No. 23-55276

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANCE BOLAND; MARIO SANTELLAN; RENO MAY; JEROME SCHAMMEL; AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,
Plaintiffs-Appellees,

v.

ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
No. 22-cv-1421-CJC-ADS
The Honorable Cormac J. Carney, Judge

APPELLANT'S REPLY BRIEF (PRELIMINARY INJUNCTION APPEAL – NINTH CIRCUIT RULE 3-3)

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INTRODUCTION

California's Unsafe Handgun Act ("UHA") imposes feasible public safety requirements before certain semiautomatic pistols may be sold at a firearms dealer in the State. The UHA is constitutional under the text-and-history standard set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022): the requirements do not interfere with any right protected by the plain text of the Second Amendment and are consistent with a historical tradition of firearms and ammunition laws aimed at ensuring public safety. As such, Plaintiffs cannot demonstrate the likelihood of success necessary for a preliminary injunction. And, at a minimum, equitable considerations weigh heavily against an injunction. The record reflects that the individual Plaintiffs collectively own over 100 firearms and have adequate means to defend themselves while the district court considers the constitutional issues presented in this case.

Plaintiffs' defense of the district court's preliminary injunction amounts to the suggestion that the Second Amendment extends to protect any firearms which manufacturers deem feasible or popular, even if those firearms lack any safety features. But that is not what the text-and-history standard requires. With respect to the textual analysis, it is Plaintiffs' burden to establish the Second Amendment's plain text covers their

proposed course of conduct. But Plaintiffs characterize this threshold inquiry in a way that would render it meaningless. They also contend that the UHA's requirements operate as a ban on certain semiautomatic pistols by suggesting that the requirements are technologically infeasible, but they fail to point to any record evidence supporting their argument. Instead, the record reflects that manufacturers can comply—indeed, have complied—with the chamber load indicator and magazine disconnect mechanism requirements, and that manufacturers have simply refused to comply with the microstamping requirement. Plaintiffs' premise for their plain text argument thus fails, and they have not met their burden to show that the Second Amendment's plain text prohibits States from imposing certain minimum public safety requirements before a firearm may be sold at retail. With respect to the history test, Plaintiffs continue to demand a "historical twin," contrary to *Bruen*. Properly analyzed, however, the challenged public safety requirements are consistent with a historical tradition of regulations aimed at reducing the harm from firearms when they do not operate as intended, and at tracing firearms used in crimes.

As to the equitable factors that Plaintiffs had to establish under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), they still fail to point to any immediate and practical harm they would suffer absent

the injunction. They already possess and can access hundreds of semiautomatic pistols. *Winter* demands some additional showing of harm, especially in circumstances where a preliminary injunction would upset a consumer safety regime that has been in place for a decade or more. Under both *Winter* and *Bruen*, the district court abused its discretion, and this Court should reverse the order granting the preliminary injunction.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR SECOND AMENDMENT CHALLENGE TO THE UHA'S REQUIREMENTS

A. Plaintiffs' Characterization of the Plain Text Inquiry Would Render It Meaningless

It is Plaintiffs' burden to establish that the "plain text of the Second Amendment protects [the individual's] proposed course of conduct," *Bruen*, 142 S. Ct. at 2134—*i.e.*, whether the regulation at issue prevents "the people" from "keep[ing]" or "bear[ing]" "Arms" for lawful purposes, U.S. Const. amend. II. Defendant's Opening Br. (OB) 20–21. If so, "the Constitution presumptively protects" the proposed course of conduct, and only then does the burden shift to the government for the historical inquiry. *Bruen*, 142 S. Ct. at 2130; *see also Oakland Tactical Supply, LLC v. Howell Twp.*, No. 18-cv-13443, 2023 WL 2074298, at *3, n.4 (E.D. Mich. Feb. 17,

2023), *appeal docketed*, No. 23-1179 (6th Cir. Mar. 1, 2023) (defining the proposed conduct simply as "training with firearms" would lead to the "absurd result" that in future constitutional challenges "any proposed conduct touching on any type of firearms training would be presumptively protected by the plain text of the Second Amendment"); *United States v. Reyna*, No. 3:21-CR-41, 2022 WL 17714376, at *4 (N.D. Ind. Dec. 15, 2022) (if the proposed conduct was "mere possession" in a challenge to the federal prohibition of possessing a firearm with an obliterated serial number, then other challenged regulations implicating possession would "promptly and automatically proceed to" the historical inquiry).

Plaintiffs try to evade this burden by characterizing the plain text inquiry in a manner that would render it meaningless. *See* AB 21 (describing it as a "low bar"). They assert they meet their burden because "the handguns Plaintiffs wish to purchase are 'arms' within the plain text of the Second Amendment whether or not they are 'state of the art,'" (AB 29), and "regardless of whether they possess whatever 'safety' features a state may mandate." AB 27; *see also* AB 21, 25–28. But this approach would mean that any regulation having any effect on firearms possession or use could be presumptively protected by the Second Amendment's plain text. For example, under Plaintiffs' approach, generally applicable zoning laws

prohibiting retail sales in residential neighborhoods (including those of firearms) could meet the plain text inquiry and then be subject to historical scrutiny; so, too, a standard sales tax that encumbered an individual's ability to purchase a handgun; or a law that required all retailers to retain records of commercial sales. And while Plaintiffs criticize the "state's logic" (AB 27) in advancing a vigorous plain text stage of the inquiry, it is Plaintiffs' approach that strays from *Bruen*'s requirements. Plaintiffs' approach is not the plain text inquiry that *Bruen* envisioned when it reiterated that the Second Amendment does not protect "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 626).

Nor does the plain text of the Second Amendment turn on firearms manufacturers' supposed perception of consumer desires. Under Plaintiffs' understanding of the plain text inquiry, the question is whether the State's regulation prohibits the "sale of common arms that lack features that the average consumer neither expects nor wants." AB 2; *see also* AB 20, 21, 41, 43. But unsubstantiated consumer desires do not dictate the scope of the Second Amendment. For example, taking Plaintiffs' position the next logical step forward, the Second Amendment would include the right to purchase a semiautomatic pistol that could inadvertently fire without the

user pulling the trigger (because it did not have to pass a drop-safety test), or that could explode in the user's hand (because it did not have to pass a firing test), or that could melt in the user's hand (because it did not have to pass a melting-point test). Under Plaintiffs' plain text inquiry, the "wish to purchase" a handgun of their choice, regardless of its lack of safety measures, would reflect conduct that is presumptively protected by the Second Amendment. AB 29. But this Court has observed, with an analysis rooted in *Heller*, that there is no "constitutional right to purchase a particular handgun" (*Pena v. Lindley*, 898 F.3d 969, 973 (9th Cir. 2018)), and that "the Second Amendment does not elevate convenience and preference over all other considerations." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017) (en banc).

Plaintiffs additionally assert that the challenged regulation should not be considered in the plain text inquiry because "the Second Amendment says nothing about what kinds of restrictions the government may impose on the right to keep and bear arms." AB 27. They contend the inquiry should focus on the proposed conduct of purchasing "lawful and common" handguns (AB 20), and ignore the regulation at issue. AB 21, 26–27. But the challenged regulation naturally informs the scope of the proposed conduct. Specifically defining the proposed conduct necessarily requires

consideration of what the challenged regulation actually restricts or prohibits. Otherwise, the Supreme Court's use of the qualifier "proposed" before "course of conduct" when describing the plain text analysis would be meaningless. *See Bruen*, 142 S. Ct. at 2134.

Ignoring the challenged regulation in the plain text inquiry would contradict *Bruen*.[1] Contrary to Plaintiffs' contention, the defined course of conduct in *Bruen*—"carrying handguns publicly for self-defense," *Bruen*, 142 S. Ct. at 2134—indeed did "bake New York's regulatory regime into its threshold textual inquiry." AB 26–27. *See also Oakland Tactical Supply*, 2023 WL 2074298, at *3 ("The proposed conduct could not be simply 'training with firearms' because the zoning ordinance does not prohibit 'training with firearms.'"); *Def. Distributed v. Bonta*, No. CV 22-6200, 2022 WL 15524977, at *4 (C.D. Cal. Oct. 21, 2022), *adopted* 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022) (the proposed conduct was the self-manufacture of firearms based on the plaintiffs' characterization of the challenged statutes as a ban on such conduct). Moreover, *Bruen* constitutionally endorsed

[1] It also contradicts two of Plaintiffs' multiple iterations of the proposed course of conduct, both of which contemplate the challenged requirements. AB 23 ("purchasing handguns for self-defense that lack state-mandated features"); AB 24 ("purchasing handguns lacking certain features").

"shall-issue" public-carry licensing regimes that required "applicants to undergo a background check or pass a firearms safety course," among other things. 142 S. Ct. at 2138, n.9; *see also id.* at 2162 (Kavanaugh, J., concurring) (noting that fingerprinting, a mental health records check, and training in firearms handling were additional "constitutionally permissible" requirements). The Court cited no historical analogues for these constitutionally permissible requirements, and it would be illogical for the Supreme Court to endorse these shall-issue regime licensing requirements without a historical analysis if, as Plaintiffs claim, it is only the "historical tradition inquiry" that "address[es] how a state may restrict the keeping and bearing of arms." AB 21; *see also* Everytown for Gun Safety Amicus Br. (EAmB) 8, C.A. Dkt. 19.

Just as these commonsense public safety requirements were constitutionally permissible without a historical analysis in *Bruen*, the same is true for the challenged requirements here, which do not prohibit the possession of handguns. Instead, the challenged provisions require that a new semiautomatic pistol have commonsense public safety features before it can be added to the Roster of Certified Handguns (the "Roster"), and thus be available for retail sale in the State. OB 6–9. The requirements themselves

do not interfere with what the district court described as "state-of-the-art handguns." 1-ER-14.

Putting aside that neither the district court nor Plaintiffs define what constitutes a "state-of-the-art handgun," it is unclear why such a handgun must be one without commonsense public safety features that can prevent accidental shootings and help solve shooting crimes.[2] OB 21–28. Plaintiffs do not meaningfully address this question and instead assert they have a presumptive right to purchase whichever handguns they desire, regardless of "whether or not they are 'state of the art,'" and regardless of "whether or not other arms they could purchase are 'state of the art.'"[3] AB 29. But that approach outsources safety requirements to firearms manufacturers by allowing them to define the market; nothing in the Second Amendment requires States to stand back and allow firearms manufacturers to dictate what the Second Amendment protects. *See* AB 34.

[2] Plaintiffs repeatedly quote the district court's finding that these supposed "state-of-the-art" semiautomatic pistols are more "durable, reliable, affordable, and possibly safer" than those currently available for retail sale in the State (AB 1, 17, 23, 54 (quoting 1-ER-21)); but that finding was not based on any evidence in the record.

[3] Contrary to Plaintiffs' unsupported contention that the Roster is "shrinking" (AB 12), the number of handguns on the Roster has not fallen below 800 in the past five years (3-ER-451).

At bottom, Plaintiffs' characterization of the plain text inquiry is detached from reality and from *Bruen* itself.

1. The chamber load indicator and magazine disconnect mechanism requirements are feasible handgun safety requirements, not a prohibition on the retail sale of semiautomatic pistols

Plaintiffs repeat the district court's mistake by characterizing the requirement for a chamber load indicator and magazine disconnect mechanism as a law that "precludes" the retail sale of "state-of-the-art" handguns. AB 28–29. Characterized as such, Plaintiffs contend that the plain text inquiry is easily satisfied because they are restricted from purchasing the arms they desire. AB 28–29. But the assumption that these two safety requirements have barred the sale of semiautomatic pistols relies on the mistaken premise that chamber load indicators and magazine disconnect mechanisms are not feasible to implement on the very arms they seek to purchase. OB 25–26.

The district court acknowledged that manufacturers have demonstrated that they can make semiautomatic pistols satisfying these two safety requirements, and never found that manufacturers could not comply with them. 1-ER-13. Plaintiffs do not assert as much either, nor could they, because the "trade association of the firearms industry" admits these features

"are capable of implementation." National Shooting Sports Foundation, Inc. Amicus Br. (NSSFAmB) 1, 20, C.A. Dkt. 54. When the chamber load indicator and magazine disconnect mechanism requirements were enacted in 2003, "between eleven and fourteen percent of handguns in the United States were available with a [chamber load indicator] and [magazine disconnect mechanism]." *Pena*, 898 F.3d at 974, n.4; *see also* Brady Center to Prevent Gun Violence Amicus Br. (BAmB) 30, C.A. Dkt. 17 (citing expert testimony from a 2009 case that over 300 handgun models have a magazine disconnect mechanism). Five manufacturers added a total of 34 semiautomatic pistols to the Roster with these two safety features after they were required in 2007. 2-ER-211–13. And 32 such pistols from four manufacturers remain on the Roster today. 2-ER-211–13.[4]

Firearms manufacturers' capacity to meet these requirements has not changed. In the short time since the district court's preliminary injunction of the microstamping requirement took effect on April 3, 2023 (*see* C.A. Dkt. 7; 1-ER-3), three rimfire semiautomatic pistols with a magazine disconnect

[4] Additionally, the United States' military has for decades used semiautomatic pistols with a chamber load indicator from two manufacturers, and other law enforcement agencies have used pistols with a magazine disconnect mechanism. BAmB 26–28.

mechanism from one manufacturer have become available for retail sale in the State,[5] and a centerfire semiautomatic pistol with a chamber load indicator and magazine disconnect mechanism will be available as well once the manufacturer pays the minimal fee required. *Recently Added Handgun Models*, Office of the Cal. Att'y Gen. (June 16, 2023, 10:48 AM), https://oag.ca.gov/firearms/certified-handguns/recently-added. These safety features are thus undeniably feasible to implement in the semiautomatic pistols that Plaintiffs wish to purchase, and manufacturers appear ready to continue to do so.

Plaintiffs assert only that the features "increase research, design, and manufacturing costs," (AB 8), and that the "average consumer neither expects nor wants" a chamber load indicator and magazine disconnect mechanism. AB 2.[6] But nothing in the record supports these assertions nor explains how Plaintiffs could speak on behalf of the "average consumer." Nevertheless, the alleged lack of consumer interest in these safety features is

[5] Unlike the magazine disconnect mechanism requirement, the chamber load indicator requirement applies only to centerfire, but not rimfire, semiautomatic pistols. Cal. Penal Code § 31910(b)(4), (b)(5).

[6] One firearms manufacturer testified that a magazine disconnect mechanism would add "at most $10 to the $500 price" of semiautomatic pistol—a mere two percent of the price. *Adames v. Sheahan*, 909 N.E.2d 742, 749 (Ill. 2009).

not relevant to the plain text analysis. The firearm industry agrees, acknowledging that the level of consumer demand for these features—whatever it may be—"is of no concern with this Court because that is an economic issue, not a legal one." NSSFAmB 20.

2. As this Court previously recognized, the microstamping requirement itself is not a prohibition on the retail sale of semiautomatic pistols

To support their argument that the microstamping requirement also operates as a ban on the sale of certain semiautomatic pistols (thus implicating the plain text of the Second Amendment), Plaintiffs emphasize that a new semiautomatic pistol has not been added to the Roster since the requirement took effect in May 2013. AB 6, 10. But also like the district court, Plaintiffs fail to reconcile their reasoning with this Court's explanation for the cause: firearm manufacturers' refusal to comply with the requirement. *Pena*, 898 F.3d at 982 ("The reality is not that manufacturers cannot meet the standard but rather that they have chosen not to."); *see also* OB 27–28.[7] Plaintiffs' only response to this is that it "is both wrong and

[7] The Legislature is currently considering Senate Bill 452 ("SB 452"), which would remove the microstamping requirement from the UHA, move it to a different division of the Penal Code, and delay the effectiveness of the requirement until July 1, 2027. S.B. 452, 2023–2024 Reg. Sess. (Cal. 2023)

irrelevant." AB 46. Yet, they point to nothing to contradict this Court's prior determination that microstamping was publicly tested by police departments, "the legislature considered studies showing that microstamping technology generally works," and "compliance with the microstamping requirement is 'technologically possible' and would cost an incremental $3.00 to $10.00 per gun." *Pena*, 898 F.3d at 983–84.[8] Plaintiffs' claims of infeasibility cannot be taken at face value because they are as conclusory and lacking in detail as they were when this Court addressed the claims five years ago. *Id.*

Otherwise, firearm manufacturers could cherry pick which public safety feature requirements they will incorporate, claim infeasibility on the others, and in effect dictate the scope of conduct covered by the Second Amendment so that any regulatory challenges they bring will proceed to the historical inquiry. That is not the plain text analysis set forth in *Bruen*.

(removing subdivision (b)(6) from California Penal Code section 31910). The bill has passed the state Senate and is pending in the Assembly, as of the date of this brief. *SB-452 Firearms (2023-2024)*, Cal. Legis. Info. (June 16, 2023, 10:50 AM), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB452. If the bill were to become law, then SB 452 would moot the injunction of the microstamping requirement after that date.

[8] This cost estimate is consistent with the two cost estimates—$6.72 and $7.87—developed in the study conducted by Plaintiffs' witness. 7-ER-1426.

B. The Challenged UHA Requirements Are Presumptively Lawful Qualifications on the Commercial Sale of Firearms

The challenged public safety feature requirements also fall into the presumptively lawful category of "laws imposing conditions and qualifications on the commercial sale of arms." *See Heller*, 554 U.S. at 626–27; *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 787 (2010); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring); OB 28–31. Plaintiffs raise two arguments in response. Neither is correct.

They first assert that *Bruen* did not endorse any presumptively lawful categories of laws. AB 32. But this not only overlooks contrary statements in *Heller* and *McDonald*, it also ignores Justice Kavanaugh's concurring opinion in *Bruen*—which Chief Justice Roberts joined—restating from *Heller* that "the Second Amendment allows for a 'variety' of gun regulations," and quoting verbatim from *Heller* the list of presumptively lawful categories of laws. *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636).

Next, Plaintiffs inaccurately describe the three challenged requirements as "an outright prohibition on the commercial sale of specific types—indeed, large swaths—of firearms." AB 32. As explained above, the challenged requirements do not operate as an outright prohibition on any arms. They

require only that new semiautomatic pistols available for retail sale include certain public safety additions. OB 6–8. And the challenged requirements do not prohibit possession of semiautomatic pistols, nor do the requirements apply to private transactions between individual firearm owners. OB 31.

C. Firearm Safety and Tracing Requirements Are Consistent with a Historical Tradition of Regulation

Even if the Court proceeds to the historical inquiry, the challenged UHA requirements are "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130; OB 31–44.

As demonstrated in the Opening Brief, the technological advances behind these requirements trigger *Bruen*'s "more nuanced" historical inquiry. Plaintiffs describe the risk of an accidental discharge from a handgun as "nothing new," (AB 31, n.4), but this misses the mark. It is the risk of accidental discharge from a *semiautomatic pistol*, which can "chamber" an ammunition cartridge and remain loaded without a magazine, that is the more recent phenomenon. OB 32; 3-ER-524 (a semiautomatic pistol user cannot see whether there is a round inside the chamber without pulling back the slide or see how many rounds remain in the magazine).

Plaintiffs otherwise do not dispute that the "more nuanced" approach is proper. But they contend that the district court actually engaged in the

nuanced approach simply because it allowed Defendant to analogize to historical laws. AB 31, n.4. As detailed in the Opening Brief and below, this is a mistaken reading of an order that does not once use the word "nuanced," even when describing the historical inquiry called for by *Bruen*. *See* 1-ER-15.[9]

1. The chamber load indicator and magazine disconnect mechanism requirements are consistent with a historical tradition of regulation

Firearm and gunpowder inspection and storage laws dating to the founding era demonstrate that the chamber load indicator and magazine disconnect mechanism requirements are consistent with this Nation's history of protecting consumers from the inherent dangers of firearms and

[9] More problematic is Plaintiffs' suggestion that analogical reasoning is appropriate only when the historical inquiry requires a "more nuanced approach," but not when the analysis is "fairly straightforward." *Bruen* rejects that suggestion, instructing that analogical reasoning is to be used in both straightforward and more nuanced contexts. 142 S. Ct. at 2131–32. When describing how courts are to conduct the historical inquiry, *Bruen* did not require a "dead ringer" for the "fairly straightforward" approach and limit analogical reasoning only for the "more nuanced approach." *Id.* Rather, the Court explained that "this *historical inquiry* that courts must conduct will often involve reasoning by analogy," and that "[l]ike all analogical reasoning, *determining whether a historical regulation is a proper analogue* for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Id.* at 2132 (italics added). For example, *Heller* and *Bruen* "exemplifie[d]" the straightforward approach and still relied on "historical analogies," which were "relatively simple to draw." *Bruen*, 142 S. Ct. at 2131-32.

ammunition. OB 33–40. Plaintiffs disagree and, like the district court, effectively demand a "historical twin" to satisfy *Bruen*. AB 35–44. But of course, there can be no historical twin for regulations meant to mitigate specific dangers in semiautomatic pistols, which did not even exist at the founding era or at the adoption of the Fourteenth Amendment.

Plaintiffs first contend that the analogy between the inspection laws and the chamber load indicator and magazine disconnect mechanism requirements is "strained," arguing that "there is an obvious difference between laws designed to ensure that firearms operate as consumers expect them to operate, and laws that require firearms to have features that consumers do not want." AB 36. That is a distinction without a difference here. Both the historical laws and challenged requirements seek to reduce the dangers of a firearm or ammunition that does not function or is not used as intended. OB 36–38. The historical laws did so by inspecting the regulated items, or by specifying how they were to be stored, to ensure the firearm or ammunition did not unexpectedly fire. OB 34–38. Similarly, the chamber load indicator and magazine disconnect mechanism "ensure that firearms operate as consumers expect them to operate" (AB 36) by working together to prevent a pistol from prematurely firing when the consumer mistakenly believes the pistol is unloaded. The chamber load indicator

"plainly indicates" the pistol is loaded (Cal. Penal Code § 16380), and if that notice fails to stop the user from pulling the trigger when a magazine is not inserted, then the magazine disconnect mechanism prevents the pistol from firing the cartridge that might remain in the chamber (Cal. Penal Code § 16900). OB 37. Plaintiffs miss the point when they state that a "firearm that fires when someone pulls the trigger" is what a firearm is "supposed to do." AB 37. A firearm that fires when the user believes it is unloaded is not one that operates as a consumer expects it to. That is why an unintentional shooting is called "unintentional."

Plaintiffs misread *Bruen* in demanding a historical analogue that "prescribe[d] particular features or specifications in order for a firearm to be sold." AB 36. That is akin to demanding a "historical twin." *Bruen*, 142 S. Ct. at 2133; *see also Hartford v. Ferguson*, No. 3:23-cv-05364-RJB, 2023 WL 3836230, at *6 (W.D. Wash. June 6, 2023) ("*Bruen* does not require that the historical regulation be the exact same."). It also elevates the firearms manufacturers' views about what safety features to include in a standard arm over the views of regulating authorities and allows the manufacturers to dictate the scope of the Second Amendment. That cannot be what the Supreme Court envisioned when it explained that a "modern-day regulation [need] not [be] a dead ringer for historical precursors," but rather

need only be "analogous enough to pass constitutional muster." *Bruen*, 142 S. Ct. at 2133.

In any event, the firearm and ammunition inspection laws indeed did prescribe "features or specifications" before those items were sold: the tested muskets and pistols could not fail and had to fire a specified distance using a certain amount of gunpowder, while the gunpowder had to meet certain quality standards. OB 35–36; *see also* 7-ER-1341–44 (text of the 1804 Massachusetts firearm inspection law); 7-ER-1350–51 (text of the 1814 update to the same law); 2-ER-232 (historical expert explaining the Massachusetts firearm inspection law); 2-ER-240 (historical expert explaining the ammunition inspection laws).[10]

The fact that historical laws did not require additional "features or specifications," especially ones that could not be contemplated given the muzzle-loading nature of firearms at the time (2-ER-229), does not thereby preclude States from doing so now. OB 38. Otherwise, it is difficult to

[10] The text of Maine's 1821 firearm inspection law, which is similar to that of Massachusetts' laws (2-ER-233), can be found at the Duke Center for Firearms Law's Repository of Historical Gun Laws: https://firearmslaw.duke.edu/laws/laws-of-the-state-of-maine-to-which-are-prefixed-the-constitution-of-the-u-states-and-of-said-state-in-two-volumes-with-an-appendix-page-685-686-image-272-273-vol-2-1821-available-at-the-maki/.

foresee how other requirements, such as melting-point tests and drop-safety tests, could pass constitutional muster. *See* District of Columbia, et al. Amicus Br. (DCAmB) 6–9, C.A. Dkt. 18. Such a result would render the Second Amendment a "regulatory straightjacket." *Bruen*, 142 S. Ct. at 2133.

Plaintiffs also contend that the historical laws did not impose comparable burdens to the challenged UHA requirements, but supports that assertion by overstating the burdens imposed by the chamber load indicator and magazine disconnect requirements. AB 37–38, 42. These requirements do not "curtail[]" access to semiautomatic pistols (AB 38); the requirements are feasible (*see* OB 39–40; NSSFAmB 20). That is no doubt why this Court previously concluded that these requirements "place almost no burden on the physical exercise of Second Amendment rights." *Pena*, 898 F.3d at 978. That conclusion remains sound. *See* EAmB 7, n.4. The firearm and ammunition inspection laws are thus "relevantly similar" under *Bruen*.[11]

Plaintiffs further err in contending that Defendant's historical analogues are not sufficiently "well-established and representative" under

[11] Plaintiffs' attempts to minimize the relevance of the firearm and gunpowder storage historical laws fare no better for the same reasons. *Compare* AB 42–43 *with* OB 36–40.

Bruen. AB 39–41. Plaintiffs would require historical laws to have been adopted by some number of states or a percentage of the population to pass muster. AB 30–31, 39–41. But *Bruen* required no particular quorum of states to have adopted laws before they could reflect a historical tradition of regulation. *See* 142 S. Ct. at 2133

Plaintiffs' numerical arguments are also deeply misleading. For example, Plaintiffs assess only which States adopted *firearm* inspection laws, omitting the additional states and localities that adopted ammunition inspection laws and/or firearm and gunpowder storage laws. *Compare* AB 39 *with* OB 34–36. Even when looking only at the inspection laws, six states adopted them (OB 35), exceeding Plaintiffs' "mere smattering" (AB 31) metric. Plaintiffs also rely on 1821 census data to argue that "over 90%" of the country's population was not subject to firearm inspection laws given the populations of Massachusetts and Maine in 1821. AB 39. But that data is an inaccurate indicator here because the population totals included groups that were not allowed to possess firearms at all. Plaintiffs additionally minimize the significance of Massachusetts laws, claiming Defendant offered "no evidence that Massachusetts-based manufacturers made a significant portion of firearms sold to individuals throughout the rest of the country." AB 40. But a historical expert explained that "Western

Massachusetts [was] the leading small arms producer in America on the eve of the War of 1812," in part because the presence of the federal armory in Massachusetts "served as a spur to innovation among local gun smiths." 2-ER-233.[12]

At bottom, Plaintiffs and the district court misinterpret the historical evidence showing that there is a historical tradition of imposing practicable and feasible safety requirements to protect the public from firearms that are not used as intended.

2. The microstamping requirement is part of a historical tradition of serial number laws designed to control and trace the sale of firearms

Historical analogues supporting the federal serial number requirements are sufficient to support the microstamping requirement because this Court has held that "microstamping is an extension of identification methods long used in imprinting serial numbers on guns." *Pena*, 898 F.3d at 985. Plaintiffs do not challenge these historical analogues. Instead, they assert that the microstamping requirement imposes a more substantial burden than that of the serial number requirements. AB 45–46. But as this Court

[12] The fact the federal armory was not subject to the Massachusetts inspection laws is irrelevant (AB 40) because the armory "nonetheless extensively scrutinized and inspected all arms made at its facilities and any arms produced by local gunsmiths under government contract." 2-ER-233.

previously recognized, any burden from the requirement arises from firearms manufacturers' reluctance to comply with it, not the requirement itself. OB 42; *see Pena*, 898 F.3d at 982–83.

Equally unpersuasive is Plaintiffs' reliance on misconstrued evidence from witness Michael Beddow. AB 47 (citing 1-ER-20). Like the district court, Plaintiffs mistakenly characterize this evidence as demonstrating that microstamping could not be implemented on a commercial scale when the study was conducted in 2005, nor could it ever be. AB 47. But that is simply not what Mr. Beddow testified to or concluded in his study. OB 27, 42–43. To the contrary, Mr. Beddow viewed his study to show that "the idea of the transfer [of a microstamp to a cartridge] works and was proven by [his] research." 3-ER-398. Specifically, after testing microstamping in six semiautomatic pistols from one manufacturer and five pistols from five different manufacturers, Beddow concluded that microstamping with alphanumeric characters (Cal. Code Regs., tit. 11, section 4049(j)) "has the potential to reliably transfer information from the firing pin to the cartridge case" and "has the future potential to handle a large database and have some survivability." 7-ER-1391; 7-ER-1400–01. Although Mr. Beddow testified that microstamping "was not suitable for mass implementation *at that time* [in 2005]," (3-ER-369), he repeatedly testified that mass implementation

could be attainable if further research were conducted. 3-ER-377 ("And that was in my recommendation to the paper . . . an *additional, a larger scale study needed to be done* to determine if such mass implementation could be done."); *see also* 3-ER-369–70; 3-ER-398.[13]

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN EVALUATING THE EQUITABLE FACTORS

A. Plaintiffs Failed to Demonstrate Irreparable Harm Because They Already Possess and Have Access to Numerous Handguns

Plaintiffs do not explain how they sufficiently "demonstrate[d] immediate threatened injury," *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988), particularly in light of record evidence that they collectively own nearly 100 operable firearms, including

[13] Plaintiffs point to no evidence that microstamping "remains cost-prohibitive," (AB 47); indeed, Mr. Beddow's study (7-ER-1426) and this Court (*Pena*, 898 F.3d at 983) concluded otherwise. Moreover, Plaintiffs' unsupported views on the usefulness of microstamping for law enforcement are irrelevant in the historical analysis. AB 45. And present claims that the microstamping requirement is unhelpful to law enforcement (Peace Officers Research Association of California, et al. Amicus Br. (PORACAmB) 5, 18, C.A. Dkt. 42), is contradicted by law enforcement support for the bill that enacted the microstamping requirement, including PORAC, 62 police chiefs, and multiple sheriffs or sheriff associations. S. Rules Comm. Analysis for Assemb. B. 1471, 2007–2008 Reg. Sess. (Cal. 2007), at 3–5; David Muradyan, *Firearm Microstamping: A "Bullet with a Name On It,"* 39 McGeorge L. Rev. 616, 621 (2008).

nearly 50 handguns, of which about 30 are semiautomatic pistols. OB 48. They identify no practical harms, but maintain that an alleged constitutional violation is sufficient. AB 49–50. But as explained in the Opening Brief, even the cases relied upon by the district court and Plaintiffs for this proposition, which were not in the Second Amendment context, do not actually stand for this principle.[14] OB 49–50; *see Doe v. Harris*, 772 F.3d 563, 582 (9th Cir. 2014) (alleged constitutional violation was coupled with a non-speculative threat of immediate harm from onerous sex offender registration requirements, including one that required notifying law enforcement by mail within 24 hours of using a new Internet identifier or service provider).

Plaintiffs did not, and cannot, identify any immediate harm that is remotely similar to the harm identified in the cases they or the district court rely upon. In addition to already having numerous arms at the ready to defend themselves, Plaintiffs have repeatedly admitted that the off-Roster

[14] The case that Plaintiffs assert extended this principle to the Second Amendment is also unhelpful as there was a non-speculative threat of immediate future harm because the ordinances at issue banned all firing ranges in the city while simultaneously requiring range training as a prerequisite to owning a firearm. AB 50 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 689–90, 700 (7th Cir. 2011)).

semiautomatic pistols they desire to purchase are "essentially the same" as, or "technically function no differently" from, those currently on the Roster, besides some undefined ergonomic changes.[15] 2-ER-136; C.A. Dkt. 4 at 2, 16. Moreover, Plaintiffs can purchase at a firearms dealer any one of the nearly 500 semiautomatic pistols or over 300 revolvers currently on the Roster. 3-ER-450–51.

Plaintiffs rely on the assertion that left-handed shooters "are stuck with handguns not designed for them." AB 52. Putting aside the fact that none of the individual Plaintiffs claim to be left-handed (2-ER-315; 2-ER-329; 5-ER-780–81; 5-ER-786–87), and the fact that this Court previously rejected an identical argument (*Pena*, 898 F.3d at 978, n.8), there are indeed semiautomatic pistols on the Roster with ambidextrous features such as a magazine release and external safety. 7-ER-1314–18 (photographs of some on-Roster semiautomatic pistols with ambidextrous features from different manufacturers).[16]

[15] Manufacturers can already make some ergonomic changes to a semiautomatic pistol already on the Roster—such as changing the material, shape, or texture of the grip—and seek to add the pistol to the Roster without meeting the challenged requirements. Cal. Penal Code § 32030(a).

[16] There are possibly more, but not every semiautomatic pistol on the Roster was reviewed prior to the preliminary injunction hearing. 3-ER-523.

The absence of any allegation of practical harm is more significant because of the heightened showing required to obtain a mandatory preliminary injunction. OB 46–48. The injunction does not "simply enjoin[] the state from enforcing the challenged provisions of the UHA," as Plaintiffs contend. AB 48. Rather, in addition to prohibiting Defendant from "implementing or enforcing" the challenged requirements, the injunction bars Defendant "from otherwise preventing the retail sale of handguns" that lack the challenged features, "but that meet the other" UHA requirements. 1-ER-3. In effect, the injunction requires the Department of Justice to receive a laboratory-tested sample of a semiautomatic pistol without the enjoined features, verify the sample meets the UHA requirements not subject to the injunction, and notify firearms dealers that the pistol can be sold. Cal. Penal Code §§ 32010, 32015. The injunction thus operates in a way that "orders Defendant to take an affirmative action" in a manner that upsets the status quo. *Doe v. Snyder*, 28 F.4th 103, 108 (9th Cir. 2022). Plaintiffs had to establish that "extreme or very serious damage" would result in the absence of an injunction. *Id.* at 111. They failed to do so.

B. The Balance of Equities Weighs Against a Preliminary Injunction

This Court has concluded, and Defendant's evidence reaffirms, that chamber load indicators and magazine disconnect mechanisms improve the safety of semiautomatic pistols by reducing the likelihood of accidental shootings. *Pena*, 898 F.3d at 980; *id.* at 988 (Bybee, J., concurring in part and dissenting in part); OB 52–54; *see also Adames*, 909 N.E.2d at 749 (firearms manufacturer's witnesses agreeing that a magazine disconnect mechanism could have prevented an accidental shooting). Neither Plaintiffs nor the district court's order seriously dispute this or point to evidence demonstrating otherwise. AB 55; 1-ER-23–24.

Instead, Plaintiffs—like the district court's order (1-ER-21)—contend, without any supporting evidence in the record, that the off-Roster pistols Plaintiffs desire to purchase are "likely safer" than those on the Roster even though Plaintiffs also admit they "technically function no differently" from each other. AB 55; C.A. Dkt. 4 at 2. Plaintiffs additionally highlight the number of semiautomatic pistols on the Roster without chamber load indicators and magazine disconnect mechanisms because of the prospective

nature of those requirements.[17] AB 53. But the preliminary injunction, if upheld, would swiftly and dramatically increase the proportion of semiautomatic pistols available for retail sale without these life-saving features.[18] In turn, that would increase the risk of deaths and injuries, particularly to minors, from accidental shootings. *See* BAmB 10–14.

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[17] Plaintiffs also point to the UHA's exceptions for law enforcement agencies to support their argument that the requirements do not increase safety. *See, e.g.*, AB 1, 10, 22, 35, 44. That is incorrect. OB 51–56. Plaintiffs also overstate the scope of the exceptions by asserting they apply to all "state employees" (AB 2) and by mistakenly treating the exceptions as the same. The first exception allows specified federal, state, and local agencies to purchase off-Roster handguns "for use in the discharge of their official duties," and "sworn members of these agencies" can also purchase them. Cal. Penal Code § 32000(b)(4). The second exception allows specified state and local agencies or "sworn members of these entities" to purchase an off-Roster handgun "for use as a service weapon," so long as the sworn member completes a "live-fire qualification" every six months and "satisfactorily completed" the Commission on Peace Officer Standards and Training (POST) "basic course,"—which is a minimum of 664 hours—or who before January 1, 2021 completed the firearms portion of the same course. Cal. Penal Code § 32000(b)(6). The third exception allows specified state agencies, but not individual sworn members of the agencies, to purchase off-Roster handguns "for use as a service weapon by the sworn members" so long as the sworn members "satisfactorily completed" the same training requirements as those for the second exception. Cal. Penal Code § 32000(b)(7).

[18] Plaintiffs' attempt to minimize the effect of an injunction as "simply adding some more models" (AB 53) is inconsistent with their own characterization of the significance of a preliminary injunction. AB 4; C.A. Dkt. 4 at 2.

It is also a common occurrence in the implementation of any consumer product safety regulation that products without newly required safety features remain on the market until they are phased out. The Legislature recognized this by allowing semiautomatic pistols on the Roster before the requirements took effect to remain there and, more recently, by adding a provision to the UHA that would allow pistols with the safety features to become a proportionally larger share of pistols on the Roster. *See* Cal. Penal Code § 31910(b)(7). The number of pistols on the Roster with these safety features compared to the number that lack them does nothing to detract from the commonsense reality that these features help prevent accidental shootings.[19]

Plaintiffs also improperly downplay the harms caused by unintentional shootings and discount the number of individuals who (erroneously) believe a firearm cannot fire without a magazine inserted. *See* BAmB 7 (an average of 500 people were killed and over 20,000 were wounded in unintentional

[19] Nor does the fact that certain law enforcement agencies and officers can purchase off-Roster semiautomatic pistols. OB 54, n.20. The average civilian lacks the same level of training in the use and safe storage of firearms that law enforcement officers have, particularly those included in the UHA exceptions. Cal. Penal Code § 32000(b)(4), (6), (7); *see also* 3-ER-470 (testimony that many people do not safely store their firearms, including at residences with minors); 3-ER-524–25 (Department of Justice special agent supervisor explaining how he safely stores his duty weapon).

shootings each year between 2016 and 2020); *id.* at 8 (about 100 minors are killed and 3,000 are wounded in unintentional shootings each year); *id.* at 12–14 (highlighting statistics regarding the mistaken beliefs about when a firearm is unloaded). Plaintiffs also do not address the public safety benefits of microstamping (OB 54–56), which this Court previously recognized (*Pena*, 898 F.3d at 982). At bottom, the district court abused its discretion in evaluating the public interest and balancing the equities, by giving outsized importance to the harm arising out of an alleged constitutional violation and discounting evidence of public safety harms that would result from a preliminary injunction while the court considered the merits of Plaintiffs' claims.

CONCLUSION

The Court should reverse the district court's order granting the preliminary injunction.

Dated: June 16, 2023

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FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-55276

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