No. 23-55276

United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellees,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,

Defendant-Appellant,

and

DOES, 1-10,

Defendant.

On Appeal from the United States District Court for the District of Central California, No. 8:22-cv-01421-CJC-ADS, Hon. Cormac J. Carney

BRIEF FOR AMICUS CURIAE NATIONAL SHOOTING SPORTS FOUNDATION, INC. SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the National Shooting Sports Foundation, Inc. certifies that it does not have a parent corporation and that no publicly held corporation owns more than 10% of its stock.

INTEREST OF AMICUS CURIAE¹

The National Shooting Sports Foundation, Inc. (NSSF), is the trade association of the firearms industry, a Connecticut nonprofit corporation recognized under Section 501(c)(6) of the Internal Revenue Code as a professional association. Founded in 1961, NSSF has more than 10,000 members, including federally licensed firearm and ammunition manufacturers, distributors, and retailers, as well as manufacturers, distributors, and retailers of products for the hunting, shooting and self-defense market, shooting ranges, sportsmen's organizations, and endemic media.

Many NSSF members operate retail firearms businesses in California or manufacture and distribute products into the California marketplace, including semiautomatic pistols. The models of pistols that they can sell in California to lawabiding California residents exercising their Second Amendment rights are severely limited by the Unsafe Handgun Act (UHA)—the statute at issue here. Consumers in all other States are able to purchase a wide variety of models of pistols that the UHA restricts. NSSF has a vital interest in protecting and restoring the Second

¹ All parties consent to this *amicus* brief. No party's counsel authored any part of this brief. No party, party's counsel, or person other than *amicus* contributed money to the brief's preparation or submission.

Amendment rights of its customers who wish to purchase modern, state of the art pistols for lawful reasons, including self-defense.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves California's Unsafe Handgun Act (UHA), which codifies unproven firearms technology as a prerequisite to exercising Second Amendment rights. The UHA establishes a registry of "not unsafe" handguns, the "Roster of Handguns Certified for Sale," consisting of certain old handguns that are grandfathered in, plus newer handguns that include three new features.

The first of those features is microstamping, which in theory refers to etching or imprinting information from the tip of a pistol's firing pin into the primer of an ammunition cartridge casing on the make, model, and serial number of the pistol. The imprinted case is then ejected from the firearm upon firing. But that technology is not as yet feasible.

There is a consensus among scholars and forensic professionals that this technology of microstamping in its current form cannot be commercially deployed. This body of independent, peer-reviewed literature includes papers coauthored by the inventor and patent holder of the technology. No peer-reviewed study or feasibility test has delivered readable results on the level required by California, and statistically fewer than four cartridges are left behind at a crime scene, which is less than half the number studies show are needed to reliably obtain the necessary

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information to identify the firearm in question, even when the technology otherwise works.

But there are several other reasons the technology does not work. The only part of the gun on which it can even be attempted is the firing pin, but those results are unreliable, as already noted. Even if that problem could be solved, firing pins can easily be replaced. And other surfaces inside a firearm do not contact other parts of a cartridge in such a way that microstamp information could be transferred. For these reasons, not a single firearm manufacturer in the world sells even a single handgun model with microstamp technology. And apparently also for these reasons, Congress has never mandated this technology, despite considering legislation more than once to do so.

The other features the UHA requires in order to list a new pistol model on California's Roster are magazine disconnect mechanisms and loaded chamber indicators. While those features are technologically possible, they are not typically desired features by most gun purchasers due to their perceived lack of benefit to the user, and in the case of a magazine disconnect, the possible impediment to the utility of the firearm for self-defense.

What the UHA's requirements ultimately amount to is a gradual ban on handguns in California. Models on the Roster of "not unsafe" handguns are increasingly older and frozen in time. And given that manufacturers must pay an

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annual fee for each model on the Roster, models drop off as market demand disappears for models that lack more and more of the modern refinements that make firearms more effective and—ironically—safer. But no new models can be added, primarily because one of the three features required by the UHA is literally impossible to implement on any handgun in the world.

But California consequently faces a legal problem: Handgun bans are unconstitutional. For all the reasons Appellees explain, the UHA fails under *Bruen* because there are no historical analogues to the UHA's firearm feature mandates. But this Court does not even need to get as far as *Bruen*, because this effective ban on handguns cannot stand under the Supreme Court's earlier watershed decisions in *Heller* and *McDonald*. California's ban on handguns in the UHA violates the Second Amendment right to keep and bear arms.

ARGUMENT

I. THE UHA WANDERS INTO UNCHARTED WATERS, DABBLING IN UNPROVEN CONCEPTS AND TECHNOLOGIES.

This case involves a California statute, the Unsafe Handgun Act (UHA), Cal. Penal Code § 31900 *et seq.*, which wanders into uncharted regulatory territory in terms of firearms technology, making counterfactual assumptions about the reliability and affordability of new technologies as a condition of exercising the Second Amendment right to purchase a handgun. The UHA establishes a registry of handguns that are approved as "not unsafe," which is called the "Roster of Handguns Certified for Sale." *See id.* §§ 23650–55; 32015(a).² This registry is comprised of older firearm models that are either grandfathered in or newer models that California lawmakers consider "safe" due to these technological changes—though as explained below, not a single newer model has all of the requisite features to be labeled "not unsafe."

One of these novel technologies is microstamping. "Microstamping is a patented process that micro-laser engraves a unique alpha-numeric code on the tip of the gun's firing pin so that, in theory, it imprints the information on discharged cartridge cases." Nat'l Shooting Sports Found., Inc., *NSSF Fast Facts: Microstamping Technology: Proven Flawed and Imprecise*, at 1 (Feb. 2021), https://www.nssf.org/wp-content/uploads/2022/09/NSSF-factsheet-Microstamping -22upd.pdf (hereinafter "NSSF Fast Facts").

The microstamping provision in the UHA originated with California Assembly Bill 1471 in 2007, originally codified as Cal. Penal Code § 12126. A.B. 1471, 2007-08 Reg. Sess. § 2 (Cal. 2007). *See* Matthew Yi, *Assembly OKs microstamp on some guns/Bill would make state first in nation to require tracking device in semiautomatic pistols*, S.F. Chron. (May 30, 2007), https://tinyurl.com/49rnfaf4. In 2010, Senate Bill (S.B.) 1080, "reorganize[d] without substantive change the

² See Cal. Dep't of Just., *Handguns Certified for Sale*, available at https://www.oag.ca.gov/firearms/certified-handguns/search (last viewed June 2, 2023).

provisions of the Penal Code relating to deadly weapons," and became operative January 1, 2012. S.B. 1080, 2009-10 Reg. Sess. (Cal. 2010), https://legiscan.com/CA/text/SB1080/2009.

Under this legislation, an "unsafe handgun" is "any pistol, revolver, or other firearm capable of being concealed upon the person" that does not have certain statemandated features. Cal. Penal Code § 31910. As one of these features, California designates a handgun as "unsafe" if it does not have a microstamping feature. *Nat'l Shooting Sports Found., Inc. v. California*, 420 P.3d 870, 871 (Cal. 2018). New semiautomatic pistols must "include a feature called 'microstamping': each such pistol must imprint … microscopic arrays of characters that identify the make, model, and serial number of the pistol onto the cartridge or shell casing of each fired round." *Pena v. Lindley*, 898 F.3d 969, 974 (9th Cir. 2018). Specifically, California's Unsafe Handgun Act provides that:

for all semiautomatic pistols that are not [grandfathered], it is not designed and equipped with a microscopic array of characters used to identify the make, model, and serial number of the pistol, etched or otherwise imprinted in one or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired.

Cal. Penal Code § 31910(b)(6)(A).

This requirement went into effect in May 2013 when then-California Attorney General Kamala Harris certified that the technology for microstamping was no longer encumbered by any patents. Div. of Law Enf't, Cal. Dep't of Just., *No. 2013-* BOF-03, Information Bulletin: Certification of Microstamping Technology Pursuant to Penal Code section 31910, subdivision (b)(7)(A) (May 17, 2013), https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/infobuls/2013-BOF-03.pdf. But Harris' certification consisted solely of her legal conclusion that mandating microstamping technology was not impeded by any patent rights, not a factual conclusion that the technology could in fact deliver the physical results mandated by S.B. 1080.

II. UHA'S MICROSTAMPING REQUIREMENT IS NOT FEASIBLE.

It is a consensus position among scholars and firearms forensics experts that microstamping technology in its current nascent form cannot meet the requirements of the UHA. It is therefore impossible to satisfy this statutory requirement, leaving only grandfathered models of firearms on the Roster in California. No new models of centerfire pistols have been added to the Roster since May 2013.

As a starting point, it is possible to use the firing pin as a sort of stylus to imprint information. "Because the firing pin is made of hard steel, micro-stamped characters will sometimes successfully transfer into the softer primer that the firing pin strikes during the firing process." Decl. of Frederic Andre Tulleners ¶ 3, *Nat'l Shooting Sports Found. Inc. v. California*, No. 14CECG00068 DSB, 2015 WL 10945332 (Cal. Super. July 16, 2015) (hereinafter "Tulleners Decl."), *rev'd*, 210

Cal. Rptr. 3d 867 (Cal. Ct. App. 2016), *rev'd*, 420 P.3d 870 (Cal. 2018). That is not the problem.

It is also possible for the firing pin to imprint the sort of information that the statute would seek to transfer. "Micro-stamped characters on the firing pin consist of either an alpha numeric code etched or imprinted onto the tip of the firing pin, a pattern of dots known as a dot code that surrounds the alpha numeric code, a pattern of irregularly connected lines known as a gear code that surrounds alpha numeric code, or a pattern of bars located on the side of the firing pin just behind its tip." Tulleners Decl. ¶ 24.

But after that, there are insurmountable problems with implementing the UHA's statutory mandate.

A. Scholarly and professional literature conclude that current microstamp technology is unreliable.

The scholarly, independent, peer-reviewed research on microstamping technology reach a consensus that the current state of that science cannot produce results that reliably meet the standards called for in the UHA. Five studies illustrate this consensus.

1. First is a study by George Krivosta from Suffolk County Crime Laboratory in New York, published in the Journal of the Association of Firearms and Tool Mark Examiners (AFTE). This study was conducted with firearms fitted with two engraved firing pins. George G. Krivosta, *NanoTag Markings from*

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Another Perspective, 38 Ass'n of Firearm & Tool Mark Exam'rs J. 41, 42 (2006), https://tinyurl.com/vdx5kv9j. "While the proposed concept seemed too simple to fail, the experience of this examiner suggested further examination and testing would be necessary before the firearms industry embraces the proposed solution." *Id.* at 41.

The study found that "the weapon producing the highest percentage of readable impressions was incapable of firing three shots in a row." *Id.* at 46–47. As a result, the author concluded that microstamp technology is not yet ready for mass production, because "implementing this technology will be much more complicated than burning a serial number on a few parts and dropping them into firearms being manufactured." *Id.* at 47.

2. A second study published in the Journal of the Association of Firearm & Tool Mark Examiners was co-authored by Todd Lizotte, the inventor and patent holder on microstamp technology. This study utilized the firing pins of three different handguns modified to attempt to stamp both a six-character alpha-numeric code and a gear code, then studied the results with a scanning electron microscope. Taylor Grieve et al., *Gear Code Extraction from Microstamped Cartridges*, 45 Ass'n Firearm & Tool Mark Exam'rs J. 64, 64 (2013), https://tinyurl.com/2mnyajb6. Even with proponents like the microstamping patent-holder participating, the study

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concluded that "a full gear code appears to be rare and dependent on the weapon that made the impression." *Id.* at 72–74.

Another study, also coauthored by patent-holder Lizotte, involved 3. microstamp characters placed on firing pins of three 9mm handguns-one each made by Sig Sauer, Taurus, and Hi-Point-which were then used to fire 1,000 arounds, consisting of 100 cartridges from each of ten different brands. L.S. Chumbley et al., Clarity of Microstamped Identifiers as a Function of Primer Hardness and Type of Firearm Action, 44 Ass'n Firearm & Tool Mark Exam'rs J. 145 (2012), https://tinyurl.com/yc86aad3. As the authors explained, "[t]he purpose of this exploratory study is to examine one aspect of microstamping, namely, the performance of a microstamped identifier on a small test set as a function of ammunition brand, hardness, and firearm action type." Id. at 147. Yet in their conclusion Lizotte and the other experts acknowledged that "it is apparent that legitimate questions exist related both to the technical aspects, production costs, and database management associated with microstamping that should be addressed before wide scale implementation is legislatively mandated." *Id.* at 146–47.

4. The University of California at Davis also conducted a study of microstamping "to evaluate the efficacy of this new technology so that policymakers could make informed decisions in support of facilitating the identification of forensic science evidence in firearm-related crimes." David Howitt, Frederic A. Tulleners,

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& Michael T. Beddow, Univ. of Cal. Davis, *What Micro Serializing Firing Pins Can Add to Firearm Identification in Forensic Science: How Viable are Micro-Marked Firing Pin Impressions as Evidence?*, at 7 (2008), https://www.nssf.org/wpcontent/uploads/2021/02/UC-Davis-Microstamping-Study.pdf. This study consisted of a series of tests to determine (1) the durability and longevity of microstamps, (2) the effects of repeated firings, (3) how easy it would be to deface those markings, and (4) evaluate the cost. Id. The study was conducted with 14 engraved firing pins of diverse calibers and qualities from a representative crossspectrum of firearms. Id. at 8.

In this study coauthored by Tulleners, UC Davis concluded that microstamping technology is just not ready for prime time in its current state of development. "At the present time, therefore, because its forensic potential has not yet been fully assessed, a mandate for implementation of this technology in all semiautomatic handguns sold in the state of California is counter-indicated. Further testing, analysis, and evaluation are required." *Id.* at 47.

5. The National Academy of Sciences reached a similar assessment in another study, in a 345-page report. *See* Nat'l Rsch. Council, Comm. to Assess the Feasibility, Accuracy, & Tech. Capability of a Nat'l Ballistics Database, *Ballistic Imaging* (2008) (hereinafter "*Ballistic Imaging*"), http://elibrary.pcu.edu.ph:9000 /digi/NA02/2008/12162.pdf. As part of a broader study on using ballistic images of

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various sorts to assist law enforcement and research efforts, this report examined microstamping technology in detail. *See id.* at 255–71. The report's conclusion is that it is not clear at this point if these challenges can ever be resolved with the current technology. As the report summarizes its research, "[t]he validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated." *Id.* at 3.

Requiring microstamping simply does not work, for at least three reasons. First, requiring it on a firing pin does not reliably imprint the required identifying information on an ammunition cartridge. Second, even if it did, firing pins can easily be replaced. And third, there is no other component of a firearm other than the firing pin where an effective microstamping feature can be located.

B. Firing pins do not reliably imprint the identifying information, and can easily be replaced.

Even though it is possible to encode the requisite information onto a firing pin, under current technology that information is not transferred with sufficient reliability to meet UHA's requirements. The UHA requires that each of three identical handguns "[f]ires the first 20 rounds without a malfunction that is not due to ammunition that fails to detonate." Cal. Penal Code § 31905(c)(1). However, the Krivosta study found that "the weapon producing the highest percentage of readable impressions was incapable of firing three shots in a row." Krivosta, *supra*, at 46– 47. Current technology cannot meet both requirements. But even if firing pins could function reliably for this purpose, it would still not reliably serve the purpose of UHA's requirement. A firing pin can easily be replaced in a firearm. It is an easily accessible component, and because sometimes they need to be replaced, firearms are designed to facilitate that replacement.

Unfortunately for proponents of the UHA's microstamping requirement:

The firing pin is the most commonly damaged, e.g., chipped, and replaced part of a firearm. After-market replacement parts are widely available, including firearm pins. A microstamped firing pin can be removed and replaced, either as a common repair or for the purpose of evading [UHA's requirement], very quickly, easily, and inexpensively.

Decl. of Lawrence G. Keane ¶ 30, *Pena v. Lindley*, No. 2:09-cv-01185-KJM-CKD, 2015 WL 854684 (E.D. Cal. Feb. 26, 2015), ECF No. 91-1 ("Keane Decl."), *aff'd*, 898 F.3d 969 (9th Cir. 2018).

The authors of the UHA have been aware since 2007 that firing pins can be removed and replaced. Tulleners Decl. ¶ 14. Yet the legislative record does not reflect this fact. This feature thus impedes law-abiding citizens but not criminals, raising questions about what exactly the UHA is expected to accomplish.

C. Microstamping features cannot be located anywhere other than the firing pin.

This problem is compounded by the fact that a microstamping feature cannot be put anywhere in a firearm other than the firing pin. In terms of producing results:

it is not possible under the current state of firearms micro serial number technology to etch or otherwise to imprint, on any interior surface or internal working part of a semi-automatic pistol other than its firing pin, a microscopic array of characters that identify the make, model and serial number of the pistol, and that can be transferred by imprinting each cartridge case when the pistol is fired.

Tulleners Decl. ¶ 25. Consequently, it would not be an alternative to place a "marking on the extractor and ejector in areas that do not come into contact with a cartridge and cannot mark the case." Krivosta, *supra*, at 46. There is no realistic alternative to the firing pin in terms of a firearms component that would imprint the coded information onto a cartridge:

There are only a limited number of internal surfaces or parts in a semiautomatic pistol other than the firing pin on which micro-stamped characters might be etched or imprinted—the breech face, chamber wall, extractor, and ejector – and none of those surfaces or parts would effectively transfer micro-stamped characters to the cartridge case upon firing.

Tulleners Decl. ¶ 25.

But there is another problem beyond the fact that only the firing pin can do the imprinting. The other part is where the imprint would be made on the cartridge that is ejected from the firearm. The reality is that microstamp "impressions would transfer poorly to areas other than the primer." Krivosta, *supra*, at 44.

So when facing the reality that much of a gun—and especially the internal components—are made of hard metals, and considering the nature of the physical contact between any part of a cartridge with any internal part of the firearm, the number of options for microstamping dwindles to one. The firing pin is the only part of the firearm by which microstamping can even be attempted.

D. Even if marks could be reliably imprinted, they are easy to erase.

Moreover, microstamp markings are easy to eradicate. So even if the markings could be placed reliably on a cartridge, either by the firing pin on the primer or by some other handgun interior surface onto some other part of a spent cartridge, it would still not produce the desired result.

As the voluminous *Ballistic Imaging* report explained:

The individual symbols in the microstamped marking can range from a few microns tall to several hundred microns, with the optimum range being 50 to 100 microns per character. A smaller size compromises the mechanical strength of the individual symbols.

Ballistic Imaging, supra, at 262.

The shallowness of these marks renders them excessively easy for criminals to circumvent. As Officer Magazine, a publication for police officers, explains, "The microstamp is only 15- to 25-microns deep-one micron is 1,000th-of a millimeter-and critics say it is easily rubbed off with household tools." Douglas the shots, Page, Microstamping calls Officer Mag. (Jan. 1, 2008), https://www.officer.com/home/article/10249197/microstamping-calls-the-shots. A mark that can be rubbed off by sandpaper does not serve the purposes the UHA has for it.

E. Congress has never mandated microstamping technology for these same reasons.

Although there are any number of reasons that a state takes regulatory action that Congress does not take on matters where both levels of government have jurisdiction, it appears that Congress is pessimistic that mandating microstamping is effective public policy. Congress has repeatedly failed to advance legislation that would require it, and currently has a draft resolution that opposes it.

Media outlets cheerleading California's efforts assured the public that the "idea of 'micro-stamping' is catching on at the federal level." Yi, *supra*. But the opposite has proven true. Proposed federal legislation requiring microstamping has repeatedly failed to pass Congress. *E.g.*, Make Identifiable Criminal Rounds Obvious (MICRO) Act, H.R. 3458, 115th Cong. (2017); National Crime Gun Identification Act (NCGIA), H.R. 5266, 110th Cong. (2008). Even during times when Congress has been controlled by majorities that at least arguably favor gun control, during the 15 years in which California has had microstamping requirements, neither chamber of Congress has passed a bill to do so, to say nothing of a bill being signed into law by the President.

Amicus NSSF's answer to microstamping proposals is—and has consistently been—to study the technology, because upon study it becomes clear that this is science fiction, not science. Policy requires the latter. NSSF supported legislation introduced by Congressman Dan Boren in 2010 (D-Okla.), called the Firearms

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Microstamping Evaluation and Study Act of 2010, H.R. 5667, 111th Cong. (2010).

As NSSF explained at the time:

NSSF is supporting this legislation because we have grave and serious concerns about this concept. We believe that a comprehensive study will add to the scientific body of evidence now available demonstrating that microstamping is an easily defeated, fundamentally flawed concept that holds the potential for pricing firearms out of the reach of the average American.

NSSF Statement on Firearms Microstamping Study, Nat'l Shooting Sports Found. (July 22, 2010), https://www.nssf.org/articles/nssf-statement-on-firearms-micro stamping-study/.

A resolution currently pending before Congress raises these points. The resolution finds that "based on the current state of this nascent technology, it is impossible to microstamp a firearm cartridge and have the required identifying information legibly and reliably imprinted on the cartridge casing when fired." H.R. Res. 244, 118th Cong. (2023). The resolution adds that "the scientific literature concludes there is no existing microstamping technology that will reliably, consistently, and legibly imprint the required identifying information from the tip of the firing pin of a semiautomatic pistol on the cartridge casing it fires," and that "one study found that the impressions were not decipherable nearly 50 percent of the time." *Id.*

Nor is the lack of efficacy the only problem with microstamping mandate, because cost is also an issue. The resolution finds that "the microstamping process

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is costly and time-consuming, and threatens the employment of thousands in the firearms industry." *Id.* This is because "requiring its use would raise the cost of legal firearms by hundreds of dollars per gun for both law-abiding citizens seeking to exercise their Second Amendment right and for United States law enforcement personnel." *Id.*

It thus appears that Congress is unlikely to mandate the use of microstamping technology in firearms in the near future.

* * *

The net result of these facts is that firearms that are not already grandfathered onto the Roster are effectively banned in the State of California, because no handgun in the world includes a microstamping feature, so every handgun on the market is "unsafe." The net effect at this time is that requiring microstamping effectively rules out any new handguns being added to the Roster of approved firearms.

Finally, it is worth noting that microstamping has nothing to do with the safety of a firearm. To the extent the technology could be implemented at all, its sole use is to assist law enforcement investigating a crime. It neither makes a firearm more nor less safe. The import of that distinction is that in performing the historical analysis required by *Bruen, see N.Y. State Rifle & Pistol Ass 'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126–27 (2022), analogies to Founding-era safety restrictions must therefore fall flat.

In conclusion, the UHA's microstamping requirement cannot be fulfilled because microstamping does not work as advertised. It can only be placed on the firing pin, which can be damaged or easily replaced. But the firing pin cannot provide microstamps with the requisite reliability. And when Congress has looked closely at this technology, it has not moved forward with it. The verdict on microstamping is clear: "Microstamping is not ready for use as a crime solving technology. That's the conclusion of a peer-reviewed study published in the scientific journal of forensic firearms examiners based on work conducted by a team of experts and funded by the U.S. Department of Justice." *NSSF Fast Facts, supra,* at 1.

III. REQUIRING MAGAZINE DISCONNECTS AND CARTRIDGE LOAD INDICATORS ARE POSSIBLE, BUT UNDESIRABLE TO CONSUMERS.

Although the primary focus of this brief is the UHA's microstamping requirement, two other UHA mandates deserve a brief mention. They are magazine disconnect mechanisms and chamber load indicators.

A "magazine disconnect mechanism" (MDM) prevents the firing pin from striking the primer in an ammunition cartridge that is situated in the chamber of a semiautomatic pistol unless a detachable magazine is inserted in the grip of the pistol, thereby preventing the firearm from discharging a round of ammunition. *See* Keane Decl. ¶ 8. A "chamber load indicator" (CLI) indicates by the display of a dot

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that there is a cartridge in the chamber of a firearm. *See id.* Those are two additional features the UHA requires to be listed on the Roster.

Unlike microstamping technology—which is impossible to implement— MDMs and CLIs are capable of implementation, and some firearms have them. Most do not, due to a lack of consumer demand for those features. The overwhelming number of military and law enforcement contracts for pistols including in California—specifically state that the pistol cannot be equipped with a magazine disconnect. This is because the firearm cannot fire when the magazine is being changed or removed. This can be detrimental in a self-defense situation when the service member or police officer might need to fire the gun while in the middle of changing a magazine. In addition, it is common to teach new shooters with a firearm with the magazine removed and only the one round in the chamber. A minority of consumers, however, do want this feature, and the market responds by offering them products with features that meet their personal needs and preferences.

A CLI is of limited value to a person unfamiliar with a firearm they may encounter. And the most fundamental rule of firearm safety is to treat every firearm as if it is loaded until you personally check the chamber to ensure it is not loaded.

While these features are not popular or widely sought, that is of no concern with this Court because that is an economic issue, not a legal one. The problem with both requirements is that they have no historical analogue. Under *Bruen*, the

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government bears the burden of showing what Founding-era restrictions or conditions on firearms are comparable to the government's current restrictions. *Bruen*, 142 S. Ct. at 2126–27. As Appellees explain, California has not done so, so those requirements likewise violate the Second Amendment.

IV. CALIFORNIA'S REQUIREMENTS ENACT A GRADUAL HANDGUN BAN, WHICH THE SECOND AMENDMENT PROHIBITS UNDER *Heller*.

The net effect is that the UHA is a gradual handgun ban in the State of California.

The number of firearms on the Roster shrink. Grandfathered firearms become increasingly older and unavailable. Every year, each manufacturer must pay a fee to renew each handgun's place on the Roster. Cal. Penal Code § 32015(b)(2). But as market demand drops for those models, manufacturers have less incentive to pay an annual fee to keep them on the Roster. And new firearms cannot be added, because none of them have all three required features of microstamping, an MDM, and a CLI—again, one of those three requirements is literally impossible. That last point alone makes that UHA requirement illegal without regard to the Second Amendment, because "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

However, a law-abiding citizen cannot look elsewhere for help. It is illegal to purchase handguns from out-of-state; a citizen must purchase the firearm from a licensed California seller. 18 U.S.C. §§ 922(a)(3), (a)(5), (b)(3); Cal. Penal Code § 27545. So it is not an option for a citizen to obtain their firearm from a State that does not impose these requirements.

The UHA therefore impedes American citizens who live in California from exercising their Second Amendment rights. But California cannot pursue that as a goal. The government has no legitimate interest in intentionally burdening the exercise of a constitutional right. *United States v. Jackson*, 390 U.S. 570, 582 (1968); *Watson v. Memphis*, 373 U.S. 526, 532–33 (1963).

Over time, the UHA imposes a categorical ban on handgun ownership in California. Yet that violates the core holding of *District of Columbia v. Heller*, 554 U.S. 570 (2008). After holding that the Second Amendment ensures an individual right to keep and bear arms, *id.* at 595, the Court turned to Washington, D.C.'s gun control law, which effectively banned handgun ownership. The Court concluded that an effective ban on handguns violates the Second Amendment. *Id.* at 635. Then in applying that same rule to Chicago's handgun ban, the Court invalidated that ban as well. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). One does not need to look into recent doctrinal developments in *Bruen*; under longstanding doctrine, the UHA's de facto gradual ban on handguns violates the right to keep and bear arms.

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CONCLUSION

For these reasons, as well as those explained by Appellees, this Court should

affirm the court below.

June 2, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am counsel for *amicus curiae*. This brief contains 5,089 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font. I certify that this brief is an *amicus* brief and complies with the 6,500 word limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) and Cir. R. 29-2(c)(2).

June 2, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, I electronically filed the forgoing document with the Clerk of the Court by using the CM/ECF system.

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June 2, 2023

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