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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**SOUTHERN DIVISION**

LANCE BOLAND, an individual; MARIO SANTELLAN, an individual; RENO MAY, an individual; JEROME SCHAMMEL, an individual; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, a California corporation,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendants.

**CASE NO.: 8:22-cv-01421-CJC(ADSx)**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

**Hearing Date: December 19, 2022**
**Hearing Time: 1:30 p.m.**
**Courtroom: 6B**
**Judge: Honorable Cormac J. Carney**

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## 1. INTRODUCTION

Plaintiffs Lance Boland, Mario Santellan, Reno May, Jerome Schammel, and California Rifle & Pistol Association, Incorporated ("CRPA"), request a preliminary injunction prohibiting Defendants from enforcing California's Unsafe Handgun Act (the "UHA"), California Penal Code sections 31910 through 32110. The UHA should be preliminarily enjoined because the UHA unconstitutionally prohibits ordinary members of the general public in California, like the individual Plaintiffs and CRPA's members, from purchasing a vast number of modern and popular handguns that Americans in essentially every other state are freely able to acquire. Indeed, no new semiautomatic handguns introduced to the broader national marketplace since May of 2013 are freely accessible to the general public in California because of the UHA.

And under key United States Supreme Court precedents established in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Assn. v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111 (2022), the UHA is clearly unconstitutional. Moreover, because injuries to constitutional rights are considered irreparable "for even minimal periods of time," and because the remaining preliminary injunction factors are decisively in Plaintiffs' favor, Plaintiffs request the Court preliminarily enjoin further enforcement of the UHA. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

## 2. FACTUAL BACKGROUND

### A. The History of California's Unsafe Handgun Act

In some key respects, the market for handguns in the United States is no different than the market for any other type of durable consumer product. New and old manufacturers are constantly innovating, refining, receiving consumer feedback, and introducing new and updated products into a competitive marketplace for civilian, military, and law enforcement customers. However, ordinary Californians have no ability to purchase on the retail market any of the newer handgun models introduced to the broader national market since May of 2013 because of the UHA.

In 1999, the California Legislature enacted the UHA to establish "safety" standards for all handguns manufactured, imported, or otherwise sold in the state. Under the UHA, a handgun cannot lawfully be sold in the primary market[1] to the general public if it meets the definition of an "unsafe" handgun. CAL. PENAL CODE §§ 32000; 31910 (Deering 2022).

A handgun is "unsafe" if it lacks certain features. However, this prohibition does not apply to law enforcement personnel, nor to an ever-expanding list of personnel with quasi-law enforcement agencies like the Department of Motor Vehicles, harbor or port districts, and the investigation division of the Department of Consumer Affairs. *Id*. § 32000(b)(6).

All UHA compliant or exempted handguns that are eligible for sale in California are added to an official list known as the roster of handguns certified for sale (the "Roster"). *Id.* § 32015. The California Department of Justice maintains the Roster "listing all of the pistols, revolvers, and other firearms capable of being concealed upon the person that have been tested by a certified testing laboratory, have been determined not to be unsafe handguns, and may be sold in this state pursuant to this part." CAL. PENAL CODE § 32015. But admission to the Roster is not permanent. It is valid for only one year and must be renewed prior to expiration via notice and a $200 fee. CAL. CODE REGS. tit 11, §§ 4070(a)-(b) & 4072(b) (2022).

Over time, the legislature has amended the UHA statutes that mandate what features a handgun must have to be "safe" for different categories of handguns, (semiautomatic pistols, revolvers, and rimfire semiautomatics) and has typically "grandfathered" those handguns that are on the Roster but would otherwise meet the

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[1] The primary market is the market for new-condition firearms in which properly licensed firearm dealers, who possess all required federal and state licenses, lawfully sell firearms. This is in contrast to the secondary market, where non-licensed individuals sell and buy firearms lawfully, with the use of a properly licensed intermediary. California law permits Californians to acquire off-roster firearms in the secondary market, where significant price markups often as high as 100 percent or more are the market norm.

definition of an "unsafe" firearm under the new requirements. That is, as long as these older firearms were already on the Roster before the new Roster-eligibility rules take effect, they can stay on the Roster and be sold in unlimited quantity in California despite otherwise meeting the State's operative definition of "unsafe."

The UHA imposes the most burdensome technological requirements on centerfire semiautomatic pistols, but also imposes requirements on rimfire semiautomatic pistols and revolvers that suppress the availability of newer, more popular models of those categories of handguns too. The UHA thus imposes slightly different requirements on all three categories of handguns, but regardless, suppresses the primary market availability of modern and popular handguns widely available throughout the nation and owned for self defense purposes.

As of 2007, for a new-to-market semiautomatic centerfire handgun to avoid the "unsafe" classification and therefore be eligible for primary market sale, the handgun needed to have both a chamber-load indicator ("CLI") and a magazine-safety-disconnect mechanism ("MDM"), in addition to passing a drop safety test and passing a firing reliability test. CAL. PENAL CODE §§ 31900, 31905 & 31910(b)(5) (Deering 2022). A CLI is visual/tactile indicator on the exterior of the handgun that will indicate that the firearm has a cartridge in the chamber (i.e., ready to be discharged upon pull of the trigger). An MDM prevents a semiautomatic handgun from firing the cartridge in the chamber unless the magazine is fully inserted into the firearm.

A revolver is considered "unsafe" if "it does not have a safety device that, either automatically in the case of a double-action firing mechanism, or by manual operation in the case of a single-action firing mechanism, causes the hammer to retract to a point where the firing pin does not rest upon the primer of the cartridge," and it fails to meet firing and drop safety requirements. *Id.* § 31910.

As of 2006, a rimfire semiautomatic pistol is considered "unsafe" and therefore not eligible for admission to the Roster if it is equipped with a detachable magazine and lacks a magazine safety disconnect. *Id*. Semiautomatic handguns that were on the Roster prior

to 2007, despite not having a CLI or MDM, were allowed to remain on the Roster and continue to be sold to the general civilian public in the primary market, as long as they comply with the formalities of Roster admission.

As of May 17, 2013, semiautomatic handguns must be equipped with the technology to stamp a microscopic identification mark on the shell casing of an expended round of ammunition ("microstamping") in two locations to be eligible for the Roster. But semiautomatic handguns that were on the Roster between January 1, 2007, and May 17, 2013, that have CLI and MDM, but lack two-location microstamping capability are allowed to remain on the Roster (i.e., are grandfathered) and may continue to be sold. As are semi-automatic handguns on the Roster prior to 2007, which lack either a CLI or MDM.

To summarize, from May 17, 2013, and until July 1, 2022, to avoid the "unsafe" classification and therefore be admitted to the Roster, a semiautomatic handgun must have three features: CLI, a MDM, and two-location microstamping. Without those three features, the UHA would deem any firearm proposed for addition "unsafe" and therefore ineligible for the Roster.

Thus, as of July 2022, the Roster has roughly 800 total listings. (Request for Judicial Notice in Support of Pls.' Mot. Prelim. Inj. ¶1, Ex.1). It has nearly 475 semiautomatic handguns SKUs, but the real number of distinct firearm model offerings is far fewer because cosmetic differences between otherwise identical handgun models are treated as distinct models. CAL. PENAL CODE § 32020 (Deering 2022). Regardless, none of the currently rostered semiautomatic handguns would meet today's operative definition of a safe handgun because not a single one of them has all three features: CLI, MDM, and microstamping.

To clarify: there is not a single semiautomatic handgun currently on the Roster (as of November 2022), available for sale in the primary retail market in California, that has all three features the UHA requires (CLI, MDM, and microstamping); every single semiautomatic handgun on the Roster is a grandfathered handgun.

Some of the semiautomatic handguns on the Roster have a CLI and an MDM, but these models are rare. The reason why is that these features are simply not desirable, they increase manufacturing costs, increase research and design costs, and are bizarre departures from the normal suite of features that comprise the modern semiautomatic handgun. These features are essentially adulterations that no one other than the California Legislature deems necessary or desirable on a pistol.

Nor does a CLI make any firearm intrinsically safer. The responsibility of ensuring that the firearm is safe and that it is not discharged negligently cannot truly be enhanced mechanically; gun safety is the responsibility of the firearm handler.

An MDM does not enhance safety, either. Indeed, not only does an MDM not make a firearm safer, but it can undermine the usability of a firearm in a life-or-death situation. Firearm magazines are very often the weak link in the functionality chain; they are delicate and slight defects (such as dirt, grime, rust, bent feed lips or weakened springs) can and often do cause malfunctions. It is not desirable to possess a firearm that can only fire with the magazine inserted because that makes it impossible to cycle the firearm if the magazine is causing the firearm to malfunction or is ejected from the firearm by accident and is not recoverable.

So, although microstamping is the most abjectly misguided of the three "safety" features, the CLI and the MDM requirements are nearly as ill-conceived. That is why these features are absent on virtually all firearms in the broader national and global marketplace, but for those handful of semiautomatic firearms that a few manufacturers modified to comply with the UHA in order to sell to the California market.

Handguns that are not on the Roster are generally known as "Off-Roster" handguns. While Off-Roster handguns are not legal to sell and acquire in the primary market for nearly all Californians, anyone can lawfully purchase Off-Roster handguns in secondary market "private party" transfer ("PPT") transactions. This is possible because there are various avenues for exempt classes of persons to acquire (law enforcement (CAL. PENAL CODE § 32000(b)(4)) or import (people moving into California (§ 27560))

an Off-Roster handgun into California, and then lawfully sell it via PPT transaction at a licensed dealer. *Id*. §§ 28050 & 32110(a) (Deering 2022).

The reason why California's microstamping requirement began on May 17, 2013, is because that is the day the DOJ issued the certification stating that the microstamping technology was available and not encumbered by patent restrictions, as required under the version of California Penal Code § 31910(b)(7)(a) then operative. However, despite issuing that certification, the California Department of Justice later admitted in litigation that the certification is not a representation that the technology to include microstamping features on mass-produced pistols is actually feasible for manufacturers. *See NSSF v. Nat'l Shooting Sports Found., Inc. v. State of Cal*., 5 Cal. 5th 428, (2018). And indeed, it is not truly commercially available. No manufacturer currently makes a pistol with the microstamping features.

In September 2020, Governor Newsom signed Assembly Bill 2847 into law, which changed the micro-stamping requirement effective July 1, 2022. Assembly Bill 2847 amended the UHA's two-location microstamping requirement to require an imprint in only one location on the cartridge. 2020 CAL. STAT. CH. 292. Thus, admission to the Roster now requires one-location microstamping; not two-location microstamping. But in reality, this makes no practical difference because microstamping of any kind—whether in two locations or one—is not commercially available technology. Even with the reduced burden, no manufacturer offers one location microstamping on any handgun. AB 2847 also imposes an additional amendment to the UHA: for every semiautomatic handgun that satisfies the new one location microstamping requirement (in addition to having CLI and MDM) and is therefore added to the Roster, the State must remove three grandfathered semiautomatic handguns from the Roster, in reverse order of addition.

The UHA's microstamping requirement is the most problematic of the three technological requirements because microstamping is simply not commercially available. But moreover, microstamping is pointless because microstamping is not actually a safety measure. The theoretical benefit it proposes is aiding law enforcement with investigating

crime.[2] The theoretical function of microstamping is to imprint the serial number of the firearm onto an expended cartridge casing, which would be recoverable at a crime scene, assuming the criminal did not attempt to retrieve the expended cartridge casing before fleeing. That information on the cartridge casing would then theoretically enable authorities to trace the firearm to a transferee. However, this hypothesis is predicated on the assumption that criminals discharging firearms at crime scenes are using firearms they lawfully acquired and are therefore traceable to them—which for obvious reasons is very unlikely. There is a surfeit of stolen handguns in the illegal market in the US, and it is this surfeit of stolen firearms from which criminals obtain their weapons. Available data suggests that roughly 200,000 firearms are stolen per year in the United States. Plfs.' RJN, Exs. 2 & 3.

**B. The UHA's Impact on Plaintiffs**

Plaintiff Boland operates a firearms training business. Declaration of Lance Boland in support of Plfs.' Mot. for Prelim. Inj., ¶4. Individuals of all experience levels, but very often people with no previous firearms experience, come to his training school to learn how to safely handle and shoot handguns. *Id*. Most of these people do so because they want to imminently acquire a firearm for self defense and want to familiarize themselves beforehand. *Id.*

Because essentially all On-Roster semiautomatic firearms are designed to favor right-handed shooters, Plaintiff Boland's left-handed clients are disadvantaged. *Id.* at ¶5. Many of the semiautomatic handgun models that the UHA prohibits allow fully ambidextrous configuration of all critical firearm controls[3], which is ideal for left-handed

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[2] 2020 CAL. STAT. CH. 292, § 1(d): "Another standard that is critical for public safety is the Unsafe Handgun Act's requirement that a new semiautomatic pistol model includes a mechanism to imprint a unique microscopic array of characters onto the casing of each round fired by the weapon, that can be used to identify the weapon's make, model, and serial number and assist law enforcement in identifying those who have criminally used firearms to endanger the public."

[3] Such as the slide stop/release, magazine release, and if equipped, manual safety.

shooters. But Because the UHA blocks Boland from obtaining such pistols and thus providing them to his clients for training purposes, his left-handed clients are at a significant disadvantage. *Id*.

Indeed, many of the Off-Roster models released to the broader national semiautomatic handgun market after May of 2013 are popular because of their ambidextrous ergonomic configurability. For example, such models include Glock's fifth generation line of pistols, such as the G17 and G19, which are popular due to their ability to position the magazine release and slide stop/lock mechanism so they can be activated from the opposite side of the pistol. The same is true of Sig Sauer's P320 series of Off-Roster pistols, Ceska Zbrojovka's ("CZ") P10 series of Off-Roster pistols, and FN's 509 series[4] of Off-Roster pistols. And Plaintiff Boland is himself disadvantaged because he too would prefer to own more Off-Roster pistols, not only so that he could provide a better training experience for his clientele, but for his own self defense and other lawful purposes. *Id*. at ¶6.

The UHA harms Plaintiffs Santellan, May, and Schammel because they too want to acquire Off-Roster models of semi-automatic handguns in the primary retail market. They would use those pistols for self defense and other lawful purposes such as recreational target shooting, competitive target shooting, and lawful concealed carry. Declaration of Mario Santellan in support of Plfs.' Mot. for Prelim. Inj., ¶4; Declaration of Reno May in support of Plfs.' Mot. for Prelim. Inj., ¶4; Declaration of Jerome Schammel in support of Plfs.' Mot. for Prelim. Inj., ¶4.

And some of CRPA's membership are lefthanded individuals who have had to make do with handguns that are not optimizable for left-handed use when choosing a

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[4] In 2021, the Los Angeles Police Department selected a variant of the FN 509 to be its new department issue service pistol, replacing its Glock pistols. *See* "Los Angeles Police Department "LAPD" Selects FN 509 MRD-LE as New Duty Pistol: FN Awarded 5-Year Agency Contract for FN 509 MRD-LE" <https://fnamerica.com/press-releases/los-angeles-police-department-lapd-selects-fn-509-mrd-le-as-new-duty-pistol/> (as of July 29, 2022).

handgun for self defense and other lawful purposes. Declaration of Richard Minnich in support of Plfs.' Mot. for Prelim. Inj., ¶5. These CRPA members would immediately purchase various models of popular Off-Roster semiautomatic handguns, at regular market prices if given the opportunity, and use those pistols for self defense and other lawful purposes. *Id*. Many of CRPA's right-handed members would also seek to acquire Off-Roster handguns in the retail market and use them for all lawful purposes too. *Id*., ¶4.

Although the UHA deprives Californians of both dexterities access to the full breadth of the modern semiautomatic handgun market, the UHA's disparate impact on left-handed Californians is particularly unfortunate. It denies them the ability to obtain a maximally ergonomic and therefore maximally safe and confidence-inspiring choice of handgun for self defense purposes. There is no principled reason why left-handed Californians seeking to exercise their right to self defense should be disadvantaged with ergonomically inferior options or forced to incur eye-popping price markups when shopping for the "quintessential" self-defense weapon.

Indeed, there is only *one* completely ambidextrous semiautomatic model on the Roster: the Heckler & Koch P2000. The Roster lists 21 different variants as of November 8, 2022, (essentially SKUs) of this sub-compact pistol, but they are all essentially the same core gun with a hefty manufacturer's suggested retail price and market price of $829. For comparison, the fifth generation Glock 19's market price is $539, the Sig Sauer P320 Nitron Compact market price is $515, the CZ P10C's market price is $499, and the FN 509's market price is $719. RJN, ¶4, Ex. 4. And because the P2000 is a *sub-compact* size pistol with a barrel length of 3.3 or 3.66 inches and a small polymer (high-strength plastic) frame, yet is chambered in 9mm and 40 S&W cartridges, it is harder to grip and has a sharp recoil impulse. That is hardly preferable to numerous other larger frame, fully ambidextrous Off-Roster models from numerous other firearm manufacturers.

## 3. LEGAL STANDARD

To obtain a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief; (3)

that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 55 U.S. 7, 20 (2008)).

## 4. ARGUMENT

### A. PLAINTIFFS' SECOND AMENDMENT CLAIM IS LIKELY TO SUCCEED ON THE MERITS

#### i. The Applicable Standard of Review for Second Amendment Claims

In 2008, the United States Supreme Court held that the Second Amendment protects an individual right, that is not dependent on service in a militia or other associative entity, to own an operable handgun in the home for self defense. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The *Heller* court described the right to self defense as the "central component" of the Second Amendment right." *Id*. at 628. Two years later, the Supreme Court deemed this right fundamental, and incorporated against the state governments under the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The *Heller* court also held that the Second Amendment protects the right to keep and bear arms "typically possessed by law-abiding citizens for lawful purposes," and found that the handgun is the "quintessential self-defense" weapon. *Heller*, 554 U.S. at 624-25.

Most critically, the *Heller* court established a "text, history, and tradition" framework for analyzing scope of the Second Amendment questions. The court then assessed historical evidence to determine the prevailing understanding of the Second Amendment at the time of its ratification in 1791, and thereafter. Based on that assessment, the Court concluded that the District of Columbia law that prohibited possession of the most commonplace type of firearm in the nation (the handgun) lacked a revolutionary era analog, did not comport with the historical understanding of the scope of the right, and therefore violated the core Second Amendment right. *Id*. at 629. The *Heller* court also held that "a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" is per se unconstitutional, especially when

that prohibition extends "to the home, where the need for defense of self, family, and property is most acute." *Id*. at 628.

In June 2022, the Supreme Court reiterated the validity of the historical understanding approach for analyzing scope of the Second Amendment questions and recognized that the Second Amendment protects the right to armed self defense in public just as much as in the home. *Bruen*, 597 U.S. ___, 142 S. Ct 2111 (2022). The *Bruen* court reiterated that courts may not apply a "means-ends" "interest-balancing" test akin to "intermediate scrutiny" in scope of the Second Amendment cases. Instead, courts must inspect the historical records of the ratification era and then apply analogical analysis to determine whether the modern-day restriction infringes the Second Amendment right. *See id*. at 2117-18.

The *Bruen* court clarified in crystal-clear language how proper Second Amendment analysis shall be applied:

> We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

*Id*. at 2129-30 (citation omitted).

The *Bruen* court further stated the "test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id*. at 2131. The *Bruen* court also acknowledged that "[w]hile the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Id*. at 2132.

Critically, the *Bruen* court established two guideposts for the historical analysis. First, not all historical data is equally important. "The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the

intervening years." *Id*. at 2136. "[T]o the extent later history contradicts what the text says, the text controls," *Id*. at 2137. Second, rare examples of plausibly analogous laws are insufficient. The government must produce evidence of a "well-established and representative historical analogue" and not an unrepresentative "outlier that our ancestors would never have accepted." *Id*. at 2133 (quoting *Drummond v. Robinson Twp.,* 9 F.4th 217, 226 (3rd Cir. 2021)).

*Bruen* itself clearly illustrates the standard. There, the court reasoned that the historical record New York presented failed to establish a sufficiently representative and well subscribed tradition of analogous regulation. That purportedly analogous tradition consisted of three laws from the colonial era, three turn-of-the-18th Century laws, three 19th Century laws, and finally, five-late 19th Century regulations from the Western Territories. *Id*. at 2138-2156.

The *Bruen* court also declined to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," but noted that *Heller* and *McDonald* "point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 2133. And critically, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at 2127 (emphasis added).

Lastly, *Bruen* does not truly pave wholly new Second Amendment ground. The *Bruen* "test" is really just the *Heller* test, with a little more guidance. It does not need to be reconciled with *Heller*, because it essentially reiterated what *Heller* tried to establish, and clearly overrules the application of the two-step interest balancing approach that unfolded in *Heller's* wake. Indeed, "[s]tep one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Bruen*, 142 S. Ct. at 2127.

### ii. The UHA is Unconstitutional Under *Bruen*

The UHA prohibits essentially all Californians from acquiring models of popular handguns that Americans nationwide own for self defense. The threshold question is whether this implicates *keeping* and *bearing* arms under the Second Amendment. It does.

In the Ninth Circuit, the Second Amendment's protection extends to the right to acquire the arms, ammunition, and accessories necessary for exercising Second Amendment rights. *See Jackson v. City & Cty. Of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014) (hollow-point ammunition); *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2021) (standard capacity magazines); *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (discussing authorities acknowledging the right-to-acquire arms); *see also Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (Second Amendment "implies a corresponding right to acquire and maintain proficiency" with arms); *United States v. Marzzarella,* 614 F.3d 85, 92 n.8 (3rd Cir. 2010) (prohibiting the commercial sale of protected arms is untenable under *Heller*).

So any argument that acquisition of handguns does not implicate the Second Amendment's plain text under *Bruen* is not only unfaithful to *Bruen*, but to a body of well-established authority in the Ninth Circuit and beyond. Acquiring arms is clearly the predicate activity to keeping and bearing them. Thus, the UHA implicates the "plain text" of the Second Amendment; the individual right of "ordinary, law-abiding, adult citizens" to *keep* and *bear* the nation's "quintessential" self-defense weapon. *Bruen*, 142 S. Ct. at 2122. Indeed, *Bruen* was emphatically clear that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms [,]" which therefore includes Off-Roster handguns. *Id*., at 2132.

Because the answer to the threshold question is that Constitution presumptively protects Plaintiffs' right to acquire Off-Roster firearms, "the government must [now] justify [the UHA] by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*. at 2130. The State will not meet this burden.

The Supreme Court already established that the handgun is not a "dangerous and

unusual weapon" that was ever historically prohibited and that handguns are the "quintessential" self-defense weapon in "common use" today. *Heller*, 554 U.S. at 624, 627. The State will simply not be able to overcome that and demonstrate that the UHA achieves a regulatory function consistent with the historical cannon of laws that regulated the general public's right to acquire common weaponry. The State will fail to show a well subscribed, representative tradition of historical regulations that imposed a burden on handgun acquisition analogous to the UHA's burden.

In lieu of attempting a task it is destined to fail, Plaintiffs anticipate the State will argue that because the Roster has nearly 800 SKUs of handguns to choose from, the UHA hardly puts a dent into the right of law-abiding and responsible citizens to keep and bear arms for self defense. But this argument is really nothing more than an attempt to reboot step one of the overruled two-step test which asked how close a challenged regulation strikes at the core Second Amendment right to self-defense. That is no longer the inquiry post-*Bruen*. Now, the inquiry is whether the plain text is implicated, not how close to the core right of self-defense the challenged law strikes. The fact that there are *some* handguns available for Californians to buy has no bearing on whether the State can show a well-subscribed historical regulatory tradition analogous to the UHA.

Plaintiffs also anticipate the State will argue the UHA implicates "unprecedented societal concerns" or "dramatic technological changes" and therefore requires a "more nuanced" approach to the analogical inquiry. *Bruen*, 142 S. Ct. at 2132. This is nothing more than a meritless attempt to relax the standard that *Bruen* requires.

The State will not be able to show that there are any Off-Roster handguns that are otherwise legal to acquire but for the UHA that are so dramatically and materially different in some unusual way or pose new societal concerns. There is nothing technologically dramatic or unusual about Off-Roster handguns that in any way presents societal concerns that are any different from those attending grandfathered handguns. And because the UHA by design allows the unlimited proliferation of grandfathered handguns that lack the features purportedly necessary for "safety," there is truly no

material mechanical difference whatsoever between the Off-Roster handguns that have proliferated throughout the nation since 2013 and the On-Roster handguns that have proliferated in California since then.

In effect, the UHA is nothing more than an arbitrary ban on new handguns that functions more like a trade protectionism measure for aging gun models than a public safety measure. Indeed, if firearms lacking the features necessary for Roster admission truly posed novel safety concerns, the UHA's prohibition of retail acquisition but allowance of secondary market acquisition would be irreconcilable with their purported threat to public safety and would be unjustifiably illogical.

The State's burden on this motion is to show a well subscribed, representative tradition of analogous regulation of pistols based on mechanical features. If it can, the UHA stands. If it cannot, the UHA falls. Here, because the UHA restricts the acquisition of handguns; the UHA clearly implicates the *bearing* and *keeping* of *arms*, and the UHA falls because there is no analogous regulatory tradition.

### B. THE REMAINING PRELIMINARY INJUNCTION FACTORS WARRANT RELIEF

If this Court concludes that Plaintiffs are likely to succeed on their Second Amendment claim, the remaining three preliminary injunction factors follow readily.

#### i. Plaintiffs Will Suffer Irreparable Harm if the Court Denies Relief

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury'." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod*, 427 U.S. at 373); 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). The Ninth Circuit has imported the First Amendment's irreparable-if-only-for-a-minute rule to cases involving other rights and, in doing so, has held a deprivation of these rights irreparable harm per se. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997); *see also Elrod,* 427 U.S. at 373.

The Second Amendment right should be treated no differently. *See McDonald,* 561 U.S. at 780 (refusing to treat the Second Amendment as a second-class right subject to different rules); see also *Ezell v. Chicago*, 651 F.3d 684, 700 (7th Cir. 2011) (a deprivation of the right to arms is "irreparable and having no adequate remedy at law"); and *Duncan v. Becerra (Bonta)*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) ("Loss of . . . the enjoyment of Second Amendment rights constitutes irreparable injury.")

Moreover, although the UHA has violated Californians' Second Amendment rights for years, the precedent that makes Plaintiffs' challenge to the UHA a straightforward proposition is essentially hot off the press. *Bruen* brings the reach of the Second Amendment's protection for firearms rights into clear focus in a way that *Heller* did not, by clarifying that the interest-balancing approach federal courts uniformly adopted in its wake was wrong and unfaithful to *Heller*. And now, under the *Bruen* standard, the likelihood of success here is met. *Bruen*, 142 S. Ct. at 2117-18.

**ii. Balancing of the Equities is Sharply in Plaintiffs' Favor**

This factor considers the "balance of hardships between the parties." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011). In contrast to Plaintiffs' injury—the denial of their Second Amendment right of access to the full scope of choices for the quintessential self-defense weapon that the marketplace has to offer—Defendants suffer no injury because there is no plausible, identifiable interest that infringing Plaintiffs' constitutional rights serves. Indeed, Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice. . . ." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir 2013); *and see Valle del Sol Inc. v. Whitting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("[I]t is clear that it would not be equitable . . . to allow the state . . . to violate the requirements of federal law.") (citations omitted).

Furthermore, "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Bruen*, 142 S. Ct. at 2127. So whatever alleged public safety interests the State may have cited when enacting and subsequently amending the UHA are irrelevant here; public-safety oriented interest balancing is not

part of the Second Amendment analysis anymore. *See id*. at 2126. Moreover, although there undeniably is a "problem of handgun violence in this country . . . the enshrinement of constitutional rights necessarily takes certain policy choices of the table." *Heller*, 554 U.S. at 636. Afterall, "[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications." *McDonald*, 561 U.S. at 783.

Even if there were room for balancing the Second Amendment rights concerns against the public safety concerns, there is no room to credibly argue that the UHA actually achieves any public safety goals.

By legislative design, the UHA allows "grandfathered" firearms that lack the "safety" features required under the act to be sold without restriction. Instead of fomenting a technological revolution in handgun technology, the UHA did the opposite; it created a monopoly for older and less ergonomic handgun designs that age further toward obsolescence every year. In other contexts, this is the kind of statute that would likely be found arbitrary and capricious or fail rational basis review. If "unsafe" guns can lawfully be bought and sold *ad infinitum*, then the UHA has quite ironically guaranteed their proliferation.

But the bigger issue is that even if the market had responded differently to the UHA, and manufacturers had endeavored to retrofit their existing designs with microstamping technology or develop new models from whole cloth with it, the core hypothesis behind microstamping is unsalvageable.

Firearm crime in the United States is largely committed with stolen weapons. Once a firearm enters the illegal market, the fact that it might imprint a serialized identification on expended cartridge casings offers no utility to investigators. Like virtually every other jurisdiction, California requires an individual to report the theft of a firearm to law enforcement within 5 days of discovering that the firearm is missing. CAL. PENAL CODE § 25250 (Deering 2022). Licensed firearm dealers must report within 48 hours. CAL. PENAL CODE § 26885(b) (Deering 2022). Once that happens, the chain of custody is legally severed, and the micro-stamps tell the investigating authorities nothing more than

who the firearm was stolen from originally and when. And because handguns are so portable, the probability that a handgun recovered from a California crime scene was stolen in another state is significant. Such a situation would require law enforcement officers to collaborate across state lines, potentially involving the FBI or the ATF. That is a lot of law enforcement resource expended to obtain information that is of little to no use to investigating authorities. More importantly, with only a crime investigation purpose, microstamping admittedly doesn't make the handguns with such theoretical technology any safer for the person who is actually firing them, the originally-claimed reason for requiring drop testing and the establishment of a safe handgun roster for retail sales.

However, as explained, there is no need to even evaluate these questions. These issues are germane only to point out the depth of the intrusion into the Second Amendment protected liberty interest here.

**iii. Granting Preliminary Injunctive Relief is in the Public Interest**

When challenging government action that affects the exercise of constitutional rights, "[t]he public interest . . . tip[s] sharply in favor of enjoining the" law. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). As the Ninth Circuit has clarified, "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Thus, not only are Plaintiffs' rights at stake, but so are the rights of all Californians seeking to engage in conduct that the UHA prohibits. The public interest therefore tips sharply in Plaintiffs' favor. *Klein*, 584 F.3d at 1208.

Furthermore, even if public safety were a relevant factor in this analysis, the UHA does not actually prevent any "unsafe" firearms from being sold in the state; every single semi-automatic handgun on the Roster is a "grandfathered" item which fails to meet the State's operative definition of a safe handgun. That is truly the abject pointlessness irrationality, and legal fiction of the UHA. It functions as nothing more than an arbitrary ban on newer versions of handguns, which operate no differently from the handguns that are allowed to proliferate without limitation, because they are allegedly unsafe. But they

are not unsafe. And prohibiting Plaintiffs and all Californians from acquiring them in the retail market violates the Second Amendment.

## CONCLUSION

The UHA is a an illogical, failed, and unconstitutional experiment. For the foregoing reasons, the Court should grant Plaintiffs' Motion for Preliminary Injunction.

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