burden, and if -- and it also
17 considers to what extent the regulation approaches the core
18 of the Second Amendment. And in Chovan, the court found one
19 of those elements met.

20 My point is that here there is no substantial burden,
21 and the core of the Second Amendment isn't threatened in any
22 way, shape, or form. So if -- you know, it -- it's not -- it
23 wouldn't be the same level of scrutiny in Chovan that would
24 be needed. But I appreciate your Court's question -- the
25 Court's question about, well, what else is there between

1 rational basis and intermediate scrutiny. But in light of
2 the facts of this case, and the standard laid out in Chovan,
3 I would just -- I think it would be important to keep in mind
4 that all intermediate scrutiny requires is a reasonable fit.
5 I mean, it's not a perfect fit between the interests and the
6 rule.

7 THE COURT: Just so I understand, is it possible to
8 see your argument and take it to its logical extension that
9 the state can ban all types of unsafe handguns except even
10 one without triggering heightened scrutiny?

11 Is that -- if it's -- if it's one handgun available,
12 or a few, is that enough to provide the choice that
13 plaintiffs deserve in light of their Second Amendment rights?

14 MR. HAKL: Well, I -- if -- the state could further
15 limit handguns provided it continued to respect the -- what
16 the Second Amendment protects, which is the ability to
17 possess and use a handgun for self-defense. Whether or not
18 that -- you know, I don't know --

19 THE COURT: How much choice is enough?

20 MR. HAKL: For example -- I mean, if the state were to
21 issue a handgun to everybody in the -- you know, every
22 citizen, issue a handgun and say that's the handgun you can
23 use, I think -- you know, I think that would probably be okay
24 in terms of -- because they would be respecting the right to
25 possess and use a handgun for self-defense purposes. There

1 is no right to own any handgun you want whatsoever, or to --
2 what we're talking about here is purchasing handguns.

3 THE COURT: I understand that.

4 Also help me understand your reference to the
5 gunpowder storage laws, which is fairly passing. I mean, is
6 that a serious argument, that the law is presumptively lawful
7 because of historically long-standing prohibitions?

8 MR. HAKL: No. The -- the point -- I cited the
9 language about commercial sale of regulation -- you know,
10 commercial sale of firearms, and there is also some reference
11 in Heller to gunpowder storage laws, and also laws requiring
12 that firearms be stored to prevent accidents, and how the
13 court admittedly, you know, only implicitly endorsed these
14 kinds of laws that are designed for safety reasons, reasons
15 to prevent accidents.

16 Plaintiffs took me to task in the briefs about the
17 gunpowder storage laws. Between the three examples of laws
18 cited in my brief, I would concede that that one is the most
19 attenuated. But I think perhaps the better example in the
20 Supreme Court's opinion is the one about storage of laws so
21 that accidents don't occur -- storage laws so that accidents
22 don't occur. And then, of course, also the commercial sale
23 language.

24 THE COURT: And those prior laws would support the
25 argument that the statute is presumptively --

1 MR. HAKL: Right.

2 THE COURT: -- lawful.

3 MR. HAKL: In my mind, Your Honor, the presumptively
4 lawful analysis goes to whether or not there is a burden on
5 the Second Amendment right at step one of the Chovan inquiry.

6 You know, our argument is that there are numerous
7 handguns available in California. And, in fact, in addition
8 to that, these -- the kind of law that we're looking at here
9 today is within the realm of laws that the Supreme Court has
10 endorsed in its language in Heller, and that other courts
11 have held up.

12 THE COURT: I understand that argument.

13 Any response, Mr. Gura?

14 MR. GURA: Yes, Your Honor. I mean, perhaps it might
15 be easier to conceive of the arguments here if we thought of
16 what would happen if the state had said, not only are
17 handguns without magazine disconnects unsafe, handguns with
18 certain calibers are unsafe because they cause more damage.
19 So, henceforth, the only handgun caliber allowable in
20 California would be a .22, the smallest standard type of
21 caliber, and if you have a .38, if you have a 9 millimeter,
22 perhaps a .45 definitely, all of those would be prohibited
23 because they're unsafe because they cause too much damage.

24 In fact, the state could take the argument further,
25 the state could say, you can have no firearms necessarily,

1 you can have only, perhaps, tazers. Which I believe there is
2 one -- one court in Michigan upheld as something within the
3 protections of the Second Amendment.

4 We're getting into this idea that the state can
5 dictate what types of arms are the ones that are safe enough
6 to have, which was, of course, exactly the type of argument
7 we had in *Heller*, where the city made a huge effort to assert
8 that handguns, for whatever reason, they're concealable,
9 they're used by criminals a lot, they're portable, they can
10 be used irresponsibly, those are too dangerous, we let people
11 have rifles and shotguns, that should be good enough.

12 I would submit it's not a question of how many arms
13 are enough, whether there is some magic number or proportion
14 that would satisfy the Second Amendment. The question is
15 much simpler than that.

16 The question is, we have a Second Amendment case, so
17 the Court has to answer whether or not the articles in
18 question are even implicated by the amendment; are they arms,
19 are they the type of arms that are protected. And if so,
20 then if we had a regulation like a storage law, for example,
21 then we can apply a level of scrutiny and see whether or not
22 the state's interest in the regulation was sufficient to
23 impose on people who wanted to have access to that protected
24 arm. But if the arm is protected, then you cannot
25 prohibit -- the state cannot prohibit its sale, that would be

1 a prohibition of the type that Heller condemned.

2 And this is why we think that once we go down this
3 rabbit hole of trying to find a magic number of guns -- if I
4 heard Mr. Hakl correctly, he believes that the state could
5 issue a gun to everybody, one type of gun, and that would be
6 good enough. We would submit, Your Honor, that the right to
7 keep arms is not the right to keep whatever arms the state
8 thinks you should have, it's the right to keep arms of the
9 kind in common use for traditional lawful purposes.

10 THE COURT: How important is the right to a particular
11 color? I understand there is a dispute about whether or not
12 it's just about the finish, but the plaintiff who wants the
13 two-tone arm that's available in a different color
14 grandfathered in --

15 MR. GURA: Because --

16 THE COURT: -- what's the problem with the different
17 color?

18 MR. GURA: The problem is it's an arbitrary
19 restriction, Your Honor, and we don't allow arbitrary
20 restrictions -- arbitrary classifications in the exercise of
21 a fundamental right.

22 The state can come up with all kinds of restrictions
23 that implicate fundamental rights and say, what's your
24 problem, I mean, you can handle, perhaps --

25 THE COURT: But the state is not restricting the

1 color. It happens to be this two-tone model has become
2 available after the new regulations have kicked in.

3 MR. GURA: The state is not even enabling -- but this
4 type of gun with the two tones is still a gun of the kind in
5 common use for lawful purposes. So the state should have the
6 burden of showing why it is that this kind of gun should not
7 be allowed. They would say, well, it doesn't have a chamber
8 loaded indicator of the type we like, it doesn't have a
9 magazine disconnect that we would like, it doesn't do
10 microstamping anymore --

11 THE COURT: I understand the arbitrariness argument.

12 MR. GURA: We believe it's arbitrary.

13 THE COURT: All right.

14 In terms of what the evidence in the record shows,
15 help me understand some of the numbers or the statistics, if
16 I even --

17 MR. HAKL: Your Honor, could I respond to the
18 arbitrary point, if that's okay?

19 THE COURT: You may, very briefly.

20 MR. HAKL: It's not arbitrary. The evidence shows
21 that the reason that that particular gun isn't on the roster
22 is because it hasn't been submitted by the manufacturer for
23 testing. The fact that it's not on the roster has nothing to
24 do with its color.

25 THE COURT: Any -- is that disputed? Does the record

1 even tell me one way or the other?

2 MR. GURA: What's not disputed, Your Honor, is that
3 we -- we don't dispute that that handgun is not on the
4 roster. The state does not dispute that other identical guns
5 are on the roster. So, we're left with an impasse, in a
6 sense, that we're claiming, look, there are handguns of the
7 kind in common use that are protected, the state even allows
8 some of them, it doesn't allow this particular one for
9 whatever reason. The fact is, people are entitled, under the
10 Second Amendment, to access this arm. There is no good
11 reason to deprive them of access to it.

12 THE COURT: If there is that kind of gap in the
13 record, and -- is there a possibility -- the Court has the
14 same question with respect to microstamping, for example. It
15 appears there is a gap.

16 The state is saying, you know, no longer sole source,
17 technically microstamping could become available. The
18 plaintiffs are saying no one is making microstamping
19 available. It doesn't really answer the question, does it,
20 if the question needs to be answered at this point, is that a
21 temporary situation? Is it a permanent ban? Do I deny
22 summary judgment and proceed to a bench trial on -- to fill
23 in those gaps --

24 MR. GURA: Your Honor --

25 THE COURT: -- both here and with respect to

1 microstamping?

2 MR. GURA: There is no factual dispute, the defendant
3 has admitted that microstamping does not exist. It's not --
4 the defendant has stated in response to discovery that he
5 doesn't know of any plans to introduce it. Right now --

6 THE COURT: He says he doesn't have the knowledge --

7 MR. GURA: But the point is --

8 THE COURT: -- to ultimately answer the question.

9 MR. GURA: He also says he doesn't know if anyone will
10 ever introduce it.

11 What we do know is that today, as we sit here right
12 now, the Second Amendment is in operative effect in this
13 state. And so today people do have a right to access
14 handguns of the kind in common use for traditional lawful
15 purposes. They are unable to obtain any new models now, and
16 for the indefinite future, because of this microstamping
17 requirement, and therefore their injury is ripe and it's
18 completed today.

19 If we have a right to these things --

20 THE COURT: Is it sufficient for me to grant summary
21 judgment if it's at this point in time? I mean, say -- is it
22 undisputed that at this point in time that microstamping
23 provision has the effect of reducing the market for new
24 semiautomatic handguns by about 80 percent? Is that
25 undisputed at this point in time, Mr. Hakl?

1 MR. HAKL: The -- I mean the microstamping, it did not
2 come in effect, for practical purposes, until May, so it's
3 only been a few months. I mean, I think that the
4 legislature, you know, thinks that, you know, if the
5 technology is there, it's available, if manufacturers want to
6 sell their guns in California, they will incorporate that
7 technology. You know --

8 THE COURT: It's a technology forcing regulation,
9 that's clear. But there is --

10 MR. HAKL: The technology exists.

11 THE COURT: Well, it's patented. Is it available for
12 purchase anywhere?

13 MR. HAKL: No. I -- in California, I'm not aware of a
14 firearm that has microstamping technology on it for sale.

15 MR. GURA: Your Honor --

16 THE COURT: But my question is, so your position is
17 that the Court could conclude, based on the record before it,
18 that it's a temporary situation?

19 MR. HAKL: I think so.

20 THE COURT: But how do I know that for summary
21 judgment purposes? How can I, based on the record before
22 me --

23 MR. HAKL: Well, I think the legislative history, I
24 think -- well, we know the technology is there, and the
25 legislative history shows, I think, that, for example, with

1 the chamber loaded indicator and the magazine disconnect
2 mechanism and so forth, that that technology would, quote,
3 unquote, drive the market. I mean, that's the reason why the
4 legislature -- the legislature indicated that.

5 THE COURT: Can I fill the gap, then, on summary
6 judgment?

7 MR. HAKL: I think you can defer to that legislative
8 finding -- well, I don't -- I don't -- for example, Your
9 Honor, I don't think it matters. I mean, I guess what you
10 might be asking is what if a gun manufacturer never decides
11 to incorporate microstamping into any of their handguns, and
12 decides to never offer those handguns for sale in California.
13 If that's the logical conclusion, I still think defendant is
14 entitled to summary judgment because -- I mean, for all the
15 reasons that we've stated. There is no burden on the Second
16 Amendment.

17 I mean, the California legislature has made a decision
18 that certain handguns that are for sale need to have
19 these certain features. And if certain -- those handguns
20 don't, they can't be sold. You know, those new handguns
21 can't be sold.

22 MR. GURA: Your Honor --

23 THE COURT: So why should I -- again, on the record
24 before me, how can I conclude that it's a permanent ban?
25 That's essentially you're -- you're saying I can conclude

1 that, right?

2 MR. GURA: I would agree, actually, with Mr. Hakl
3 about this much, I would agree with him that it doesn't
4 matter, for this reason: Suppose, for example, that tomorrow
5 every manufacturer decides to introduce microstamping. All
6 the same, Brett Thomas still could not access Dick Heller's
7 High Standard revolver, because that's not on the roster. I
8 know microstamping is not an issue of a revolver --

9 THE COURT: We'll get to that. Just focus on
10 microstamping right now.

11 MR. GURA: The point is that even if some large
12 percentage of microstamping semiautomatic handguns came onto
13 the market, the fact is there would still be handguns of the
14 kind in common use that don't have microstamping, people
15 would be entitled to purchase those handguns, and they would
16 not be able to.

17 And I would reference the amicus brief we got from
18 Glock. The most interesting thing about that amicus brief is
19 it related facts that are fairly well-known, at least in the
20 firearms community, which is that California does not allow
21 the sale of the Generation 4 Glock models that came out, I
22 believe, in 2008. And Glock still doesn't sell those
23 handguns here. They are, obviously, quite popular throughout
24 the United States in many lawful applications, but they don't
25 meet -- never mind the microstamping, they don't meet the

1 magazine disconnect and some of the other requirements.

2 People do have the right to purchase a modern Glock
3 firearm. It is the quintessential handgun that would be
4 within Heller's definition.

5 So, yes, even if microstamping came onto the market
6 tomorrow, people still would have the right to
7 non-microstamping guns.

8 Your Honor, I would also, for the record, just
9 highlight Request for Admission Number 4, just to clarify
10 something that came up. We requested, and this is docket
11 number 61-22 --

12 THE COURT: I've reviewed those responses.

13 MR. GURA: So, the defendant admitted that no handguns
14 currently available for sale in the United States have
15 microstamping technology that satisfies the requirements of
16 the Act.

17 THE COURT: That's a fair characterization of the
18 response? No supplementation to that response, Mr. Hakl?

19 MR. HAKL: That's -- I mean, as far as we know, yeah.
20 I mean, I think there is language in there to defendant's
21 knowledge, or -- we stand by the admission that is in our
22 discovery, Your Honor.

23 THE COURT: All right.

24 On that buntline revolver, do the parties have -- do
25 they agree as to why it's not rostered?

1 MR. HAKL: It's -- I think the declaration that we've
2 submitted shows that we have no record of a High Standard
3 buntline style revolver ever being submitted to the
4 department to be considered for rostering.

5 THE COURT: Do you dispute that?

6 MR. GURA: I don't dispute it wasn't submitted because
7 that handgun has not been made for many years, the High
8 Standard company -- this may be beyond the record, but I
9 think it's certainly within judicial notice that they went
10 out of business, their name was purchased by somebody else.
11 But that's an old revolver. Dick Heller purchased that
12 revolver back in the 1970s. And it's a -- it's not quite a
13 curio or relic.

14 And this raises another issue. The state exempts
15 curios or relics as defined under federal law. When we look
16 at that CFR section, we see that one way to become curio or
17 relic is to be 50 years old. So, in a sense, all of these
18 handguns that are currently not on the roster might well be
19 for sale in California if only we were to wait half a
20 century. And I suppose there might be 45 years ticking on
21 the Glock Gen4, there might be fewer years left on Dick
22 Heller's gun. But, again, another issue, that's an old gun
23 of the type that is not on the roster.

24 Other states have different ways of dealing with this.
25 For example, in Maryland, I believe when they created their

1 rostering program, which is far more generous than
2 California, one of the provisions there, I believe, is that
3 firearms manufactured prior to 1985 are exempt. So, that
4 takes care of the historical issues.

5 THE COURT: Any response to that information with
6 respect to the buntline?

7 MR. HAKL: I, frankly, do not know whether the
8 buntline would qualify as a curio or relic. I mean, there is
9 some reference to that in their papers. I don't know if it
10 would -- it -- it has gained certain status as a result of
11 what -- apparently its involvement in the Heller case. But
12 other than that, no, I don't have a response.

13 THE COURT: All right. Just checking some other facts
14 here.

15 With respect to the fee, Pena points to the delisting
16 because a fee was not paid. Does Pena have the ability to
17 try to get the fee paid one way or the other?

18 MR. GURA: I don't believe that he does because, first
19 of all, he wouldn't be a responsible party under the
20 definition, he's not a law enforcement agency or an importer,
21 manufacturer, distributor, wholesaler, even if you go that
22 far.

23 THE COURT: Does he have the ability to try to get it
24 paid by a responsible party? That's a burden on him.

25 MR. GURA: I suppose it's -- he could always make a

1 request. He could also request the DOJ to list it. I
2 believe the DOJ can submit things for testing. Nothing bars
3 the state from listing things -- testing things on their own
4 initiative. The law provides for it, in fact. But, you
5 know, that's his First Amendment right, to make a request to
6 the government. That's not within his power.

7 MR. HAKL: Mr. Pena himself could not pay the fee, but
8 there is -- I think at least the implication is correct, that
9 there is nothing stopping him from, you know, a grassroots
10 movement to, you know, lobby the particular manufacturer to,
11 you know, pay the fee.

12 THE COURT: All right. Let me just -- here are the
13 numbers I think I have in the record. Tell me if there are
14 any other numbers that help me understand the -- what's going
15 on with the market.

16 The record discloses that at least for 2011, and I
17 think only 2011, that 81.9 percent of all handguns were
18 semiautomatic. I think that's a fair characterization.

19 I think I can calculate from the numbers in the record
20 that approximately 68.5 percent of all handguns manufactured
21 in 2011 were centerfire semiautomatics.

22 I don't think I know how many of the rostered handguns
23 were semiautomatic, either centerfire or rimfire. If that's
24 in the record someplace, I'd like to know where it is.

25 I believe the record discloses that there are slightly

1 more than 1200 handguns on the roster as of October 2013, but
2 there is a difference between handguns and semiautomatics. I
3 don't think it's disputed that most new handguns are
4 semiautomatics.

5 So, let me stop there.

6 Is there anything I'm missing in terms of the
7 information that's in the record related to those stats?

8 MR. HAKL: I don't think we have a dispute about the
9 numbers.

10 THE COURT: All right. Is there anything that tells
11 me how many of the rostered handguns are semiautomatics?

12 MR. HAKL: Maybe the roster itself. I would have to
13 look at that.

14 THE COURT: All right. Is there anything besides 2011
15 statistics that shows the Court if there is any trend,
16 Mr. Gura?

17 MR. GURA: Your Honor, those are the latest years I
18 found on the ATF website. There are previous reports
19 available from previous years. I believe the numbers are
20 somewhat consistent. We would have to look it up.

21 As we sit here, who knows the number of weeks or
22 months when we might get the 2012 data, as 2011, of course,
23 recedes into the background. Those are the numbers we have,
24 Your Honor, I would agree.

25 MR. HAKL: If Your Honor would like to know how many

1 exactly semiautomatics are on the roster, we could get -- I
2 could get that information and supplement the record, if Your
3 Honor wants that piece of information.

4 THE COURT: All right. I'll let you know.

5 Do you think that would be a stipulated number?

6 MR. GURA: We could probably stipulate to that. It
7 involves counting the guns and seeing what they are, I
8 suppose.

9 THE COURT: I'll let you know if I need that.

10 And I think it's not disputed that handgun sales,
11 including revolvers and .22 calibers, have increased
12 approximately 70 percent between 2009 and 2012. I think
13 that's a calculation that can be made based on the
14 defendant's numbers. That's not disputed?

15 MR. GURA: We don't dispute the defendant's numbers,
16 Your Honor.

17 MR. HAKL: And I have not calculated the percentage
18 myself, Your Honor, but the -- the numbers set forth in our
19 declaration are accurate, and they are on the rise.

20 THE COURT: And I don't believe there is anything in
21 the record, to the extent it matters to the Court ultimately,
22 to show me what percentage of semiautomatics have detachable
23 magazines in the current time period, say, during the last
24 five years. Is there anything that addresses that question
25 if the Court --

1 MR. HAKL: Not that I'm aware of.

2 MR. GURA: We have -- I believe we have declarations
3 in the record that say they're in common use, and we would
4 stand by that. But we don't have any precise numbers if that
5 is what Your Honor is asking. We submit it's within judicial
6 notice that detachable magazines exist, and are common for
7 lawful purposes.

8 THE COURT: Is there any evidence in the record, that
9 magazine disconnect devices impede functionality for
10 self-defense?

11 MR. GURA: Some people do take that view.

12 THE COURT: But is there evidence in the record?

13 MR. GURA: I don't believe that we have evidence on
14 that. I mean, we have -- I believe the Glock amicus brief
15 made that argument.

16 MR. HAKL: Just with respect to the amicus brief, I
17 mean, it's not supported by any evidence, it's just --

18 THE COURT: It's an argument. It's an amicus.

19 MR. HAKL: Your Honor, just --

20 THE COURT: I have a few questions about equal
21 protection.

22 MR. HAKL: All right.

23 THE COURT: Then one final question circling back to
24 standing. And then, again, brief -- if you have a few
25 minutes of anything you think we haven't covered you think

1 the Court needs to hear, I'll give you a few moments to do
2 that.

3 On equal protection, Mr. Gura, is it your position
4 that you have actually identified for the Court similarly
5 situated classes who are treated disparately?

6 MR. GURA: Yes, Your Honor.

7 THE COURT: I know you run through -- so, those are
8 those similarly situated classes, the actors, the law
9 enforcement, the --

10 MR. GURA: People who have and introduced handguns
11 into the communities who should not have and introduce unsafe
12 handguns into the communities. People -- if a handgun is
13 unsafe, and it can be fired accidentally by somebody who
14 finds it, or somebody who misjudges it, then it should -- you
15 know, if that's the theory, then it's an arbitrary
16 classification, yes, Your Honor.

17 THE COURT: What's the best authority for law
18 enforcement personnel and lay persons being similarly
19 situated?

20 MR. GURA: Silvera, Your Honor. Silvera is a case
21 that was overruled. It was the Ninth Circuit case from 2003
22 dealing with the California Assault Weapons Act.

23 THE COURT: Did it actually address whether or not
24 those categories were similarly situated?

25 MR. GURA: Yes. I believe what -- the one thing that

1 Silvera did, at the very end of the opinion there is a long
2 discussion of it, is it struck down the exemption for law
3 enforcement personnel to have so-called assault weapons for
4 private purposes. The Court went into an extended discussion
5 of the fact that the legislature had determined these guns to
6 be unsafe, to be a danger to the public, to not be something
7 that people should have, and there is no reason why a retired
8 law enforcement person should have these for private purposes
9 any more than someone who didn't retire from law enforcement.
10 And they found that it was irrational.

11 THE COURT: Rational basis.

12 MR. GURA: It applied rational basis, because it found
13 no Second Amendment right exists, which of course is no
14 longer the law.

15 But the logic there, I think, at least with respect to
16 that exemption, is very telling.

17 THE COURT: Is the plaintiffs' equal protection claim
18 coextensive with the Second Amendment claim?

19 MR. GURA: It is. And the way we argue it is,
20 obviously, as the Court knows, our primary Second Amendment
21 argument is on common use. The heightened scrutiny argument
22 is more of a secondary argument. But when it comes to equal
23 protection, that's where we do look to see whether or not the
24 state has some kind of heightened scrutiny rationale to treat
25 similarly situated people differently in the exercise of

1 fundamental rights. So, that brings it in.

2 But you're right, Your Honor, it's coextensive in that
3 sense.

4 THE COURT: Anything to say in response to what you've
5 just heard, Mr. Hakl?

6 MR. HAKL: Just with respect to Silvera's discussion
7 of law enforcement officers is nuanced. They make
8 distinctions between retired law enforcement officers, law
9 enforcement officers that are active duty, and things like
10 that. So, it doesn't discuss law enforcement officers in a
11 blanket fashion as petitioners may have just suggested.
12 There are distinctions in there. There are other cases in
13 our brief that demonstrate the difference between law
14 enforcement officers and lay persons.

15 THE COURT: What's your best authority for the
16 exemption extending to off-duty law enforcement personnel?

17 MR. HAKL: I would have to rely on the cases in my
18 brief for that, Your Honor.

19 THE COURT: Just finally circling back on standing,
20 there was an additional question I had there.

21 Technically, should the Court be analyzing standing
22 looking at the as-applied challenge first? Because if the
23 law is constitutional in the face of an as-applied challenge,
24 then there is no standing for a facial challenge. Isn't that
25 the proper order?

1 MR. GURA: Your Honor, standing is a separate inquiry
2 than the merits. If the law is constitutional or not is a
3 different -- is a very different question than whether anyone
4 has standing or not.

5 So, we believe that whether the Court wants to look at
6 standing discretely first with respect to as-applied
7 challenges and then with respect to facial challenges, or the
8 other way around, in any event, standing should come first.
9 And then once the Court gets through standing, if we have
10 standing, then the Court can determine the merits of the
11 claim.

12 But I don't -- I believe the Court should keep those
13 two inquiries separate. That is, it's -- this is one of the
14 critiques that the people had of the Ninth Circuit's former
15 Second Amendment approach, where they viewed it as a standing
16 question when they held there was no right, and that was very
17 different than what had gone on even in the other circuits
18 that didn't adopt the individual acts point of view. And I
19 think that the other courts are a little bit more correct on
20 that.

21 THE COURT: Is it possible that the analysis ends up
22 being intertwined because the Court can't figure out the
23 standing question without getting into the merits?

24 MR. GURA: No. I think the Court can figure out
25 standing without getting into the merits at all.

1 The standing question is really quite distinct from
2 the merits. The standing question is, is there an injury, is
3 the injury redressable, and is it fairly traceable to the
4 conduct of the defendants. That's Lujan.

5 And none of that has anything to do with whether or
6 not the injury is a -- in fact, a constitutional violation.
7 The injury is the inability to access an item, and it's the
8 fact that people have less choice, and that they pay higher
9 prices, and they're frustrated in their ability to engage in
10 something that they claim to be within their right. That's
11 the injury.

12 Now, it could well be, I hope it's not the case, but
13 the Court could logically, even though we would disagree with
14 the outcome, it could decide, yes, the plaintiffs are injured
15 in that they are being frustrated in their access to these
16 items, but based on the Court's analysis, that injury is not
17 a constitutional injury, it's just an injury in fact.

18 That's an outcome that would be consistent, as much as
19 we wouldn't like it.

20 THE COURT: All right.

21 Anything else on that, Mr. Hakl?

22 MR. HAKL: No, Your Honor.

23 THE COURT: All right. These are cross-motions so,
24 you know, I'm not certain it matters who really goes first.
25 But is there anything else you think we haven't covered that

1 the Court needs to hear that you can tell me in a few
2 minutes?

3 Mr. Gura?

4 MR. GURA: Yes, Your Honor, just one thing briefly.

5 First of all, we do very much thank the Court for
6 obviously taking a lot of time to look at this carefully and
7 call us in here and have a very thorough hearing.

8 The only thing I wanted just to make sure we discussed
9 here today, if we needed to, is the fact that the record does
10 indicate that these features are available only in 11 percent
11 and 14 percent; that is, chamber loaded indicators and
12 magazine disconnect devices of handguns. Those are the facts
13 that were found by the legislature. We would agree that
14 these are rare features, these are not common features. More
15 importantly, guns lacking these features are common.

16 The reason I bring this up again, Your Honor, we had
17 some discussion about what percentage of handguns were
18 semiautomatic, and what percentage had detachable magazines.
19 We know that these particular features are required -- are
20 quite rare, and we know that from the legislative findings,
21 and I believe that's not disputed.

22 THE COURT: Agreed, Mr. Hakl? That's both at the time
23 the law was passed and today?

24 MR. GURA: We believe -- go ahead.

25 MR. HAKL: That's what the legislative history

1 indicates at the time that the legislative history was
2 written. I don't think there is any evidence in the record
3 as to what the current percentages are.

4 MR. GURA: We know that Glock Generation 4 handguns
5 are not available for sale in California. That is the latest
6 version of the Glock that's been for sale for five years now
7 in the United States. At some point we might surmise Glock
8 will be tired of making the old and increasingly dated models
9 just for the sake of this state. I mean, people here in
10 California should be able to access the 2008 models.

11 MR. HAKL: And --

12 THE COURT: All right. So, anything else, Mr. Gura?

13 MR. GURA: No.

14 THE COURT: Mr. Hakl.

15 MR. HAKL: With respect to the percentages in the
16 legislative history, I think that's a reference to the
17 percentage of new handguns coming to market, not all of the
18 handguns currently in the marketplace, whether new or used.
19 So, I think that's what those percentages refer to. But I
20 would defer to what, exactly, the legislative history says on
21 that.

22 THE COURT: All right. Anything else you think the
23 Court needs to hear?

24 MR. HAKL: Not from defendant's perspective, other
25 than I'm not sure -- we think the Chovan case applies here.

1 And would -- you know -- so, we stand by what's in our brief
2 in terms of the steps of the inquiry we think the Court
3 should take in evaluating the Act.

4 The common use test, whether -- we don't think -- you
5 know, there may be gaps in the record as to what is in common
6 use and what is not, but it -- we think that that's actually
7 an immaterial question, because even when it comes to
8 handguns that are in common use, or handguns that are -- it
9 doesn't mean they can't be regulated.

10 So, that -- other than that, Your Honor, we have no
11 further comments today, unless Your Honor has questions.

12 THE COURT: Just one final question.

13 I am not -- I don't know where I'm going with this,
14 but let's say I don't grant summary judgment in full for
15 either side, I think what I would do is set a status and we'd
16 talk about a bench trial date.

17 Does that sound right to you both? Mr. Gura?

18 MR. GURA: That's the procedure. If summary judgment
19 is denied to everybody, that's what you wind up with is a
20 trial, I suppose.

21 MR. HAKL: You --

22 THE COURT: Even with this kind of case? It seems to
23 me that's --

24 MR. HAKL: Well, I think --

25 THE COURT: I don't know if that's where we end up,

1 but I wanted to see if you had other thoughts about next
2 steps, if that's the Court's decision.

3 MR. HAKL: That would -- I agree with Mr. Gura on
4 that, just generally that is the next step. I don't know --
5 looking at plaintiffs' claim, I'm not sure what there is to
6 try. I mean, for example, there is no evidence that, you
7 know, chamber load indicators don't work. This isn't a case
8 where -- I mean, the nature of the claim isn't that magazine
9 disconnect mechanisms don't work. I mean, there is no
10 evidence of that. I mean, the claim is a straight ahead
11 legal constitutional claim that they have a constitutional
12 right to buy these particular handguns, and that the state
13 can't -- can't regulate them. I mean, I think it's a legal
14 question before the Court. The facts before the Court go to
15 the burden, and things like that.

16 THE COURT: That's exactly right. The question is,
17 are burdens satisfied, or how does the Court scrutinize the
18 law in light of burdens.

19 MR. GURA: One point I would raise, I suppose there is
20 one other option that we can have, we may have to research
21 this a little bit, and perhaps we can both get back to the
22 Court, if the Court is unprepared to give summary judgment to
23 anybody, then the Court might be able to certificate an
24 appeal for one or both sides. If both sides believe that
25 they have submitted enough on the record to entitle them to

1 summary judgment, and there is a dispute on that, I suppose
2 that's one way we can proceed. I'm just thinking out loud
3 here.

4 The other thing, just to get back, it came to my mind,
5 Your Honor, on the standing question, the NRA case in the
6 Fifth Circuit lays out the framework; that is, first, they
7 only discretely dealt with the injury issue as to whether or
8 not there was a fairly traceable, redressable injury, and
9 then they ruled against the plaintiffs on the Second
10 Amendment question, but those were kept very separate.

11 THE COURT: All right. Understood.

12 All right. Don't think about next steps, I was just
13 wondering if you had thought about that and had thoughts.

14 So, you will -- in my order I will either invite your
15 suggestions or set a status if I do not end up granting
16 summary judgment.

17 The matter is submitted. This was very helpful.
18 Thank you.

19 MR. HAKL: Thank you, Your Honor.

20 MR. GURA: Thank you, Your Honor.

21 THE CLERK: Court is in recess.

22 (Proceedings adjourned, 11:15 a.m.)

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REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
COUNTY OF SACRAMENTO)

I, KIMBERLY M. BENNETT, certify that I was the Official Court Reporter, and that I reported verbatim in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the foregoing pages constitute a complete, true, and correct record of said proceedings:

COURT: U.S. District Court
 Eastern District of California

JUDGE: Honorable KIMBERLY J. MUELLER, Judge

CASE: IVAN PENA, et al. Vs. STEPHEN LINDLEY,
 Chief of the California Department of
 Justice Bureau of Firearms,

DATE: DECEMBER 16, 2013

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California.

/s/ Kimberly M. Bennett
KIMBERLY M. BENNETT
CSR No. 8953, RPR, CRR, RMR