

1 Alan Gura, Calif. Bar No.: 178221
2 Gura & Possessky, PLLC
3 101 N. Columbus St., Suite 405
4 Alexandria, VA 22314
5 703.835.9085/Fax 703.997.7665

6 Donald E.J. Kilmer, Jr., Calif. Bar No.: 179986
7 Law Offices of Donald Kilmer, A.P.C.
8 1645 Willow Street, Suite 150
9 San Jose, CA 95125
10 408.264.8489/Fax 408.264.8487

11 Jason A. Davis, Calif. Bar No.: 224250
12 Davis & Associates
13 27201 Puerta Real, Suite 300
14 Mission Viejo, CA 92691
15 949.310.0817/Fax 949.288.6894

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

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

24 Come now Plaintiffs Ivan Peña, Roy Vargas, Doña Croston, Brett Thomas,
25 the Second Amendment Foundation, Inc., and the Calguns Foundation, Inc., by and
26 through undersigned counsel, and submit their Memorandum of Points and
27 Authorities in Support of their Motion for Summary Judgment.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: October 25, 2013

Respectfully submitted,

Alan Gura, Cal. Bar No.: 178221
Gura & Possessky, PLLC
101 N. Columbus St., Suite 405
Alexandria, VA 22314
703.835.9085/Fax 703.997.7665
alan@gurapossessky.com

Donald E.J. Kilmer, Jr., Cal. Bar No. 179986
Law Offices of Donald Kilmer, A.P.C.
1645 Willow Street, Suite 150
San Jose, CA 95125
408.264.8489/Fax 408.264.8487
Don @DKLawOffice.com

/s/ Alan Gura
Alan Gura

/s/ Donald E.J. Kilmer, Jr.
Donald E.J. Kilmer, Jr.

Jason A. Davis, Cal. Bar No.: 224250
Davis & Associates
27201 Puerta Real, Suite 300
Mission Viejo, CA 92691
949.310.0817/Fax 949.288.6894

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Table of Authorities. ii

Introduction. 1

Statement of Facts. 1

 1. *The Handgun Rostering Program*. 1

 2. *Defendant’s Enforcement of the “Handgun Roster” Program Against Plaintiffs*. 6

Summary of Argument. 9

Argument. 9

 I. The Second Amendment Protects the Acquisition of Arms of the Kind in Common Use for Traditional Lawful Purposes. 9

 II. Defendant’s Handgun Rostering Program Violates the Second Amendment By Restricting Access to Handguns of the Kind in Common Use for Traditional Lawful Purposes. 13

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

Conclusion. 20

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases

Andrews v. State,
50 Tenn. 165 (1871). 10

City of Chicago v. Morales,
527 U.S. 41 (1999) 19

District of Columbia v. Heller,
554 U.S. 570 (2008). 1

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011) 17

Hussey v. City of Portland,
64 F.3d 1260 (9th Cir. 1995) 16

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010). 17

Parker v. District of Columbia,
478 F.3d 370 (D.C. Cir. 2007). 12

Richmond Newspapers v. Virginia,
448 U.S. 555 (1980). 10

United States v. Chester,
628 F.3d 673 (4th Cir. 2010) 17

United States v. Marzzarella,
614 F.3d 85 (3d Cir. 2010). 10

United States v. Masciandaro,
638 F.3d 458 (4th Cir. 2011). 17

United States v. Miller,
307 U. S. 174 (1939). 9, 12

Wilson v. County of Cook,
2012 IL 112026. 10, 12

1 Statutes, Rules and Regulations

2 24 DCMR § 2323.1 20

3 24 DCMR § 2323.2. 20

4 24 DCMR § 2323.3 20

5 27 C.F.R. § 478.11 18

6 Cal. Penal Code § 16380. 19

7 Cal. Penal Code § 16380(c). 8

8

9

10 Other Authorities

11 A New and Complete Law Dictionary (1771).. 11

12 Bureau of Alcohol, Tobacco, Firearms & Explosives,

13 *Annual Firearms Manufacturing and Export Report*,

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

15 [report.pdf](http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf) (last visited Oct. 24, 2013). 1, 13

16 N. Webster, American Dictionary of the

17 English Language (1828) (reprinted 1989). 11

18

19

20

21

22

23

24

25

26

27

28

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

3 INTRODUCTION

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

11 STATEMENT OF FACTS

12 1. *The Handgun Rostering Program*

13 [A]ny person in this state who manufactures or causes to be manufactured,
14 imports into the state for sale, keeps for sale, offers or exposes for sale, gives,
15 or lends any unsafe handgun shall be punished by imprisonment in a county
16 jail not exceeding one year.

17 Statement of Undisputed Facts ("SUF") 4. California law presumes that all
18 handguns are "unsafe" and therefore, generally barred from importation and sale,
19 unless those handguns have been placed on the state's special roster of handguns
20 "determined not to be unsafe." SUF 5.

21 Since 2007, a center-fire¹ semi-automatic² handgun cannot make the roster if
22

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

25 ²A semiautomatic handgun is a handgun that fires only one bullet each time
26 the trigger is pulled, with the energy of the just-fired bullet causing the ejection of
27 the spent case and loading of the next cartridge into the firing chamber. Most
28 handguns sold in the United States today are semiautomatic. See Bureau of
Alcohol, Tobacco, Firearms & Explosives, *Annual Firearms Manufacturing and
Export Report* ("ATF Report"), available at <http://www.atf.gov/files/statistics/>

1 it does not have both a chamber loaded indicator (“CLI”) and, if it has a detachable
2 magazine, a magazine disconnect mechanism. SUF 6. Since 2006, a rimfire³ semi-
3 automatic handgun must have a magazine disconnect mechanism if it has a
4 detachable magazine. SUF 7. Handguns rostered prior to the effective dates of these
5 requirements can remain rostered despite lacking these features. SUF 8.

7 A magazine disconnect mechanism is “a mechanism that prevents a
8 semiautomatic pistol that has a detachable magazine from operating to strike the
9 primer of ammunition in the firing chamber when a detachable magazine is not
10 inserted in the semiautomatic pistol.” SUF 9. A chamber load indicator (“CLI”) is “a
11 device that plainly indicates that a cartridge is in the firing chamber.” SUF 10.

13 Not all CLIs satisfy California’s requirement. SUF 11. Although a CLI is
14 sufficient if it is “designed and intended to indicate to a reasonable adult user” that
15 the firearm is loaded, Cal. Penal Code § 16380, in practice Defendant tests the
16 sufficiency of CLIs by asking his employees if they understand the CLI – and when
17 the regulatory authority’s employees allegedly fail to understand the CLI,
18 regardless of what the CLI is “designed and intended to indicate to a reasonable
19 adult,” the CLI is ruled inadequate. SUF 12. Given the rarity of CLIs and magazine
20 disconnect devices, handguns lacking these features are in common use today,
21 comprising the majority of handguns currently for sale elsewhere. SUF 13.

24 [download/afmer/2011-final-firearms-manufacturing-export-report.pdf](#) (last visited
25 Oct. 24, 2013). Almost all the rest are revolvers, *id.*, which hold several rounds in a
26 rotating cylinder and fire only one bullet each time the trigger is pulled. This suit
does not address fully automatic firearms, also known as machine guns.

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

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

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

20 In fact, to acquire any handgun in California, an individual must pass a
21 written handgun safety test. SUF 20. The test requires knowledge of the basic rules
22 of handgun safety, the first of which is: “Treat all guns as if they are loaded.” SUF
23 21, 22. The state’s specific instructions for unloading a semi-automatic handgun
24 contained in its gun safety study guide provides that mechanical safety mechanisms
25 should not be trusted. SUF 23. The state’s gun safety study guide does not discuss
26 chamber load indicators or magazine disconnect devices. Yet it teaches, in order to
27
28

1 pass the mandatory safety test, rules that would have gun owners ignore such
2 devices. The study guide specifically instructs that in order to verify a semi-
3 automatic handgun is unloaded, one must remove the magazine and visually
4 inspect the chamber to verify that it is empty. SUF 24, 25.
5

6 In order to purchase a handgun, the buyer must demonstrate that he or she
7 knows how to safely operate the handgun, including following these instructions.
8 SUF 26. Moreover, California law also generally requires that all newly purchased
9 firearms either be accompanied by an approved gun lock or the purchaser's affidavit
10 that she owns an adequate lock box or gun safe. SUF 27.
11

12 As of May 17, 2013, all semi-automatic handguns not already rostered cannot
13 be submitted for roster listing unless they employ so-called "microstamping" or
14 similar technology. SUF 28, 29, 30.

15 Defendant admits that no handguns for sale in the United States have the
16 microstamping technology required by California's roster law. Exh. O, Response to
17 Request for Admission No. 4. No firearms manufacturer has submitted any
18 microstamping-compliant handguns, Exh. P, Response to Interrogatory Request No.
19 8, and Defendant has no information as to whether any manufacturer will ever
20 produce microstamping handguns, Exh. O, Response to Request for Admission No.
21 5. Accordingly, the microstamping requirement imposes a *de facto* ban on the sale of
22 all new semiautomatic handgun models in California. SUF 31.
23
24

25 Listings on the California handgun roster are valid for one year, and must be
26 renewed annually, including payment of an annual fee, prior to expiration to
27 remain valid. SUF 32. Defendant charges firearms manufacturers, importers, and
28

1 dealers annual fees, ostensibly to operate the handgun roster program. Any
2 handgun whose manufacturer fails to pay the required fees may be excluded from
3 the roster for that reason alone. SUF 33. The initial and renewal annual listing fees
4 for inclusion on the handgun roster are \$200. SUF 34.

5
6 Other than the California DOJ, only the manufacturer/importer of a handgun
7 model is authorized to submit that handgun model to a DOJ-Certified Laboratory
8 for testing. SUF 35. A handgun can remain on the roster if its manufacturer/
9 importer goes out of business or discontinues the model, provided that the model is
10 not being offered for sale to licensed dealers, and “a fully licensed wholesaler,
11 distributor, or dealer submits a written request to continue the listing and agrees to
12 pay the annual maintenance fee.” SUF 36. So long as a handgun is sold to dealers
13 outside of California, the handgun’s manufacturer can cause the sale of that
14 handgun to be forbidden inside California by failing to submit the gun for testing in
15 that state or refusing to pay the annual \$200 fee. SUF 37.

16
17
18 A manufacturer/importer or other responsible party may submit a written
19 request to list a handgun model that was voluntarily discontinued or was removed
20 for lack of payment of the annual maintenance fee. The request may be approved,
21 and the handgun restored to the “safe gun” roster, provided the fee is paid. SUF 38.

22
23 The following firearms and transactions are exempted from the handgun
24 rostering requirement: (1) firearms defined as curios or relics under federal law; (2)
25 the purchase of any firearm by any law enforcement officer – state or federal; (3)
26 pistols that are designed expressly for use in Olympic target shooting events, as
27 defined by rule; (4) certain single-action revolvers, as defined by rule; and (5) the
28

1 sale, loan, or transfer of any firearm that is to be used solely as a prop during the
2 course of a motion picture, television, or video production by authorized people
3 related to the production. SUF 39.

4
5 It is also not illegal in California to import an unrostered handgun when
6 moving into the state without the intention of selling it, nor is it illegal in California
7 to possess or use an unrostered handgun that is otherwise lawful to possess or use.
8 SUF 40. California also exempts private party transfers, intra-familial transfers
9 including gifts and bequests, and various loans. SUF 41.⁴

10
11 2. *Defendant's Enforcement of the "Handgun Roster" Program Against Plaintiffs*

12 Plaintiff Ivan Peña sought to purchase a Para USA (Para Ordnance)
13 P1345SR / Stainless Steel .45 ACP 4.25", and has identified a willing seller who
14 stands ready to deliver said handgun to him. SUF 42. The Para USA P1345SR that
15 Peña wants to buy was listed on California's Handgun Roster until December 31,
16 2005, when it was discontinued and its listing not renewed. SUF 43.

17
18 Peña cannot lawfully purchase and take possession of the handgun as that
19 handgun is not on the California Handgun Roster. SUF 44. Peña fears arrest,
20 prosecution, fine and incarceration if he completes this handgun purchase. SUF 45.

21
22 Plaintiff Roy Vargas has sought to purchase a Glock 21 SF with an
23 ambidextrous magazine release, and has identified a willing seller who stands
24 ready to deliver said handgun to Plaintiff. SUF 46. However, Vargas cannot
25

26
27 ⁴"Single" or "Double" action refers to the gun's trigger function. If the trigger
28 only drops the hammer (with the firing pin) after it is cocked, then the firearms is
considered a "Single" action. If the trigger can also draw back the hammer and
release it, the firearm is considered a "Double" action.

1 lawfully purchase and take possession of the handgun as that handgun is not listed
2 on the California Handgun Roster. SUF 47. Vargas fears arrest, prosecution, fine
3 and incarceration if he completes this handgun purchase. SUF 48.

4
5 Vargas was born without an arm below the right elbow. SUF 49. The Glock
6 21 SF-STD with a standard magazine release is listed on the California Handgun
7 Roster. SUF 50. However, the Glock 21 SF with ambidextrous magazine release is
8 superior for left-handed shooters such as Mr. Vargas, as opposed to the approved
9 version of the Glock 21. SUF 51. Glock's efforts to add the Glock 21 SF with
10 ambidextrous magazine release to the California Roster have failed. SUF 52.

11
12 However, Defendant permits Glock customers to have their Glock 21 SF-STD
13 handguns fitted with an ambidextrous release at the Glock factory. SUF 53. In
14 other words, California permits the sale of a Glock 21 SF-STD, and the alteration of
15 that handgun by Glock to add an ambidextrous magazine release, but will not allow
16 consumers to purchase new Glock 21 SFs with an ambidextrous magazine release
17 in the first place.

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

26
27 Other models of this identical gun – but in different colors – are listed on the
28

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

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

18
19 Plaintiffs Ivan Peña and Brett Thomas are law-abiding citizens, shooting
20 enthusiasts and gun collectors, as are other members and supporters of Plaintiffs
21 Second Amendment Foundation, Inc. ("SAF") and Calguns Foundation, Inc.
22 ("CGF"). Peña, Thomas, Croston, and other SAF and CGF members and supporters
23 would acquire new semiautomatic handguns of the kind in common use throughout
24 the United States, for traditional lawful purposes including self-defense, but cannot
25 do so owing to the operation of California microstamping scheme. SUF 66.
26
27
28

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

9
10 SUMMARY OF ARGUMENT

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

18 Defendant's handgun rostering program also violates equal protection
19 principles, in that it arbitrarily distinguishes between otherwise identical firearms,
20 inherently making arbitrary distinctions among the people who would possess
21 them, and arbitrarily bars people from possessing handguns deemed safe for others.
22

23 ARGUMENT

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

25 "[T]he sorts of weapons protected [by the Second Amendment are] those 'in
26 common use at the time,'" *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*,
27 307 U. S. 174, 179 (1939)), "the sorts of lawful weapons that [citizens] possessed at
28

1 home.” *Id.* “[T]he Second Amendment does not protect those weapons not typically
2 possessed by law-abiding citizens for lawful purposes.” *Id.* at 625. Handguns plainly
3 satisfy this test:

4
5 It is enough to note, as we have observed, that the American people have
6 considered the handgun to be the quintessential self-defense weapon . . .
7 [H]andguns are the most popular weapon chosen by Americans for self-
8 defense in the home, and a complete prohibition on their use is invalid.

9 *Id.* at 629.

10 Because there is a right to keep and bear firearms, there is, necessarily, a
11 right to acquire them. “[C]ertain unarticulated rights are implicit in enumerated
12 guarantees . . . fundamental rights, even though not expressly guaranteed, have
13 been recognized by the Court as indispensable to the enjoyment of rights explicitly
14 defined.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980). “The right
15 to keep arms, necessarily involves the right to purchase them . . .” *Andrews v. State*,
16 50 Tenn. 165, 178 (1871). A complete ban on gun commerce would violate the
17 Second Amendment right at its core. *United States v. Marzzarella*, 614 F.3d 85, 92
18 n.8 (3d Cir. 2010). Of course, Defendant is still free to ban “arms” that are
19 nonetheless “dangerous and unusual weapons,” *Heller*, 554 U.S. at 627 (citations
20 omitted), including “sophisticated arms that are highly unusual in society at large.”
21 *Id.* “Historically, weapons like machine guns, sawed-off shotguns, grenade
22 launchers, and other high-powered weapons have fallen into this category due to
23 their extreme nature.” *Wilson v. County of Cook*, 2012 IL 112026, at ¶ 46.

24
25 And while “all firearms constituted ‘arms,’” *Heller*, 554 U.S. at 581 (citation
26 omitted), Defendant can ban those weapons which do not meet the historic legal
27 definition of “arms” as used in the Second Amendment – “any thing that a man
28

1 wears for his defence, or takes into his hands, or useth in wrath to cast at or strike
2 another.” *Id.* (citing 1 A New and Complete Law Dictionary (1771); N. Webster,
3 American Dictionary of the English Language (1828) (reprinted 1989)).
4

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

13 Nor did the Supreme Court utilize such tests in resolving *Heller’s* challenge
14 to Washington, D.C.’s bans on the possession of functional firearms in the home,
15 and handgun carrying within the home. With respect to Washington’s complete ban
16 on the possession of functional firearms within the home, the Court simply offered
17 that the ban “makes it impossible for citizens to use [guns] for the core lawful
18 purpose of self-defense and is hence unconstitutional.” *Id.* at 630. This same
19 process, identifying whether a regulation conflicts with a “core protection” of the
20 Amendment without resort to interest-balancing, resolved *Heller’s* challenge to a
21 requirement that he obtain an unavailable permit to move a handgun inside his
22 home. The D.C. Circuit found the restriction violated the Second Amendment’s core:
23
24

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

1 *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom*,
2 *Heller*.⁵ The Supreme Court affirmed using the same approach, concluding the city
3 had no discretion to refuse issuance of the permit. *Heller*, 554 U.S. at 635.
4

5 In its methodology, *Heller* repeatedly demonstrated a simple fact that is too-
6 often forgotten: not every constitutional question is answered with balancing tests.
7 Sometimes, interpretation is enough. At other times, categorical rules will apply.
8 Means-ends scrutiny can play a role, but not where the problem is fairly basic. Just
9 as some First Amendment cases turn on the question of whether something
10 constitutes protected speech, and some Fourth Amendment cases turn on whether
11 conduct constitutes a “search” or a “seizure,” *Heller* demonstrates that in the Second
12 Amendment, categorical prohibitions on types of “arms” are resolved by the
13 common-use test, derived from *Miller*. Were balancing tests required to discern
14 whether handguns are protected “arms” under the Second Amendment, *Heller*
15 would have utilized them. Illinois’ Supreme Court, considering a challenge to a so-
16 called “assault weapons” ban, acknowledged the categorical nature of examining a
17 prohibition on a class of arms. Remanding the case, that court explained,
18
19

20 it cannot be ascertained at this stage of the proceedings whether these arms
21 with these particular attributes as defined in this Ordinance are well suited
22 for self-defense or sport or would be outweighed completely by the collateral
23 damage resulting from their use, making them “dangerous and unusual” as
24 articulated in *Heller*.

24 *Wilson*, 2012 IL 112026, at ¶ 49.

25 This case addresses not so-called “assault weapons,” a discrete if
26 inconsistently-defined subset of firearms purportedly possessing uniquely
27

28 ⁵Heller did not request a public-carry permit. *Id.*

1 dangerous functions, but handguns—which the Supreme Court has already held are
2 categorically within the Second Amendment’s protection. Indeed, the rostering
3 scheme begins with the now-unconstitutional presumption that *all* handguns are
4 “unsafe” until declared otherwise by the state, including *all* new semiautomatic
5 handgun models (since none contain microstamping). The state’s burden of showing
6 that somehow, all handguns that do not fit its complex rostering requirements are
7 outside the Second Amendment’s protection as defined in *Heller* is impossible.
8

9 II. Defendant’s Handgun Rostering Program Violates the Second Amendment
10 By Restricting Access to Handguns of the Kind in Common Use for
11 Traditional Lawful Purposes.

12 The handguns banned by Defendant’s rostering program – guns that do not
13 microstamp (e.g., all new gun models for the foreseeable future if not forever), guns
14 not incorporating CLIs and/or magazine disconnect mechanisms, guns that have not
15 been (and cannot be) submitted by their manufacturer for government testing, and
16 guns that would be perfectly acceptable by the government but for lack of an annual
17 listing fee – are all nonetheless handguns of the kind in common use protected by
18 the Second Amendment. Moreover, none of these characteristics render a firearm
19 “dangerous or unusual” or militarily “sophisticated.”
20

21 The Supreme Court required no particular evidence to discern that handguns
22 are in common use for traditional lawful purposes. Looking further, the federal
23 government’s latest manufacturing report reveals that in 2011, the latest year for
24 which numbers are available, the nation produced 3,170,990 handguns, of which
25 2,598,133—81.9%—were not revolvers, and thus, virtually all semi-automatic. See
26 ATF Report, *supra* n.2. Of these, only 427,448 were chambered in calibers up to .22,
27
28

1 which would be rimfire pistols. The remainder, 68.5% of all handguns
2 manufactured in the United States in 2011, utilized center-fire ammunition
3 calibers. *Id.* Thus, not only are handguns generally arms of the kind in common use
4 for traditional lawful purposes. SUF 1. Semi-automatic handguns with detachable
5 magazines, including those utilizing center-fire ammunition, are in common use for
6 traditional lawful purposes. SUF 2, 3.

8 The CLIs and magazine disconnect mechanisms required for rostering are
9 rare features, found on perhaps only 11% and 14% of all handguns in the
10 marketplace. Considering California's particularly harsh and entirely arbitrary
11 enforcement of its CLI requirement, that number of qualified CLI's is surely lower
12 than even 11% of the market. Microstamping guns currently command exactly 0%
13 of the market for handguns in the United States. As much as California's
14 legislature would like for these guns to exist, they do not exist. Nor will they
15 probably ever exist. Defendant is not expecting them to show up any time soon.
16 Likewise, many guns are still protected by the Second Amendment even if they
17 have not been manufactured for many years prior to the advent of the California
18 Handgun Roster, or have been manufactured by a company that does not wish to
19 sell its products in one particular state. And plainly, a gun model deemed "not
20 unsafe" does not somehow alter its characteristics and become "unsafe" simply
21 because a check has not been cashed in Sacramento within the year.

22 The specific handguns denied Plaintiffs are plainly within the Second
23 Amendment's protection. Croston's gun appears on Defendant's approved list, albeit
24 in different colors, but is unavailable in the black/stainless finish because it was not
25
26
27
28

1 made available for testing in that particular color before the CLI and magazine
2 disconnect requirements came into effect. Ivan Peña’s gun was once deemed safe
3 enough for sale, but is only unavailable because its listing was not renewed. The
4 gun did not suddenly become dangerous on January 1, 2006, when its listing
5 expired because the manufacturer would not pay a fee and fill out a piece of paper.
6

7 It makes no sense that Vargas cannot simply purchase a Glock 21 SF with an
8 ambidextrous magazine release, but that he can purchase the right-handed version
9 of this exact same gun, and undergo the additional burden and expense of having
10 the Glock factory make him a custom modification— resulting in the exact same
11 handgun that Defendant will not place on the roster. That the handgun roster law
12 is incompatible with Supreme Court precedent is illustrated by the roster’s banning
13 of Brett Thomas’s High Standard revolver. This is the exact same make and model
14 gun the possession of which the Supreme Court ordered Washington, D.C. to allow
15 Mr. Heller. This gun may not appear on the state’s approved list, but per the
16 Supreme Court, it appears in the Second Amendment. New handguns
17 manufactured and offered for sale in the other 49 states without microstamping
18 technology are similarly protected.
19
20

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

1 disconnects and CLIs. And on top of the mandatory instruction on such practices,
2 and the requirement that handgun purchasers demonstrate safe handling
3 techniques, the state mandates that each handgun sale be accompanied by the sale
4 of a lock or a guarantee that room exists in a safe for the gun.
5

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

14 Since microstamping is, for all intents and purposes, more a piece of science
15 fiction than commercial reality, it can hardly be said that guns *lacking* this concept
16 are "dangerous and unusual." Microstamping may not be dangerous, but it is not
17 merely "unusual"—it is non-existent. And plainly, administrative failures—the lack
18 of a fee to support a gun's continued listing, or the lack of a manufacturer to support
19 the rostering of an historic firearm such as Heller's—have nothing to do with
20 whether a gun is "dangerous and unusual."
21

22 III. Defendant's Handgun Rostering Program Violates the Fourteenth
23 Amendment's Equal Protection Clause.

24 "Where fundamental rights and liberties are asserted under the Equal
25 Protection Clause, classifications which might invade or restrain them must be
26 closely scrutinized." *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995)
27 (citation omitted). Rational basis is not a standard of review for Second Amendment
28

1 claims, which are as important as other enumerated rights. *Heller*, 554 U.S. at 629
2 n. 27. Second Amendment rights are fundamental. *McDonald v. City of Chicago*,
3 130 S. Ct. 3020, 3042 (2010).
4

5 That does not mean that there is a one-size-fits-all standard for Second
6 Amendment claims in those contexts where means-ends scrutiny is relevant. “[A]s
7 has been the experience under the First Amendment, we might expect that courts
8 will employ different types of scrutiny in assessing burdens on Second Amendment
9 rights, depending on the character of the Second Amendment question presented.”
10 *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).
11

12 “Borrowing from the Court’s First Amendment doctrine, the rigor of this
13 judicial review will depend on how close the law comes to the core of the Second
14 Amendment right and the severity of the law’s burden on the right.” *Ezell v. City of*
15 *Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (citations omitted). Thus, while courts
16 typically reduce the level of scrutiny given laws addressing criminal misconduct or
17 irresponsibility, see, e.g., *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010)
18 (intermediate scrutiny for domestic abuser), or conduct that the court believes to
19 fall outside the Second Amendment’s “core” purpose, see, e.g., *Masciandaro*
20 (possessing handgun in park), courts employ higher levels of scrutiny where the
21 conduct being impacted is closer to the Second Amendment’s perceived “core,”
22 and/or exercised by responsible, law-abiding adults. “[W]e assume that any law that
23 would burden the ‘fundamental,’ core right of self-defense in the home by a
24 law-abiding citizen would be subject to strict scrutiny.” *Masciandaro*, 638 F.3d at
25 470; *Ezell*, 651 F.3d at 708 (“not quite strict scrutiny” for regulating gun ranges).
26
27
28

1 To the extent Defendant's practices implicate equal protection concerns, the
2 proper standard of review is strict scrutiny. After all, at issue is the acquisition of
3 handguns, by law-abiding, responsible adults, for self-defense within the home.
4

5 The sort of classifications created by the handgun are unacceptable under
6 any sort of scrutiny reserved for enumerated rights. In California, unrostered guns
7 are permitted by private importation or as intra-family gifts, just not as retail
8 purchases. The roster thus privileges people who move into the state, or who have
9 family out-of-state. Yet all people, not just relatives, may transfer unrostered
10 handguns inside the state. These classifications make no sense. Any of the Plaintiffs
11 might live next door to individuals who lawfully obtained the same handguns
12 denied by the roster law, prior to moving to the state, or as a gift from an out-of-
13 state relative.
14

15 California's wide exemptions for law enforcement personnel, allowing them to
16 purchase unrostered guns for personal use, is completely irrational. If a gun is
17 unacceptably dangerous, it is odd to allow it to those perhaps most likely to use it.
18 And if the harm to be ameliorated is the unauthorized use of guns by people not
19 knowledgeable in their use, police weapons, including those owned privately by
20 police officers, are no less likely to be stolen or mishandled by unauthorized users.
21

22 The exceptions for curios and relics seems particularly egregious. Brett
23 Thomas's High Standard revolver is not quite old enough to be exempt from the
24 rostering law as a curio or relic, though in perhaps ten years, it would qualify.
25 Ironically, Mr. Heller's particular gun might qualify today based on the fact of its
26 involvement in an historic Supreme Court case. 27 C.F.R. § 478.11. But then, if
27
28

1 Thomas prevails here, his gun, too, by that virtue, might also be transformed into
2 an exempted curio or relic. Then there are the exceptions for movie and television
3 production, which are not merely irrational, but also underscore the fact that
4 unrostered handguns are so common that audiences would not expect to see only
5 those guns approved by Defendant in realistic depictions of American life.
6

7 The distinctions between different guns on the basis of whether they have an
8 acceptable chamber loaded indicator are also unconstitutional given the wholly
9 arbitrary manner in which California regulators determine whether a CLI is
10 sufficient. While the California Legislature might have established “minimal
11 guidelines,” *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) defining a CLI based
12 on design intent and characteristics, Cal. Penal Code § 16380, the regulatory
13 practice is untethered from the legislative standard and in the end amounts to
14 “because we said so.” Of course, since the government does not ban revolvers or
15 exceedingly popular handguns that fire rimfire rounds such as the .22, CLIs will
16 always be missing from significant numbers of handguns.
17
18

19 These and other senseless distinctions are inevitable considering the
20 handgun roster law’s audacious mission: to make a complete list of all lawful
21 handguns, and substitute the design and feature preferences of legislators and
22 regulators for that of a market comprising hundreds of millions of people over the
23 course of generations.
24

25 The D.C. City Council reluctantly concluded as much. Having adopted the
26 California roster as their own, District officials re-considered upon being served
27 with a very similar motion for summary judgment. The District noted its:
28

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

7 Exhibit J . The new "District Roster" consists not only of the California and
8 Massachusetts rosters, but also that of Maryland. 24 DCMR § 2323.1. Notably,
9 Maryland allows anyone to petition for additions to its roster, does not require an
10 annual maintenance fee for guns to remain rostered, and does not require handguns
11 to have neither a magazine disconnect device nor CLI nor microstamping.
12 Moreover, the new District roster expressly includes models removed from the
13 California roster for lack of payment, as well as guns that have only minor cosmetic
14 differences from those listed, and exempts all handguns manufactured prior to
15 1985. 24 DCMR §§ 2323.2, 2323.3. Exhibit K, L, M.

16 CONCLUSION

17 The Court should enter summary judgment for Plaintiffs.

18 Dated: October 25, 2013

Respectfully submitted,

19 Alan Gura, Cal. Bar No.: 178221
20 Gura & Possessky, PLLC
21 101 N. Columbus St., Suite 405
22 Alexandria, VA 22314
23 703.835.9085/Fax 703.997.7665
alan@gurapossessky.com

Donald E.J. Kilmer, Jr., Cal. Bar No. 179986
Law Offices of Donald Kilmer, A.P.C.
1645 Willow Street, Suite 150
San Jose, CA 95125
408.264.8489/Fax 408.264.8487
Don @DKLawOffice.com

24 /s/ Alan Gura

Alan Gura

24 /s/ Donald E.J. Kilmer, Jr.

Donald E.J. Kilmer, Jr.

25 Attorneys for Plaintiffs
26
27
28