APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IVAN PENA; ROY VARGAS; DONA CROSTON; BRETT THOMAS; SECOND AMENDMENT FOUNDATION, INC.; CALGUNS FOUNDATION, INC., *Plaintiffs-Appellants*, v. STEPHEN LINDLEY, Chief of the California Department of Justice Bureau of Firearms, *Defendant-Appellee*.	No. 15-15449 D.C. No. 2:09-cv-01185-KJM-CKD OPINION

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted March 16, 2017
San Francisco, California

Filed August 3, 2018

Before: J. Clifford Wallace, M. Margaret McKeown, and Jay S. Bybee, Circuit Judges

Opinion by Judge McKeown; Partial Concurrence and Partial Dissent by Judge Bybee

COUNSEL

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OPINION

McKEOWN, Circuit Judge.

Unsurprisingly, the Second Amendment says nothing about modern technology adopted to prevent accidental firearm discharges or trace handguns via serial numbers microstamped onto fired shell casings. The question before us is whether making specific commercial gun sales contingent on incorporating these innovations violates the constitution. This appeal stems from a challenge to three provisions of California's Unsafe Handgun Act ("UHA"). For safety reasons, California requires that new models of handguns meet certain criteria, and be listed on a handgun roster, before they may be offered for sale in the state. Two provisions require that a handgun have a chamber load indicator and a magazine detachment mechanism, both of which are designed to limit accidental firearm discharges. The third provision, adopted to aid law enforcement, requires new handguns to stamp

microscopically the handgun's make, model, and serial number onto each fired shell casing.

Ivan Pena, along with several other individuals and two nonprofit organizations, the Second Amendment Foundation, Inc. and the Calguns Foundation, Inc. (collectively, "Purchasers"), challenge the constitutionality of the UHA. Purchasers argue that these three provisions have narrowed their ability to buy firearms in California, in violation of the Second Amendment, and that the handgun roster scheme imposes irrational exceptions, in violation of the Equal Protection Clause of the Fourteenth Amendment. We do not need to reach the question of whether these limitations fall within the scope of the Second Amendment's right to bear arms because, even assuming coverage, these provisions pass constitutional muster. The California law only regulates commercial sales, not possession, and does so in a way that does not impose a substantial burden on Purchasers. We reject Purchasers' claim that they have a constitutional right to purchase a particular handgun. Nor do the provisions violate the Equal Protection Clause. We affirm the district court's grant of summary judgment in favor of California.

BACKGROUND

I. The Unsafe Handgun Act

As its name implies, California's Unsafe Handgun Act (UHA) seeks to reduce the number of firearm

deaths in the state. The primary enforcement clause reads:

> A person in this state who manufactures or causes to be manufactured, imports into the state for sale, keeps for sale, offers or exposes for sale, gives, or lends an unsafe handgun shall be punished by imprisonment in a county jail not exceeding one year.

CAL. PENAL CODE § 32000(a).[1] An "unsafe handgun" is defined as "any pistol, revolver, or other firearm capable of being concealed upon the person" and that does not have certain safety devices, meet firing requirements, or satisfy drop safety requirements. *Id.* § 31910.

The UHA charges the California Department of Justice ("CDOJ") with maintaining a roster of all handgun models that have been tested by a certified testing laboratory, "have been determined not to be unsafe handguns," and may be sold in the state. *Id.* § 32015(a).[2] Effectively, the Act presumes all handguns are unsafe unless the CDOJ determines them "not to be unsafe." Handguns with purely cosmetic differences (including a difference in finish, grip material, and shape or texture of the grip) from a handgun already on the roster need not meet these criteria. *See id.* § 32030.

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[1] Enacted in 1999, the UHA became effective in 2001.

[2] To add a handgun to the roster, a firearm manufacturer must pay a fee so that the state may test the firearm against the statutory and regulatory criteria. *See* CAL. PENAL CODE § 32015(b).

Over time, California has added new requirements for inclusion on the roster. Since 2007, new models of semiautomatic pistols must be equipped with both a chamber load indicator (CLI) and a magazine detachment mechanism (MDM)—safety features designed to limit accidental discharges that occur when someone mistakenly believes no round is in the chamber. *Id.* § 31910(b)(5). A CLI is a "device that plainly indicates that a cartridge is in the firing chamber." *Id.* § 16380. An MDM is "a mechanism that prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted in the semiautomatic pistol." *Id.* § 16900.

Since 2013, new models of semiautomatic pistols need to include a feature called "microstamping": each such pistol must imprint two sets of 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. *Id.* § 31910(b)(7).[3] Designed to help solve crimes, microstamping provides law enforcement with identifying information about a handgun fired at a crime scene. *See Fiscal v. City & Cty. of S.F.*, 70 Cal. Rptr. 3d 324, 337 (Ct. App. 2008).

There are exceptions to these requirements. Most significant, the required features are inapplicable to

[3] This requirement was set to begin in 2010, but did not become effective until 2013 because it was contingent on the CDOJ certifying "that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions." *Id.* § 31910(b)(7)(A).

models of semiautomatic pistols that were "already listed on the roster" when such requirements became effective. CAL. PENAL CODE § 31910(b)(5), (7). In addition, firearms sold to law enforcement officials and certain curios or relics (as defined in the *Code of Federal Regulations*) are exempt. CAL. PENAL CODE § 32000(b)(3), (4). Pistols used in Olympic target shooting are exempt, *see id.* § 32105, as are certain single action revolvers and single shot pistols of either a certain age (a curio or relic made before 1900) or a certain size (greater than seven-and-a-half inches), *see id.* §§ 32000(b)(3), 32100. Other exemptions include firearms transferred between private parties, *see id.* § 32110(a), firearms delivered for consignment sale or as collateral for a pawnbroker loan, *see id.* § 32110(f), and firearms used solely as props for video production, *see id.* § 32110(h).

II. District Court Proceedings

Seeking to enjoin the state from enforcing the UHA, in 2009 Purchasers sued the Chief of the CDOJ Bureau of Firearms Stephen Lindley on two constitutional theories. Purchasers claimed that the CLI, MDM, and microstamping requirements restricted access to the firearms of their choice, in violation of the Second Amendment.[4] Purchasers also claimed that the

[4] Purchasers' theory is that handguns lacking CLI, MDM, and microstamping technology are in common lawful use throughout the United States and that prohibiting their sale in California violates the Second Amendment. When the legislature amended the UHA to include these requirements, between eleven

UHA's roster scheme transgressed the Equal Protection Clause of the Fourteenth Amendment by making irrational exceptions.

After cross-motions, briefing, and a hearing, the district court granted summary judgment to California. Citing the Supreme Court's landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the district court characterized the UHA provisions as "laws imposing conditions or qualifications on the commercial sale of firearms," and thus concluded that the laws presumptively did not violate the Second Amendment. The district court observed that the provisions were conditions on the sale of firearms, not prohibitions, and that Purchasers maintained access to nearly 1,000 types of firearms on the roster, all of which were approved for sale in California. Purchasers' "[i]nsistence upon . . . particular" handguns, the court concluded, simply "f[e]ll outside the scope of the right to bear arms."

Analysis

I. SECOND AMENDMENT

A. The Supreme Court's *Heller* Framework

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free

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and fourteen percent of handguns in the United States were available with a CLI and MDM. According to Purchasers, no handguns were available in the United States that met the microstamping requirements. The record does not indicate whether and how these figures have changed over time.

State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a "lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. at 635.[5]

Whether the UHA violates Purchasers' Second Amendment rights is framed by a two-step inquiry established in *Heller*. We first consider whether the Act "burdens conduct protected by the Second Amendment," and if it does, we "apply an appropriate level of scrutiny." *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014).[6]

Whether a challenged law burdens conduct protected by the Second Amendment depends on "the historical understanding of the scope of the right," including "whether the challenged law falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected." *Jackson*, 746 F.3d at 960. In *Heller*, the Supreme Court set forth non-exhaustive categories of "presumptively lawful regulatory measures" that are presumed to be consistent with the historical scope of the Second Amendment:

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[5] The Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See McDonald v. Chicago*, 561 U.S. 742 (2010).

[6] Once the district court answered "no" to the first question, it never reached the second part of the analysis.

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626–27 & n.26. The Court, however, did not define the contours of these "presumptively lawful" categories. *See id.* at 635 ("[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when these exceptions come before us.").

In the decade since *Heller*, the courts of appeals have spilled considerable ink in trying to navigate the Supreme Court's framework. Perhaps that is why the Seventh Circuit observed, "[w]e do not think it profitable to parse these passages of *Heller* as if they contained an answer." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Our sister circuits have struggled to unpack the different meanings of "presumptively lawful." *See United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny."); *United*

States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010) ("It is unclear to us whether *Heller* was suggesting that 'longstanding prohibitions' such as these were historically understood to be valid limitations on the right to bear arms or did not violate the Second Amendment for some other reason."); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1253 (D.C. Cir. 2011) (citations omitted) ("*Heller* tells us 'longstanding' regulations are 'presumptively lawful,' that is, they are presumed not to burden conduct within the scope of the Second Amendment.").

Our circuit similarly has strained to interpret the phrase "conditions and qualifications on the commercial sale of arms." Viewing that language as "sufficiently opaque" to "rely[] on it alone," we instead conducted a full textual and historical review of the scope of the Second Amendment in a recent challenge. *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 683 (9th Cir. 2017) (en banc).

The opaqueness of the presumption of legality for "conditions and qualifications on the commercial sale of arms" likely explains why we and other courts often have assumed without deciding that a regulation does burden conduct protected by the Second Amendment rather than parse whether the law falls into that exception. In these cases, the court avoided having to define the contours of the commercial sales category because it assumed the Second Amendment applied

and upheld the restriction under the appropriate level of constitutional scrutiny.[7]

We, too, follow this well-trodden and "judicious course." *Wollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013). We assume without deciding that the challenged UHA provisions burden conduct protected by the Second Amendment because we conclude that the statute is constitutional irrespective of that determination. By making this assumption, we bypass the constitutional obstacle course of defining the parameters of the Second Amendment's individual right in the context of commercial sales. Thus, we have no occasion to engage with the dissent's extensive exegesis on this point.

B. Determination of the Appropriate Level of Scrutiny

Because we assume that the UHA implicates Purchasers' right to bear arms, our next task is to determine the appropriate level of scrutiny for review of the California requirements. Purchasers stump for

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[7] *See Silvester v. Harris*, 843 F.3d 816, 827–29 (9th Cir. 2016) (assuming a ten-day waiting period on the purchase of a firearm burdened conduct protected by the Second Amendment and applying intermediate scrutiny); *Wilson v. Lynch*, 835 F.3d 1083, 1092 (9th Cir. 2016) (applying intermediate scrutiny to a regulation prohibiting possessors of medical marijuana card from buying firearms), *cert. denied*, 137 S. Ct. 1396 (2017); *cf. Jackson*, 746 F.3d at 967–68 (applying intermediate scrutiny to a ban on the sale of hollow-point ammunition).

strict scrutiny while California invites intermediate, at most.

Our post-*Heller* decisions generally have applied intermediate scrutiny to firearms regulations. *See Silvester*, 843 F.3d at 822 (upholding a ten-day waiting period on the sale of firearms to those who already own one); *Wilson*, 835 F.3d at 1092 (upholding ban on possession by holders of state medical marijuana cards); *Fyock*, 779 F.3d at 1000–01 (refusing to preliminarily enjoin an ordinance banning possession of high-capacity magazines); *Jackson*, 746 F.3d at 966, 970 (upholding ordinances requiring firearms to be stored in a locked container when not carried on the person and forbidding the purchase of hollow-point ammunition); *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) (upholding a ban on firearm possession by people convicted of domestic violence).

Which level of scrutiny to apply depends on "how close the law comes to the core of the Second Amendment right" and "the severity of the law's burden on the right." *Id.* at 1138. We strictly scrutinize a "law that implicates the core of the Second Amendment right and severely burdens that right." *Silvester*, 843 F.3d at 821. Otherwise, we apply intermediate scrutiny if the law "does not implicate the core Second Amendment right *or* does not place a substantial burden on that right." *Fyock*, 779 F.3d at 998–99.

Consistent with our threshold decision not to assess whether the California restrictions fall within the Second Amendment, we need not answer

conclusively whether the UHA's restrictions implicate the core Second Amendment right of "self defense of the home." *Silvester*, 843 F.3d at 821 (citing *Heller*, 554 U.S. at 628–29). Because the restrictions do not substantially burden any such right, intermediate scrutiny is appropriate.

At the outset, it is important to understand what the statute does and does not do vis-à-vis handguns, the "quintessential self-defense weapon." *Heller*, 554 U.S. at 629. Moving forward, the statute limits commercial sales of new models of semiautomatic pistols to those with the CLI, MDM, and microstamping protections. Importantly, the UHA "grandfathers" hundreds of handgun models on the approved guns roster that do not meet the new requirements. The statute does not restrict *possession* of handguns in the home or elsewhere (with or without CLI, MDM, and microstamping features). The statute also includes a number of exemptions. For example, the statute does not affect the sale of off-roster existing handguns in private sales transactions. Nor are out-of-state sales regulated.

In weighing the severity of the burden, we are guided by a longstanding distinction between laws that regulate the manner in which individuals may exercise their Second Amendment right, and laws that amount to a total prohibition of the right. *See Chovan*, 735 F.3d at 1138; *accord Heller II*, 670 F.3d at 1251–58 (reasoning that gun-registration requirements do not severely burden the Second Amendment because they do not "prevent[] an individual from possessing a

firearm in his home or elsewhere"); *Marzzarella*, 614 F.3d at 97 (distinguishing between a law requiring handguns to bear original serial numbers, and *Heller*'s law prohibiting the possession of handguns). The UHA is of the former variety—regulation of the manner of use, not possession—and thus affects Second Amendment rights less severely. *See Silvester*, 843 F.3d at 827 ("[L]aws which regulate only the '*manner* in which persons may exercise their Second Amendment rights' are less burdensome than those which bar firearm possession completely." (citation omitted)).

The CLI, MDM, and microstamping requirements place almost no burden on the physical exercise of Second Amendment rights. There is no evidence that CLIs or microstamping interferes with the functioning of any arms. Although MDMs might prevent a gun from firing at will, it is likely a rare occurrence when someone has time to put a round from outside a magazine in the chamber without inserting the magazine itself. CLIs and MDMs are designed to make the handgun owner aware of when there is ammunition in the chamber. That feature not only prevents accidental discharges—which itself protects "hearth and home"—but also informs the owner when the gun is loaded so that the weapon may be fired in self-defense.

Perhaps recognizing the absence of a physical burden, Purchasers assert a substantial burden because the UHA precludes them from buying in California the majority of Smith & Wesson's handguns, two of Ruger's most popular models, and the fourth generation of Glocks. But being unable to purchase a subset of

semiautomatic weapons, without more, does not significantly burden the right to self-defense in the home. *See Heller*, 554 U.S. at 626 ("[T]he Second Amendment right is not unlimited. . . . [T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

Indeed, all of the plaintiffs admit that they are able to buy an operable handgun suitable for self-defense—just not the exact gun they want. Purchasers have adduced little evidence that the handguns unavailable for purchase in California are materially more effective for self-defense than handguns currently for sale in the state.[8] *See Jackson*, 746 F.3d at 968 (looking at self-defense effectiveness during this inquiry).[9]

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[8] The evidence is slim. One Purchaser was born without a right arm and wishes to buy a Glock with an ambidextrous magazine release, which is better suited for left-handed people. A similar Glock model is listed on the CDOJ roster, except it does not include the ambidextrous release. Apparently, the CDOJ determined that the ambidextrous release was not purely a cosmetic change and declined to list the model without going through its testing and registration protocols. Two others wish to purchase handguns not on the roster. A fourth wishes to purchase a firearm that is on the roster, but in a different color. Apparently, the manufacturer has not yet paid the fee to submit that change to the CDOJ to see if the gun can be listed as cosmetically "similar" to the model already on the roster.

[9] Purchasers point to the declining number of handguns listed on the roster. At the end of 2013, the CDOJ's handgun roster contained 1,273 handguns and 883 semiautomatics. As of oral argument in March 2017, it contained 744 handguns and 496 semiautomatics. *Roster of Handguns Certified for Sale*, CAL. DEP'T JUST., http://certguns.doj.ca.gov (last visited Mar. 2, 2017). But simply showing that the number of entries on the roster has decreased does not tell us much about whether the availability of

Contrary to Purchasers' assertion, the severity of the burden is not "obvious[]."

Any burden on the right is lessened by the UHA's exceptions, which allow for the purchase of firearms that do not have the CLI, MDM, and microstamping features. *See Chovan*, 735 F.3d at 1138 (holding that a "substantial[] burden[] . . . is lightened by . . . exceptions"). For example, Purchasers may buy handguns without the three features if such firearms are grandfathered on the roster, and may buy off-roster handguns in private transactions. There is no evidence in the record that the hundreds of firearms available for purchase are inadequate for self-defense. *See Decastro*, 682 F.3d at 168 ("[A] law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.").

Because the UHA does not effect a substantial burden, we conclude that intermediate scrutiny is

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handguns has declined in a way *relevant* to the Second Amendment. It is not the number of handguns on the roster that matters, it is the impact on self-defense in the home. Some handguns might not be on the roster for the simple reason that they have not been submitted to DOJ for testing for reasons wholly unrelated to CLIs, MDMs, and microstamping. And, handguns could have fallen off the list simply because no one paid the fee to keep them on. The mere fact of a declining number of rostered handguns does not satisfy Purchasers' obligation to show a substantial burden.

adequate to protect the claimed Second Amendment rights at issue here.

C. Application of Intermediate Scrutiny to the UHA Provisions

Intermediate scrutiny requires (1) a significant, substantial, or important government objective, and (2) a "reasonable fit" between the challenged law and the asserted objective. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014). The government must show that the regulation "promotes a 'substantial government interest that would be achieved less effectively absent the regulation,'" but not necessarily that the chosen regulation is the "least restrictive means" of achieving the government's interest. *Fyock*, 779 F.3d at 1000 (quoting *Chovan*, 735 F.3d at 1139).

When considering California's justifications for the statute, we do not impose an "unnecessarily rigid burden of proof," and we allow California to rely on any material "reasonably believed to be relevant" to substantiate its interests in gun safety and crime prevention. *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017). Hence, our analysis of whether there is a "reasonable fit between the government's stated objective and the regulation" considers "the legislative history of the enactment as well as studies in the record or cited in pertinent case law." *Fyock*, 779 F.3d at 1000 (9th Cir. 2015) (internal citations marks omitted).

It is important to note that we are weighing a legislative judgment, not evidence in a criminal trial. Because legislatures are "not obligated, when enacting [their] statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review," we should not conflate legislative findings with "evidence" in the technical sense. *Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192, 1199 (9th Cir. 2013) (en banc) (internal citations and quotation marks omitted).

Nor do we substitute our own policy judgment for that of the legislature. *Id.* When policy disagreements exist in the form of conflicting legislative "evidence," we "owe [the legislature's] findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) (internal citations and quotation marks omitted); *see also id.* ("In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress." (internal quotation marks omitted)). "It is not our function to appraise the wisdom of [California's] decision to require" new semiautomatic gun models manufactured in-state to incorporate new technology; instead, the state "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 52 (1986). These principles apply equally to benchmarking the efficacy as well as the technological feasibility

of the regulations. Therefore, in the face of policy disagreements, or even conflicting legislative evidence, "we must allow the government to select among reasonable alternatives in its policy decisions." *Peruta v. Cty. of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J., concurring), *cert. denied*, 137 S. Ct. 1995 (2017); *accord Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012) ("It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments.").

Our role is not to re-litigate a policy disagreement that the California legislature already settled, and we lack the means to resolve that dispute. Fortunately, that is not our task. *See City of Renton*, 475 U.S. at 51–52. And, as required by precedent, California's evidence "fairly support[ed]" its conclusions. *Jackson*, 746 F.3d at 969.

1. The CLI and MDM Requirements

There is no doubt that the governmental safety interests identified for the CLI and MDM requirements are substantial. California represents that the legislature's goal in requiring CLIs and MDMs "was targeting the connection between cheaply made, unsafe handguns and injuries to firearms operators and crime." These interests are undoubtedly adequate. *See*, *e.g.*, *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997); *Jackson*, 746 F.3d at 965–66; *see also Silvester*, 843 F.3d at 827 ("[The statute at issue] has . . . the objective of promoting safety and reducing gun

violence. The parties agree that these objectives are important. The first step is undisputedly satisfied."). The CLI and MDM requirements also reasonably fit with California's interest in public safety. A CLI lets someone know that a gun is loaded without even having to pick it up to check; it acts as a red flag for those handling the gun who may have forgotten that it was loaded. An MDM prevents a firearm from shooting unless a magazine is inserted. Without an MDM, a magazine-equipped pistol can be fired if there is a bullet in the chamber, even if the magazine has not been inserted.

In one sense then, an MDM disables a gun capable of providing self-defense. But the practical effect strikes us as a rare instance. Because it is more likely that people will associate firearms that have magazines with loaded firearms and firearms that do not have magazines with unloaded firearms, the legislature could reasonably predict that the MDM could prevent accidental discharges of the weapon. The legislative judgment that preventing cases of accidental discharge outweighs the need for discharging a gun without the magazine in place is reasonable. The legislative history cites studies confirming this commonsense conclusion. Purchasers do not provide any reliable evidence that these studies are incorrect or that CLIs or MDMs will clearly thwart, rather than advance, California's goal of saving lives by preventing accidental discharges. The fit between the prevention of accidental discharges and the requiring of CLIs and

MDMs on not-yet-rostered handguns is a reasonable one.

Purchasers argue that the UHA's requirements have "nothing to do with consumer safety" because the UHA "exempts specially-favored individuals whose safety is no less important[] [and] mandates alleged 'safety' features that California instructs consumers to ignore as unreliable." Purchasers point to exemptions in the UHA for law enforcement, entertainment industry-related props, intra-family transfers, and private-party transfers. *See*, *e.g.*, CAL. PENAL CODE §§ 32000(b)(4) (law enforcement), 32110(a) (private party transfer), 32110(h) (entertainment industry props), 27875 (intra-family transfers). Although Purchasers are correct that these groups are exempt from the UHA, that underinclusiveness does not doom the MDM and CLI requirements under intermediate scrutiny. *See Minority Television Project*, 736 F.3d at 1204 ("Unlike strict scrutiny, intermediate scrutiny does not require that the means . . . be the least restrictive."). The exceptions are not so pervasive or without basis as to make the fit unreasonable.

Purchasers further fault the UHA because "not every aspect of the roster obviously advances the state's regulatory interest." Purchasers argue that once a gun has been deemed "safe" and put on the roster and then falls off the roster for administrative reasons, California has no interest in deeming it "unsafe." We do not agree. Although purely administrative reasons may not have anything to do with a weapon's performance and safety—just as not having a current

driver's license is not proof that the driver is not a safe driver—we will not interfere with the orderly administration of California's roster. We are not here to order California to re-list weapons where the manufacturers or importers have otherwise failed to comply with California law.

Purchasers also argue that California "teaches consumers to disregard [CLIs] and [MDMs], [so] requiring handguns to have these features actually impedes the state's safety interests." Amicus briefs filed in support of Purchasers add that the regulations, by encouraging people to look for or rely on a CLI or a MDM, respectively, "inevitably discourage[ ] individuals from *actually checking* to see whether a firearm is loaded." This, *amici* tell us, "may increase the likelihood of an unintentional discharge." We disagree. California does not instruct consumers to disregard CLIs and MDMs. Instead, the regulations simply mean that consumers should not rely entirely on them or assume that just because a magazine is out or the CLI is not popped up, the weapon is incapable of being dangerous. "Treat all guns as if they are loaded," California tells gun-owners. That is just good, old-fashioned common sense. *Cf. United States v. Carona*, 660 F.3d 360, 368–69 (9th Cir. 2011) ("That some wear a belt and suspenders does not prove the inadequacy of either to hold up the pants, but only the cautious nature of the person wearing the pants." (citation omitted)).

We conclude that the CLI and MDM regulations pass intermediate scrutiny. *See Draper v. Healey*, 98 F. Supp. 3d 77, 85 (D. Mass. 2015) (holding that

Massachusetts' CLI and MDM regulations pass "any standard of scrutiny"), *aff'd on other grounds*, 827 F.3d 1 (1st Cir. 2016).

2. The Microstamping Requirement

The UHA's microstamping requirement also passes constitutional muster under intermediate scrutiny. Purchasers acknowledge that California's two stated objectives for the microstamping requirement—public safety and crime prevention—are substantial government interests. Countless cases support this concession. *See*, *e.g.*, *Schenck*, 519 U.S. at 376 (public safety); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (crime prevention). More specifically, "preserving the ability of law enforcement to conduct serial number tracing—effectuated by limiting the availability of untraceable firearms—constitutes a substantial or important interest." *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010). Serial number tracing "enabl[es] law enforcement to gather vital information about recovered firearms." *Id.* The same logic applies to recovered bullets, and counsels the conclusion that limiting the availability of untraceable bullets serves a substantial government interest.

California also has established a "reasonable fit" between these substantial interests and the microstamping requirement. The legislative history supporting the microstamping provision describes California's "enormous and diverse" problem regarding unsolved homicides committed with handguns. In

approximately 45 percent of all homicides in California, no arrests are made because police lack the needed evidence, and more than 60 percent of the homicides in California are committed with handguns. According to the legislative history, microstamping would "provide rapid leads in the first crucial hours after a homicide" because police could match a bullet found at a crime scene with the registered owner. This data is particularly critical in drive-by-shootings, the legislature observes, where the only evidence at the crime scene may be spent cartridges. California is dealing with a real-world problem and has crafted a real-world solution.

The California legislature considered and rejected other, more intrusive solutions to combat the unsolved homicide-by-handgun problem. The legislature found that microstamping technology improved the accuracy of ballistic identification "without requiring the manpower and expense associated with the creation and maintenance of a ballistic image database containing millions of images." Purchasers do not suggest a less invasive approach to curbing unsolved handgun homicides.

Instead, Purchasers contest California's evidence that microstamping will address the problem *effectively.* California presented evidence that existing microstamping technology is accurate 96 percent of the time. Purchasers caution that the microstamping technology is not as reliable as California claims. The standard does not demand that California's solution be a perfect one. At the time it considered this provision, the California legislature weighed competing evidence

on effectiveness before enacting the statute. California's evidence need only "fairly support[]" its conclusions. *Jackson*, 746 F.3d at 969. California has gone well beyond this threshold requirement.

Purchasers also argue that microstamping is impracticable.[10] Although this case involves the Purchasers, not the manufacturers, the Purchasers cloak their argument in the language of the producers. The reality is not that manufacturers cannot meet the standard but rather that they have chosen not to. Purchasers offered evidence that gun manufacturers have not "produced a functioning, commercially available semiautomatic pistol" equipped with the microstamping technology and they "have no plans to attempt to do so." The declarations offered are "lacking in details," as the dissent candidly notes, and rest on conclusory language, such as "appears infeasible" or "cannot practically implement." Simply because no gun manufacturer is "even considering trying" to implement the technology, it does not follow that microstamping is technologically infeasible.

Notably, the parties agree that semiautomatic handguns are not subject to the microstamping

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[10] The California Supreme Court recently ordered judgment in favor of California in a challenge brought to invalidate the UHA as "impossible" to comply with under state law, observing that the plaintiffs had not "petitioned for a writ of mandate against the [California] Department of Justice for improperly certifying the availability of dual placement microstamping technology." *Nat'l Shooting Sports Found., Inc. v. State*, No. S239397, 2018 WL 3150950, at *4 (Cal. June 28, 2018).

requirement and are grandfathered as long as the manufacturer continues to pay a roster fee and the firearms do not fail a retest. We thus find it odd, indeed, that the manufacturers indirectly assert a right to sell new models of—modern—semiautomatic handguns, but refuse to modernize their firearms by installing microstamping features. We need not accept wholesale that manufacturers will decline to implement this new public safety technology in the face of California's evidence that the technology is available and that compliance is feasible.[11]

It is ironic that Purchasers filed a cross-motion for summary judgment, agreeing with California that "[t]his case's essential facts are not in dispute." As Purchasers lay out in their cross-motion:

> Defendant admits that no handguns for sale in the United States have the microstamping technology required by California's roster law.

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[11] The argument here echoes a similar one made for decades about airbags. *See Chrysler Corp. v. Dep't of Transp.*, 472 F.2d 659 (6th Cir. 1972) ("The petitioners next contend that Standard 208 is not practicable because airbag technology is not, at present, developed to the point where airbags can be installed in all presently manufactured cars."); Frank Waters, *Air Bag Litigation: Plaintiffs, Start Your Engines*, 13 Pepp. L. Rev. 4 (1986) ("There is mounting concern that because automobile manufacturers and governmental agencies have not been successful in paving the way toward air bag installation, consumers may never receive the benefit of this lifesaving device."); Nat'l Highway Traffic Safety Admin., *Airbags*, available at http://www.nhtsa.gov/equipment/air-bags ("In 25 years—from 1987 to 2012—frontal air bags saved 39,976 lives."). As with that debate, it may be that protests about technical ability to comply reflect a reluctance to comply.

> No firearms manufacturer has submitted any microstamping-compliant handguns, and Defendant has no information as to whether any manufacturer will ever produce microstamping handguns. Accordingly, the microstamping requirement imposes a de facto ban on the sale of all new semiautomatic handgun models in California.

For Purchasers, it is enough that manufacturers say that they will not and "cannot" comply. But that begs the question of the deference we provide to California's lawmakers, who made a considered judgment.

California's evidence carries the day in the legislative context. The state produced evidence that compliance with the microstamping requirement is "technologically possible" and would cost an incremental $3.00 to $10.00 per gun. By 2008, the inventor of microstamping had publicly tested the technology with local police departments across the country. In those tests, he gave microstamping-equipped firearms and cartridges to local range officers so that they could observe the stamped cartridges and extract their codes. Overall, the technology was publicly tested seven times with seven different police departments, including in Sacramento and Los Angeles before the law was enacted. In addition to this critical evidence, the legislature considered studies showing that microstamping technology generally works.

Throughout the legislative process and in this litigation, the state has reasonably relied on Todd Lizotte, the inventor of microstamping. For over fifteen

years, Lizotte has shared his expertise by testifying before state legislative committees, conducting public tests, and contributing to articles that appear in law enforcement periodicals, technical journals, and newspapers. During consideration of the UHA, Lizotte answered technical questions from the drafting committee, and the legislative history contains multiple references to Lizotte and his company, NanoMark Technologies. Given his extensive firsthand knowledge, it is significant that Lizotte concluded that "20 years of development, testing and public demonstrations show that microstamping can be implemented," that "[p]rinting two separate codes on the firing pin is feasible," and that "it is possible for firearm manufacturers to implement microstamping technology contemplated by the California legislation."

The judgment California made about technological feasibility is no less predictive than the judgment on efficacy. In both cases, the legislators reviewed the record, including conflicting testimony. We cannot countenance the dissent's effort to draw an artificial distinction and hold California to a standard never before imposed. The dissent suggests that California must produce specific evidence of compliance with its own microstamping requirement in a "laboratory." But the state need not don lab coats, equip semiautomatic firearms with microstamping technology, and test the technological feasibility results itself. That is far too exacting a standard of "proof" in the context of intermediate legislative scrutiny. *See City of Renton*, 475 U.S. at 52. In effect, the dissent would transform the

state into a gun manufacturer. Instead, California may "predict[]" as a policy judgment that gun manufacturers are capable of outfitting firearms with "available" technology when experts state that compliance is technologically "feasible." *Turner*, 520 U.S. 16 at 195. Reliance on experts is particularly understandable here, since a government "considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *Alameda Books*, 535 U.S. at 439–40 (O'Connor, J., announcing the judgment of the court).

California's microstamping requirement is the first of its kind, an "experimental" solution "to admittedly serious problems." *City of Renton*, 475 U.S. at 52. The microstamping requirement only became effective after the CDOJ certified that the technology "is available to more than one manufacturer unencumbered by any patent restrictions." It bears noting that a second microstamping law became effective this year, in the District of Columbia. *See* D.C. Code Ann. §§ 7-2504.08; 7-2505.03. The District initially set its applicability date "in order to incorporate best practices learned from California's experience" and "to allow the model being developed in California to be refined." District of Columbia Committee Report, B. 18-963 (2010). As Justice Brandeis famously wrote, "a single courageous state may, if its citizens choose, *serve as* a laboratory," and "try novel [legislative] experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added). But we have never

forced an experimenting state to prove its policymaking judgment with scientific precision, especially when expert opinion supports the decision.

Even if microstamping proves technologically infeasible or ineffective, the UHA authorizes an alternative process: The California Attorney General "may also approve a method of equal or greater reliability and effectiveness in identifying the specific serial number of a firearm from spent cartridge casings discharged by that firearm than that which is set forth in this paragraph." CAL. PENAL CODE § 31910(b)(7)(B).[12]

Microstamping or an authorized alternative may indeed "represent[] an important advance in the techniques used by law enforcement to serve legitimate police concerns." *See Maryland v. King*, 133 S. Ct. 1958, 1975 (2013). In *King*, the Supreme Court justified additional Fourth Amendment intrusion because of DNA technology's promise in serving "important" identification interests:

> DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant . . . and DNA is a markedly more accurate form of identifying arrestees.

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[12] Such alternative method must also be "unencumbered by any patent restrictions." *Id.*

Id. at 1976. The Court held that DNA identification secured by swabbing the inside of an arrestee's cheek is "no more than an extension of methods of identification long used in dealing with persons under arrest" and so did not violate the Fourth Amendment's protection against unreasonable searches. *Id.* at 1977 (internal citation omitted).

Similarly, microstamping is an extension of identification methods long used in imprinting serial numbers on guns. The Third Circuit upheld under heightened scrutiny a statute punishing receipt or possession of any firearm on which the manufacturer's serial number was removed, obliterated, or altered. *See Marzzarella*, 614 F.3d at 98–99. The court held that "[r]egulating the possession of unmarked firearms . . . fits closely with the interest in ensuring the traceability of weapons," and so 18 U.S.C. § 922(k) survives intermediate scrutiny. *Id.* at 99.[13]

During consideration of the UHA, the California legislature considered microstamping to be a modification on the federal serial number law upheld by the Third Circuit. As in *King*, any additional constitutional intrusion beyond requiring serial numbers is "not significant" and justified by "scientific advancements." 133 S. Ct. at 1975–76. Indeed, "new technology will

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[13] 18 U.S.C. § 922(k) makes it "unlawful for any person knowingly to transport, ship, or receive . . . any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered."

only further improve" microstamping's effectiveness. *Id.* at 1977.

We are not convinced that the microstamping requirement impinges any further on Second Amendment rights than the serial number law approved in *Marzzarella*. That law punishes receipt or possession—in addition to sale or transfer—of any firearm on which the manufacturer's serial number was removed, obliterated, or altered. 614 F.3d at 88 n.1 (citing 18 U.S.C. § 922(k)). California law does not go so far—it does not ban possession or use of guns manufactured without microstamping features. Instead, the UHA sanctions only someone who "manufactures," "imports into the state for sale," "keeps for sale," "offers or exposes for sale," or "gives or lends an unsafe handgun." CAL. PENAL CODE § 32000(a). The microstamping restrictions on commercial manufacture and sale implicate the rights of gun owners far less than laws directly punishing the possession of handguns. *See D.C. v. Heller*, 554 U.S. 570, 627 (2008); *Teixeira v. Cty. of Alameda*, 2017 WL 4509038, at *8 (9th Cir. Oct. 10, 2017) (en banc) ("[G]un buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained."). In addition, the law at issue in *Marzzarella* applies to "any firearm" that once had a serial number. The microstamping provision, however, regulates only new models of semiautomatic weapons offered for sale in California after May 2013.

California is entitled to "a reasonable opportunity to experiment with solutions to admittedly serious

problems." *City of Renton*, 475 U.S. at 52. The microstamping requirement need not be "the least restrictive means of" reducing the number of unsolved handgun homicides. *Jackson*, 746 F.3d at 966. California has met its burden to show that microstamping is reasonably tailored to address the substantial problem of untraceable bullets at crime scenes and the value of a reasonable means of identification. Accordingly, the requirement passes intermediate scrutiny.

II. EQUAL PROTECTION CLAUSE

Purchasers also claim that the UHA's three requirements violate the Equal Protection Clause of the Fourteenth Amendment. We disagree. To the extent that the Equal Protection challenge is based on the Second Amendment's fundamental right to bear arms and the disparate treatment of groups in exercising that right, as recognized by *McDonald*, that challenge is subsumed in the Second Amendment inquiry above. *See Orin v. Barclay*, 272 F.3d 1207, 1213 (9th Cir. 2001) (treating an "equal protection claim as subsumed by, and co-extensive with, his First Amendment claim").

Purchasers do not allege that they are part of any suspect or quasi-suspect class.[14] "[A] statutory

[14] Purchasers allege that the UHA discriminates "on the basis of state residence" and this "normally triggers strict scrutiny." But because Purchasers pursue this line of reasoning no further—and, in fact, admit that strict scrutiny has not been used when laws discriminate against *instate* residents as opposed to out-of-state residents—it is forfeited. *See Greenwood v. FAA*, 28 F.3d

classification [that treats similarly situated persons differently] that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (requiring, as a prerequisite, that there be a "similarly situated" class of persons (citation omitted)). Thus, the regulations need do no more than "bear[ ] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Purchasers "have the burden 'to negative every conceivable basis which might support it,'" and each basis will be afforded a "strong presumption of validity." *FCC*, 508 U.S. at 314–15. But Purchasers have failed to carry that burden and demonstrate that any of the differences in treatment by the UHA challenged here lack a rational basis.

Purchasers challenge the UHA's exceptions for sales to sworn members of law enforcement agencies, sales of curios and relics, and use in movie and television productions. *See* CAL. PENAL CODE §§ 32000(b)(3), (4), 32110(h). But we have already said that "[i]t is manifestly rational for at least most categories of peace officers to possess and use firearms more potent than those available to the rest of the populace in order to maintain public safety." *Silveira v. Lockyer*, 312 F.3d

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971, 977 (9th Cir. 1994) (refusing to manufacture arguments for an appellant who made bare assertions in an opening brief).

1052, 1089 (9th Cir. 2003), *abrogated on other grounds by Heller*, 544 U.S. 570. Purchasers point out that the UHA's exception does not limit law enforcement officers to use of their weapons only during "official duties." Even so, the legislature could rationally conclude that because law enforcement officers receive extensive training and are expected to respond to emergencies even when off duty, such safety provisions might not be necessary for them. That is a rational explanation.

Purchasers' challenge to the exceptions for curios and relics and weapons used in film and television also have a rational justification. The curios-and-relics provision grandfathers "[f]irearms which are of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons." 27 C.F.R. § 478.11, para. Curios or Relics; *see* CAL. PENAL CODE § 32000(b)(3) (incorporating the federal definition found at 27 C.F.R. § 478.11). These include firearms more than fifty years old, "curios or relics of museum interest," and firearms valuable because they are "novel, rare, bizarre, [or associated with] some historical figure, period, or event." 27 C.F.R. § 478.11, para. Curios or Relics, subsec. (a)–(c). Because collectors hold these weapons for reasons other than "as offensive or defensive weapons," the exemption is a rational one. Similarly, the video-production exemption is rational because those weapons, one anticipates, are not intended to be used for live fire. The fit of these exemptions may not be perfect—and we express no view how these exceptions might fare under more exacting

standards of scrutiny—but it is sufficient to satisfy rational basis scrutiny.

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of California.

AFFIRMED.

BYBEE, Circuit Judge, concurring in part and dissenting in part:

Under California's Unsafe Handgun Act (UHA), any new semiautomatic handguns commercially sold in the state must be equipped with three technical features: a chamber load indicator (CLI), a magazine detachment mechanism (MDM), and microstamping.[1] CAL. PENAL CODE §§ 32000(a), 31910(b)(1)–(7). For the reasons explained in the majority opinion, I agree that intermediate scrutiny applies to Plaintiffs' Second Amendment challenge. I also agree that there is a reasonable fit between the CLI and MDM requirements and the State's substantial interest in enhancing public safety. *See United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) ("[T]he intermediate scrutiny standard . . . require[s] (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation

[1] The UHA exempts from these three requirements any handguns that were "already listed on the roster" of approved handguns before the requirements were enacted. *See* CAL. PENAL CODE § 31910(b)(5)–(7)(A).

and the asserted objective."). Both mechanisms help prevent accidental handgun discharges by decreasing the likelihood that a person will mistakenly believe that the firing chamber is empty. I therefore join these portions of the majority opinion.[2]

I part company with the majority, however, over the microstamping provision.[3] Plaintiffs have raised two different points. First, they argue that the mechanism for stamping cartridge casings can be disabled by the owner, thus undoing the benefits of microstamping. The State and its *amici* emphasize that microstamping is a proven technology and that, even if some owners disable the microstamping mechanism, it will aid the police in solving crimes. They urge us to defer to the California legislature's judgment on the overall usefulness of microstamping. The majority agrees. Pointing to "evidence that the technology is available," Maj. Op.

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[2] I also join the majority opinion in concluding that the three provisions do not violate the Equal Protection Clause.

[3] Microstamping is a mechanism that can imprint a cartridge casing "with a microscopic array of characters that identify the make, model, and serial number of the pistol" that fired the round. CAL. PENAL CODE § 31910(b)(7)(A). Microstamping involves laser micromachining alphanumeric characters linked to a handgun's make, model, and serial number onto a handgun's interior surfaces. Once a microstamped surface, such as the tip of the firing pin or the breech face, impacts the cartridge casing after the handgun is fired, that surface will imprint the casing with its identifying characters. If the police discover a spent casing from a microstamped handgun at a crime scene, they can examine it under a microscope and, *in theory*, discover legibly-imprinted characters. A simple database search would reveal who last registered the handgun that ejected the casing. The police would then have an important lead in their investigation.

at 26; *see also id.* at 27–28, the majority concludes that "California has gone well beyond [the] threshold requirement" of showing that its evidence "fairly support[s] its conclusion," *id.* at 25 (citation omitted). If the efficacy of microstamping as an aid to police forensics were the only issue before us, I would join the majority in its entirety; this is a policy question well-suited to legislative prediction. And even if microstamping is not a perfect solution, California is entitled to see whether microstamping will aid police in solving crime.

But Plaintiffs raise a second argument, one that the majority largely ignores. Plaintiffs argue that the testing protocol adopted by the California Department of Justice ("CDOJ") in its regulations is so demanding that no gun manufacturer can meet it. Plaintiffs have come forward with evidence that no new handguns being sold in the United States can satisfy CDOJ's testing protocol and, therefore, no new handguns qualify for California's approved-as-safe roster. The State argues that the technology is available, and that the manufacturers are just unwilling to submit to California's requirements. This is an argument we cannot resolve on this record. So far as we can tell from the meager record before us, no one—including CDOJ—has ever tested any weapon against California's protocol to see whether it is technologically feasible. Plaintiffs claim that the microstamping requirement acts as a prohibition on the commercial sale of new handguns in California. On the record before us, I cannot conclude that the State is entitled to summary judgment on Plaintiffs' challenge to the microstamping

requirement, and that means that we must take Plaintiffs' Second Amendment claims seriously.

Under the appropriate Second Amendment analysis, I cannot conclude that there is a reasonable fit between CDOJ's microstamping requirement and the legislature's object [sic] in solving handgun crimes. The result of CDOJ's restrictive testing protocol is undisputed: since at least 2013, no new handguns have been sold commercially in California, and that means that no guns were sold with the microstamping feature. That fact has an important secondary effect—it means that no new handguns are being sold commercially with the MDM and CLI safety features either.[4]

The consequence is obvious. Today, no one in California can purchase handguns that have the safety features the legislature thought critical for saving lives, nor can any Californian purchase guns with the microstamping feature the legislature thought important to assist police. The only guns commercially sold in California are grandfathered from these provisions. This is a totally perverse result. If the legislature (or CDOJ, seeking to implement the legislature's instructions) has adopted safety requirements that no gun manufacturer can satisfy, then the legislature has effectively banned the sale of new handguns in

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[4] Some guns with CLIs and MDMs might have been approved before the microstamping requirement went into effect. Neither party has provided figures on how many handgun models on the UHA roster are equipped with CLIs and MDMs. But given the scarcity of these features nationwide, the vast majority of the handguns on the roster likely lack these safety features.

California. The effect of this result on our intermediate-scrutiny analysis is clear: the fit between California's interest in solving handgun crimes and the microstamping requirement would not only fail to be reasonable, it would be non-existent. The requirement would severely restrict what handguns Californians can purchase without advancing the State's interest in solving handgun crimes—or any government interest—one iota.

This result would surely violate the Second Amendment and therefore cries for a more searching inquiry than the majority has provided us. Here is how I will proceed. In Part I, I demonstrate that there is a conflict in the evidence as to whether any manufacturer can comply with California's testing protocol. The majority confronts neither the conflicting evidence nor the possibility that California has effectively banned the commercial sale of all new handguns. It instead concludes—in a cursory fashion—that we must defer to the State because its legislature weighed the evidence of microstamping's technological feasibility. Maj. Op. at 24. But as I discuss in Part II, the majority is in error both as a matter of law and fact. This deference is only appropriate for a legislative body's predictive policy decisions—i.e., how effectively a law will advance the government's stated interest. In contrast, Plaintiffs' challenge to CDOJ's microstamping protocol presents a more fundamental question of technological feasibility, one the legislature did not and, in fact, could not have addressed because it did not have the testing protocol before it.

These defects reveal why, at step 2 of our Second Amendment inquiry, we cannot conclude on summary judgment that there is a reasonable fit between the microstamping requirement and the State's goal in solving handgun crimes. But this disposition requires returning to step 1 and deciding whether the microstamping requirement burdens conduct protected under the Second Amendment—a point the majority assumed without deciding. I believe we must address the point rather than assume it. I thus conclude in Part III by discussing why the microstamping requirement is not, as the district court held, presumptively valid as a "law[] imposing conditions and qualifications on the commercial sale of arms," *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008), and requires the application of heightened scrutiny. I would reverse the district court and remand for further proceedings.

If all of this feels complicated and backwards, welcome to the strange world of the Second Amendment.

I

The critical factual question raised by Plaintiffs is whether any handgun is capable of satisfying the testing protocol for microstamping set out in the UHA and its regulations. Plaintiffs' challenge to the microstamping requirement is not over whether the technology *generally* works. There can be little doubt that microstamped handguns are capable of imprinting a cartridge casing with alphanumeric characters, and the technology's inventor attests to having publicly tested

the technology with police departments across the country. Plaintiffs have quibbled around the edges about the usefulness of microstamping, but even the studies that Plaintiffs cite demonstrate the technology's general application. *See*, *e.g.*, David Howitt et al., WHAT MICRO SERIALIZED FIRING PINS CAN ADD TO IDENTIFICATION IN FORENSIC SCIENCE, at 31–40 (2008); George G. Krivosta, *Nanotag™ Markings from Another Perspective*, 38 AFTE J. 41, 43 (2006). The degree to which microstamping will in practice aid police investigations is not my concern. My sole interest is the conflicting evidence over whether CDOJ's testing protocol can be satisfied by any gun manufacturer. Because the majority has not addressed these requirements, I will discuss the statute and its accompanying regulations and then address the evidence in the record.

A

In order to qualify for the UHA's approved-as-safe roster, a handgun model must undergo testing by a state-certified laboratory. CAL. PENAL CODE § 32010(a)–(b); 11 CAL. CODE REGS. § 4059(a). The manufacturer must "provide[] three handguns of the make and model for which certification is sought," and the lab must fire 600 rounds from each handgun. CAL. PENAL CODE § 31905(a)–(b). To ensure that the handgun model is capable of legibly microstamping the cartridge casings, the lab must fire 2 rounds from each handgun before the 600-round test, as well as 2 rounds after the test. 11 CAL. CODE REGS. § 4060(e)–(g). These 4 casings per handgun are the only casings the lab

examines. *Id.* § 4060(h). Using a "stereo zoom microscope," the lab must verify that (1) "the pistol has transferred an imprint or etching in at least two places on each cartridge casing" and that (2) "the pistol's complete FIN can be identified from the one or more etchings on each cartridge casing. . . ." *Id.* § 4060(h)(1). The "FIN" is the firearm identification number, which must "consist of at least eight, but no more than 12, unique alpha and/or numeric characters that must begin with the manufacturer's" identifying code. Id. § 4049(j). This test is conducted on all three handguns of the model submitted for certification. *Id.* § 4060(h)(3). The lab may certify that the model is microstamping compliant only if the examiner can identify the complete FIN from all twelve of the cartridge casings collected for testing.[5] *Id.*

Plaintiffs and their *amici* raise two specific objections to these requirements. First, they argue that microstamping technology is incapable of legibly imprinting casings consistently enough to ensure that all twelve casings are imprinted with the *complete* FIN. Second, Plaintiffs contend that no handgun can satisfy the requirement that each casing be imprinted "in at least two places. . . ." *See id.* § 4060(h)(1); *see also* CAL. PENAL CODE § 31910(b)(7)(A). They assert that, while a handgun's firing pin can sometimes successfully imprint a casing, the other internal surfaces—e.g., the

[5] Four cartridge casings are collected from each of the three handguns submitted, for a total of twelve casings examined.

breech face, extractor, ejector—are incapable of *ever* imprinting legible characters.

Plaintiffs cite to studies and declarations in support of these troubling assertions. I will address this evidence momentarily, but the critical take-away is this: contrary to the majority's assertion, Maj. Op. at 27–29, there is no indication in the brief legislative history included in the record before us that the state legislature, in enacting the UHA, considered either of these two impediments to certifying handguns as microstamping compliant. With regard to the examination of the twelve casings, the legislature could not have directly considered whether manufacturers could comply with this testing standard because CDOJ promulgated the regulation *after* the legislature amended the UHA to include the microstamping requirement. Similarly there is almost no mention in the legislative history of the dual-imprint requirement[6] and no evidence that the legislature addressed whether a surface other than the firing pin could legibly imprint cartridge casings. Simply stated, the California legislature did not consider the concerns raised by Plaintiffs, to which I now turn.

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[6] This is not to say that the dual-imprint requirement was heedlessly added to the UHA or its regulations. The legislature originally considered a single-imprint requirement. It appears the legislature included the dual-imprint requirement to prevent criminals from circumventing microstamping by replacing or defacing a handgun's firing pin.

B

Plaintiffs rely principally on declarations from industry representatives and academic studies. Their most detailed declaration comes from Lawrence Keane, who is the Secretary and General Counsel to the Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI") and Senior Vice President, Assistant Secretary, and General Counsel to the National Shooting Sport Foundation ("NSSF"). According to Keane, NSSF is a trade association for the firearms industry, while SAAMI is an ANSI-accredited standards development organization for the industry's test methods, definitive proof loads, and ammunition performance standards. Keane states:

> To date, I am not aware of a single handgun manufacturer worldwide that has produced a functioning, commercially available semiautomatic pistol designed and equipped with "a microscopic array of characters that identify the make, model, and serial number of the pistol" etched or otherwise imprinted in two or more places on the interior surface of internal working parts of the pistol, and that are transferred by imprinting on "each cartridge case when the firearm is fired." I am unaware of any handgun manufacturer who has attempted, or is even considering trying, to design and equip a semiautomatic pistol incorporating this technology. NSSF and SAAMI handgun manufacturers have informed me and stated publicly that they cannot comply with California's microstamping requirements and have no plans to attempt to

> do so. The reason is simple, microstamping does not work.

He further states that various "[i]ndependent, peer-reviewed studies, including ones by the inventor of microstamping, Todd Lizotte, have confirmed that firearm microstamping is unproven and unreliable to perform in the manner that the UHA requires." According to Keane, "[b]ecause the microstamping requirement cannot be complied with, it is currently preventing scores of manufacturers, distributors and retailers from selling many semi-automatic pistol models in the State of California that are widely available in more or less every other state of the Union, because any such sales would subject them to criminal prosecution." More specifically, he states that "[microstamping] certainly cannot produce the required markings at two locations on the cartridge case, as required by the law." He repeats that "[b]ecause the microstamping requirement cannot be complied with," manufacturers are not planning to sell in California. These "[c]ompanies have actually stopped doing business in California because of that requirement, not because they wished to cease operations there." He concludes that the microstamping requirement "constitute[s] a de facto ban on handguns in California. . . ."

Plaintiffs also provided declarations from two CEOs, Michael Fifer of Sturm, Ruger & Co., and James Debney of Smith & Wesson Corp. Their declarations are nearly identical, although Debney provides more detail. Fifer states that "Ruger believes that California's microstamping regulations make compliance

impossible. Quite simply, the state law requires the technology to perform at a level that Ruger cannot practically implement and, to our knowledge, has never been achieved by any manufacturer." Debney states that "Smith & Wesson does not believe it is possible currently to comply with California's microstamping regulations. Quite simply, the state law requires the technology to perform at a level that it cannot. . . . As it appears infeasible to comply with the CA DOJ microstamping regulations, Smith & Wesson does not have the ability or plans to incorporate microstamping in its semiautomatic handguns. . . ." He adds that Smith & Wesson currently produces California-compliant handguns and will continue to do so "as long as we do not make any changes to them," because any changes Smith & Wesson makes would require CDOJ to test the weapons to keep them on the approved-as-safe roster.

In addition, Plaintiffs and their declarants cite to several studies regarding microstamping's technological feasability. One of the most insightful pieces of evidence is a 2013 study, in which Lizotte is listed as a coauthor. *See* T. Grieve et al., *Gear Code Extraction from Microstamped Cartridges*, 45 AFTE J. 64 (2013). The study acknowledges that the alphanumeric characters microstamped on a casing can become "deformed, or partially removed due to the firing and cartridge ejection process. . . ." *Id.* at 64. Indeed, the study focuses on the viability of additionally microstamping casings with a "circular gear code" as a failsafe "that could either fill in any gaps in a distorted alpha-numeric code,

or be used to replicate the code if the alpha-numeric identifier *is entirely illegible*." *Id.* at 64–65 (emphasis added). The study acknowledges that characters can become distorted when the primer is "struck twice"—presumably by the firing pin—and consequently smeared. *Id.* at 68. It also notes that "[d]ouble strikes were especially prevalent in" one of the handgun models tested, *id.*, which indicates that a handgun's ability to satisfy the UHA's testing protocol may rely more on its make and model than on the progression of microstamping technology.

Similarly, microstamping's effectiveness appears to have almost as much to do with the type of ammunition used as it does with any other factor addressed so far. *Id.* at 70 ("Lacquered cartridges . . . posed problems during the optical and SEM evaluations, especially for the Hi-Point cartridges as it interfered with the transfer of the identifiers and the gear code."); *see also* L.S. Chumbley et al., *Clarity of Microstamped Identifiers as a Function of Primer Hardness and Type of Firearm Action*, 44 AFTE J. 145, 153 (2012) ("[F]urther study is necessary before any definitive statements can be made concerning the effect of ammunition type. However, it is clear that the presence of lacquer is of paramount importance in identifier transfer.").[7] Finally, the 2013 study also acknowledges that the ability to identify characters imprinted on a casing may depend on the use of a scanning electron microscope. Grieve, *supra*, at 68. As I discuss immediately

[7] Lizotte is also listed as a co-author of this 2012 study.

below, this equipment is not currently permitted under the UHA's testing protocol and the use of only an optical microscope is unaccounted for in the State's evidence.

The State relies solely on a declaration from microstamping's inventor, Todd Lizotte. Mostly [sic] notably, Lizotte describes a "stress test" he performed in 2007 with a Smith & Wesson .40 caliber handgun, which he equipped with a microstamped firing pin that he designed to work with that specific handgun model. Lizotte attests that, after firing over 2,500 rounds, "all eight microstamped digits from the firing pin were legible 97% of the time," while "breech face markings transferred to cartridge casings were legible 96% of the time." He further represents that,"[b]etween firing pin and breech face markings, all eight microstamped digits were identifiable in all cases."

These results are undeniably impressive, but they do not directly assuage the concerns regarding the UHA's testing requirements because it is not clear that Lizotte's 2007 stress test would satisfy California's testing protocol, which did not even become effective until 2011. There are several problems.

Although Lizotte reports a perfect rate of legibility when combining characters imprinted on casings by both the firing pin and breech face, there is a subtle but important caveat to this result: he identifies the imprinted characters through the use of both "optical microscopy and scanning electron microscopy techniques. . . ." The UHA's regulations, however, prescribe

the use of only a "stereo zoom microscope"—i.e., an optical microscope. 11 CAL. CODE REGS. § 4060(h)(1); *see also id.* § 4052(b)(1)(A). In other words, Lizotte's declaration never explains how often imprints are legible using only the equipment allowed for in the microstamping protocol. Certainly handgun manufacturers and consumers would have reason for concern if these rates are relatively low. And this may very well be the case, as Lizotte has emphasized the importance of scanning electron microscopy in identifying imprinted characters. In countering the results of a study critical of microstamping's technological feasibility,[8] Lizotte asserted "that the results [the study] observed would have been different, and the markings would have been 'fully legible,' if a more sophisticated method had been used to read the markings known as, 'Scanning Electron Microscopy (SEM). . . .'"

Moreover, it is unclear from Lizotte's declaration whether the modified handgun he used in the stress test imprinted *each* casing with two sets of microstamped characters. He does not state how often the breech face made an imprint, but only how many imprints were legible. Because each of the twelve casings examined during CDOJ's certification procedure must be imprinted "in at least two places," a low rate of breech-face imprints would also be troubling.

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[8] *See* Krivosta, *supra*, at 43 (testing microstamping in ten different handguns and concluding that "[t]he overall ratio of Satisfactory to Unsatisfactory impressions [imprinted on the casings] was 54 to 46").

In highlighting these informational deficits, it is not my intention to be critical of Lizotte's work. He appears to be a responsible inventor and advocate who has placed his technology in the public domain in order to encourage microstamping's adoption. But the State, in defending its implementation of a novel handgun restriction against a Second Amendment challenge, has relied solely on Lizotte's nine-page declaration, which is not fully responsive to the concerns raised by Plaintiffs.

The majority does not even mention any of this evidence. Rather, it offers a back-of-the-hand dismissal by concluding that "[t]he reality is" that gun manufacturers are merely unwilling to comply with the microstamping requirement.[9] *See* Maj. Op. at 25. The majority claims that the failure to produce a complying

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[9] The majority's conclusion that manufacturers are unwilling, not unable, to comply with California's testing protocol is the subject of debate between two *amici.* NSSF/SAAMI point to the Keane Declaration. They explain that the dual-imprint requirement came about because the legislature was concerned that a firing pin could be easily altered by the weapon's owner. They represent that the statute and regulations require a 100 percent success rate, which is beyond what any testing has shown. The Los Angeles City Attorney argues that NSSF/SAAMI "cherrypick[ed] the facts they like, and mischaracteriz[ed] or omitt[ed] those they do not." In the end, the L.A. City Attorney relies exclusively on Lizotte's declaration, and concludes that "it is not that manufacturers *can't* comply with the UHA's microstamping requirement. It is that they *won't*."

The majority just sided with the State in this debate. We don't get to do that at summary judgment. Nor, as I discuss in the next section, do we have to side with the State out of deference to the legislature.

handgun is not evidence "that microstamping is technology [sic] infeasible." Maj. Op. at 25–26. But Ruger's CEO attests that California's "law requires the technology to perform at a level that Ruger cannot practically implement and, to [his] knowledge, has never been achieved by any manufacturer." I do not see how the majority gets to decide at summary judgment what "the reality is" when there is conflicting evidence in the record. While the declarations are certainly lacking in detail, they should not be construed so narrowly—especially considering that it is the State that bears the burden under intermediate scrutiny of proving that its law passes constitutional muster. After all, the State does not attempt to explain why gun manufacturers would forgo the opportunity of selling their new generations of handguns in a major market like California.

The majority also summarily asserts that this suit has been brought by gun purchasers rather than gun manufacturers, implying that the inability of the latter to comply with the UHA is somehow irrelevant to Plaintiffs' inability to purchase handguns. *See* Maj. Op. at 25. But Plaintiffs have not claimed that gun manufacturers have a right under the Second Amendment to *produce* the guns of the manufacturer's choice. *See Teixeira v. County of Alameda*, 873 F.3d 670, 681 (9th Cir. 2017) (en banc) (rejecting a gun seller's argument "that, independent of the rights of his potential customers [to acquire firearms], the Second Amendment grants him a right to *sell* firearms"), *cert. denied*, 138 S. Ct. 1988 (2018). Rather, Plaintiffs' claim is based solely on their own inability to purchase handguns.

Taken together, Plaintiffs' evidence is impossible to reconcile with Lizotte's declaration, which portrays microstamping as nearly infallible. We cannot assume that microstamping can satisfy the UHA's testing protocol.[10] In any other context, this conflict in the evidence would render this case inappropriate for decision on summary judgment. The district court was well aware of these factual disputes. Instead of resolving them, the court held that the commercial sales exception—which I discuss at length below—meant that the Second Amendment does not even apply to Plaintiffs' claims. The majority declines to affirm the district court on the grounds on which the court based its decision, assumes the Second Amendment applies, and then decides the factual conflict for itself. We should have sent this case back to the district court to resolve these factual issues.

C

The majority raises other arguments in defense of its decision to uphold the microstamping requirement

[10] The majority finds that California produced evidence that microstamping is technologically feasible and would cost between $3 and $10 per handgun, citing Lizotte's demonstrations of microstamping with police departments. Maj. Op. at 27–28. But the majority stubbornly refuses to acknowledge the problem. As stated above, there can be little doubt that microstamped handguns are generally capable of imprinting a cartridge casing with alphanumeric characters. But there is conflict in the evidence before us whether *any* handgun can satisfy California's microstamping testing protocol. The problem is not the legislation, but the *regulations* that implement the microstamping requirement. A testing protocol that cannot be satisfied is effectively a ban.

in the face of conflicting evidence. These rationales are unavailing and, in large part, inapposite.

The majority highlights aspects of the UHA that, in its view, offset Plaintiffs' central contention that the requirement effectively bans the sale of new handguns. It cites, for instance, the fact that "[t]he microstamping requirement only became effective after the CDOJ certified that the technology 'is available to more than one manufacturer unencumbered by any patent restrictions.'" Maj. Op. at 29. If the majority is implying that this certification has any bearing on the issue before us, this assertion is wide of the mark. The certification was required by the legislature to ensure that manufacturers had legal access to the technology; the certification was about patent rights, not technological feasibility. CAL. PENAL CODE § 31910(b)(7)(A). As the State recently conceded before the California Supreme Court, "this certification confirms the lack of any patent restrictions on the imprinting technology, not the availability of the technology itself."[11] *Nat'l Shooting*

[11] This concession was made in the context of a state-law challenge to the microstamping requirement by NSSF, an *amicus* in this case. Although NSSF claimed (as it does here) that the dual-imprint requirement is impossible to comply with, the California Supreme Court had no cause to address this technical question. *See Nat'l Shooting Sports Found.*, 2018 WL 3150950, at *1–2. Rather, "[t]he sole dispute" was whether a California court could invalidate the microstamping requirement "on the basis of Civil Code section 3531's declaration that '[t]he law never requires impossibilities.'" *Id.* at *2 (alteration in original). Because the challenge was decided below at the pleading stage, the California Supreme Court "assume[d] that complying with the [microstamping requirement] is impossible. . . ." *Id.* The court's decision

Sports Found., Inc. v. State, No. S239397, 2018 WL 3150950, at *1, slip op. at 2 (Cal. June 28, 2018). The absence of patent restrictions resulted from Lizotte generously placing his technology in "the public domain . . . free of royalty."

The majority similarly relies on the fact that, even if microstamping proves to be technologically infeasible, the UHA authorizes the California Attorney General to "approve a method of equal or greater reliability and effectiveness in identifying the specific serial number of a firearm from spent cartridge casings. . . ." Maj. Op. at 29–30 (quoting CAL. PENAL CODE § 31910(b)(7)(B)). So what is this replacement technology? Who knows? The State has not represented that it knows of a microstamping alternative even at the conceptual stage, and the majority has wisely declined to speculate on this point.

The majority also misleadingly states that "semiautomatic handguns are not subject to the microstamping requirement and are grandfathered as long as the manufacturer continues to pay a roster fee and the firearms do not fail a retest." Maj. Op. at 26. But semiautomatic handguns that were not listed on the

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addressed only a matter of state statutory interpretation and therefore has no bearing on the question before us. Nor should we draw any inference from the fact that—as the majority points out—NSSF did not challenge the propriety of CDOJ's certification of "the availability of dual placement microstamping technology. . . ." *Id.* at *4; *see also* Maj. Op. at 25 n.10. Again, the absence of a patent encumbrance says nothing about the technology's feasibility.

UHA roster *before* the microstamping requirement took effect are expressly subject to the requirement. *See* CAL. PENAL CODE § 31910(b)(7)(A). If the majority is asserting that the availability of grandfathered handguns in California affects the application of intermediate scrutiny, then this too is incorrect. That Plaintiffs can commercially purchase older-model handguns says nothing about whether there is a reasonable fit between the microstamping requirement—which Plaintiffs claim effectively bans *new* handgun sales—and the State's interest in solving handgun crimes. If the requirement is impossible to comply with, then as discussed above, it imposes a burden without advancing any state interest. Similarly, the fact that the UHA does not altogether ban possession of non-microstamped handguns does not squarely address the application of intermediate scrutiny; it only means that California has not banned the sale of *all* handguns—new and old—in violation of *Heller*.

Moreover, contrary to the majority's assertion, the Third Circuit's decision in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), bears little resemblance to this case. Maj. Op. at 31–32. There, the Third Circuit rejected a Second Amendment challenge to a federal criminal statute prohibiting "possession of a firearm with an obliterated serial number. . . ." *Marzzarella*, 614 F.3d at 88. The court reasoned that "preserving the ability of law enforcement to conduct serial number tracing—effectuated by limiting the availability of untraceable firearms—constitutes a substantial or important interest." *Id.* at 98. Here, however, there

is no disputing that microstamping's potential ability to aid the police in solving handgun crimes presents a substantial interest. *Marzzarella* did not address anything remotely analogous to the question of technological feasibility presented in this case and is therefore inapposite.

The majority similarly justifies its unfounded confidence in the ability of manufacturers to comply with the microstamping requirement by citing to other areas of law that have little relevance to this case. The challenge before us "echoes a similar one made for decades about airbags," the majority announces. Maj. Op. at 26 n.11. We as readers, however, are left to suss out how regulations concerning automobile safety standards compare to testing requirements that will potentially curtail a fundamental right to possess handguns. The analogy is pretty far afield. The majority also perplexingly attempts to analogize to the Fourth Amendment. Maj. Op. at 30 (citing *Maryland v. King*, 133 S. Ct. 1958 (2013)). But the challenge before us presents the inverse of the Fourth Amendment paradigm, in which the more advanced certain technologies become the more likely it is that they can be used to encroach upon our constitutional rights. *See*, *e.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001). Here, by contrast, it is the lack of assurance that microstamping technology can perform at the levels required under California law that prevents us from concluding that the requirement passes constitutional muster.

* * *

In sum, there is a plain conflict in the evidence that in any other context would preclude summary judgment. Indeed, the district court in this case requested additional briefing on the factual questions and then decided that summary judgment was appropriate under one of *Heller*'s exceptions—an error that I address in Part III. Pressing fearlessly where the district court declined to go, the majority does not address the conflict in evidence in any degree of granularity. Instead, it asserts that we must defer to the California legislature's conclusion that microstamping is technologically feasible because the legislature "weighed competing evidence on effectiveness before enacting the statute." Maj. Op. 25. But as I show in the next section, such deference is inapplicable to the question of whether gun manufacturers can comply with the UHA and its testing requirements and is unwarranted in this case given the impediments to compliance that the legislature failed to consider.

II

The majority thinks it has an answer to why, in light of the conflict in evidence, we can grant summary judgment. In the majority's view, we must defer to the legislature's own judgment on microstamping's technological feasability. Maj. Op. at 25, 28–29. With respect, the majority is wrong, both as a matter of law and fact. I address first the general principles, then discuss how we have applied these principles in Second Amendment cases, and why these principles do not apply to the arguments Plaintiffs have made in this case.

A

When applying heightened scrutiny, we defer to a legislative body's predictive policy judgments. Although there is seldom a dispute that the government's interest in an objective is substantial, these goals are often stated in the abstract. After all, who could genuinely dispute that enhancing public safety and solving handgun crimes are important interests? *See Chovan*, 735 F.3d at 1139 ("It is self-evident that the government interest of preventing domestic gun violence is important."). But a legislature "must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 664 (1994) (plurality opinion) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). It "must demonstrate that the recited harms are real, not merely conjectural, and that the [law at issue] will in fact alleviate these harms in a direct and material way." *Id.* Accordingly, a legislature must have a basis for believing that it is necessary to enact "X"-law in order to prevent "Z"-harm.

In *Turner I*, for instance, the Supreme Court reviewed the constitutionality of a federal requirement that cable operators "carry the signals of a specified number of local broadcast television stations"—a policy aimed at advancing Congress' stated interest in "promoting the widespread dissemination of information" and "fair competition. . . ." *Id.* at 640, 662. The so-called "must-carry rules" (X-law) were premised on the proposition that, absent federal intervention, cable operators would refuse to voluntarily carry the signals

from broadcast stations, thus forcing them out of business (Z-harm). *Id.* at 666.

In addressing Plaintiffs' challenge to this proposition and the supporting studies, the Court began from the premise "that courts must accord substantial deference to the predictive judgments of Congress." *Id.* at 665. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Id.* Deference to such policymaking stems in part from the reality that legislative bodies are "far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" complex issues. *Id.* at 665–66 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985)); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion) (applying this same rationale to a local government).

Similarly, when a legislature attempts to redress a harm, it must forecast the *effect* of its remedial law—I will call this "Y." Means-end scrutiny thus inevitably invokes questions of the law's *efficacy* in advancing the government's stated interest. The parties often present competing evidence, such as social-science studies and economics forecasts, on whether X-law will have Y-effect, which is aimed at redressing Z-harm in order to advance the government's interest. *See*, *e.g.*, *Alameda Books*, 535 U.S. at 429, 435–36 (addressing the parties dispute regarding whether a police-department report supported the city council's conclusion that prohibiting

"the establishment . . . of more than one adult entertainment business in the same building" would advance the city's interest in mitigating the secondary effects these businesses cause, such as increased crime).

We may defer to these types of predictive policy judgments, even when they touch on protected constitutional rights. *See id.* at 440 (citing *Turner I*, 512 U.S. at 655–56). Indeed, the Supreme Court has admonished on multiple occasions that the legislature "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986); *see also Alameda Books*, 535 U.S. at 439. While a legislature may have empirical data to support its predictions, a policy's efficacy is *not* something that can be tested in a laboratory; rather, a legislature must implement a law and assess over time whether it had the desired remedial effect. *See Alameda Books*, 535 U.S. at 439–40 ("A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously.").

B

It should therefore come as no surprise that deference to legislative policy judgments has played a role in several of our post-*Heller* Second Amendment decisions. Applying intermediate scrutiny, we have upheld city ordinances banning large-capacity magazines, *Fyock v. Sunnyvale*, 779 F.3d 991, 1000–01 (9th Cir.

2015), banning hollow-point rounds, *Jackson v. City & County of San Francisco*, 746 F.3d 953, 969–70 (9th Cir. 2014), and requiring residents to either store their handguns in an approved locked container or disable them with a trigger lock, *id.* at 958, 965–66. We were able to conclude that each of these laws advanced their intended interest in enhancing public safety based, in part, on the fact that the city councils had relied on relevant studies and made legislative findings.[12] *Fyock*, 779 F.3d at 1000 ("Sunnyvale also presented evidence that large-capacity magazines are disproportionately used in mass shootings as well as crimes against law enforcement, and it presented studies showing that a reduction in the number of large-capacity magazines in circulation may decrease the use of such magazines in gun crimes."); *Jackson* 746 F.3d at 965, 969; *see also Peruta v. County of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J., concurring) ("[S]ocial scientists disagree about the practical effect of modest restrictions on concealed carry of firearms. In the face of that disagreement, and in the face of inconclusive evidence, we must allow the government to select among reasonable alternatives in its policy decisions.").[13]

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[12] None of this is to say that legislative bodies are "obligated, when enacting [laws], to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner I*, 512 U.S. at 666. But as discussed below, courts must still ascertain whether a legislature, "in formulating its judgments, . . . has drawn reasonable inferences based on substantial evidence." *Id.*

[13] Our sister circuits have applied legislative deference in similar Second Amendment challenges. *See*, *e.g.*, *New York State*

This brings me to the appropriate role for legislative deference in this case. Recall that Plaintiffs actually raised two challenges to microstamping. *See supra* pp. 36–37. Although I have focused on Plaintiffs' challenge to the microstamping requirement based on its technological feasibility, they first raised the question of microstamping's efficacy in aiding police investigations. Plaintiffs contend that criminals can easily defeat the technology by either replacing a handgun's firing pin—a fairly common and inexpensive procedure—or obliterating its characters with sandpaper. And even if a microstamped handgun did successfully imprint the cartridge casings from the rounds fired during a crime, Plaintiffs assert that it is only the utterly careless criminal who fails to pick up his casings before fleeing the scene. The brief legislative history of the microstamping requirement demonstrates that these precise arguments were made before the legislature, which evidently found them unpersuasive.

Perhaps Plaintiffs are correct, and microstamping will do little to solve handgun crimes. But it is not our role to second guess the legislature's predictive

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Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015) ("We remain mindful that, '[i]n the context of firearm regulation, the legislature is "far better equipped than the judiciary" to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks.' " (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012))); *Drake v. Filko*, 724 F.3d 426, 437 (3d Cir. 2013) ("The predictive judgment of New Jersey's legislators is that limiting the issuance of permits to carry a handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety.").

judgment that microstamping will solve at least some crimes. Indeed, the technology need not result in the police making arrests in every case in order for the microstamping requirement to have a reasonable fit. This is thus precisely the type of dispute over whether X-law will have Y-effect that will prevent Z-harm that is entitled to legislative deference. And as the majority notes, the "legislature considered and rejected other, more intrusive solutions" to solving handgun crimes. Maj. Op. at 24. We must therefore "allow the government to select among reasonable alternatives in its policy decisions." *Peruta*, 824 F.3d at 944 (Graber, J., concurring). Faced with an alarmingly-high number of unsolved handgun-based homicides per year,[14] California "must be allowed a reasonable opportunity to experiment with solutions to [an] admittedly serious problem[ ]." *Renton*, 475 U.S. at 52. I agree with the majority on this point.

When the majority notes that the parties dispute whether microstamping will "effectively" address this problem, it fails to distinguish between the issues of efficacy in solving crime and the separate issue of

[14] Plaintiffs concede that solving handgun crimes is an important government interest. Indeed, in presenting the microstamping amendment to the UHA before the California legislature, the legislation's author cited the fact that nearly 60 percent of the approximately 2400 homicides in the state each year are committed with handguns. No arrests are made in nearly 45 percent of homicide cases. Had Plaintiffs contested the need for some form of remedial action, this evidence would have been more than sufficient to demonstrate that the harm California seeks to redress is "real, not merely conjectural. . . ." *Turner I*, 512 U.S. at 664.

technological feasibility. *See* Maj. Op. at 25–26. The majority summarily cites to the principles of legislative deference laid out above to conclude that we must defer to California with respect to *both* the efficacy of microstamping to aid police *and* the question of whether manufacturers can produce handguns that satisfy the testing protocol. The former question is a predictive judgment about policy and should earn our deference; the latter is a judgment of scientifically-verifiable fact—a question of whether gun manufacturers, importers, and sellers can even comply with the law—and is not entitled to the same deference.

The majority counters that this is "an artificial distinction" and that I seek to "hold California to a standard never before imposed." Maj. Op. at 28. But this assertion fails to take into account that Plaintiffs' challenge to the microstamping provision raises a novel question. The majority does not cite—nor was I able to discover—any case in which the public's ability to exercise a constitutional right was dependent on the technological feasibility of a requirement imposed by the government. Rather than proceed with caution through this unchartered terrain, the majority presses forward by relying solely on the concept of legislative deference. Indeed, the majority declines to even pause and question whether the rationales discussed above for deferring to a legislative body's policy judgments are applicable to the question before us. They are not.

Indeed, the technological feasibility of microstamping is just not comparable, for example, to questions of how effective a zoning ordinance will be in

combating the secondary effects of adult entertainment. *See Renton*, 475 U.S. at 52 ("We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton."). Nor can we properly compare the question before us to our prior Second Amendment cases, which similarly hinged on what can fairly be described as policy disputes. *See*, *e.g.*, *Fyock*, 779 F.3d at 1000–01 (acknowledging the existence of competing evidence regarding whether high-capacity magazines are conducive for self-defense rather than crime); *see also Peruta*, 824 F.3d at 944 (Graber, J., concurring) ("To be sure, we recognize the existence of studies and data challenging the relationship between handgun ownership by lawful citizens and violent crime. . . . It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012))).

In contrast, the question of technological feasibility—in the sense of whether a manufacturer can satisfy the testing protocol—is one that can be readily answered in a laboratory. As discussed above, the UHA already requires gun manufacturers to submit handguns they wish to sell in California to a State-certified laboratory, which tests compliance with the CLI, MDM, and microstamping requirements. CAL. PENAL CODE § 32010(a). If microstamping technology is feasible and as reliable as the State believes it to be, there is no purpose for relying on predictive judgment. The

State could simply demonstrate and certify that popular brands of modern handguns, once modified with microstamped interior surfaces, will legibly imprint cartridge casings in two places with their identifying information—and can do so at rate of consistency that will satisfy the State's testing protocol.[15]

The majority objects to this invitation, arguing that it would essentially "transform [California] into a gun manufacturer." Maj. Op. at 28. But the State has already interjected itself into the granularity of this issue by *setting* (through CDOJ regulations) the technical UHA compliance requirements and certifying private laboratories to certify handgun compliance. It is not an onerous burden for the State to counter Plaintiffs' central contention that no handgun can satisfy the testing protocol by simply testing a single handgun. This is especially true in light of the fundamental right at stake.

One final note on legislative deference. The majority fails to acknowledge that even though predictive policy judgments "are entitled to substantial deference"—where appropriately applied—they are not "insulated from meaningful judicial review altogether." *Turner I*, 512 U.S. at 666. "On the contrary, [the

[15] While the State may counter this invitation by pointing to the purported unwillingness of gun manufacturers to comply with the microstamping requirement, the State's own evidence indicates that components such as the firing pin and breech face can be microstamped and tested without a manufacturer's participation. Indeed, Lizotte's stress test involved a handgun he modified with microstamped interior surfaces.

Supreme Court has] stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose . . . independent judgment of the facts bearing on an issue of constitutional law.'" *Id.* (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)). While "not a license to reweigh the evidence *de novo,*" *id.*, courts are obliged "to assure that, in formulating its judgments, [a legislature] has drawn reasonable inferences based on substantial evidence," *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 195 (1997) (quoting *Turner I*, 512 U.S. at 666); *see also Alameda Books*, 535 U.S. at 438 ("This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.").

Even if legislative deference, in the abstract, applied to the question of technological feasability, its application would be unwarranted in this case. As demonstrated above, the California legislature failed to adequately consider the impediments to complying with the microstamping requirement and its testing protocol. And contrary to the majority's assertion, there is little indication in the record before us that the legislature relied on Lizotte's expertise in debating whether to enact the requirement. *See* Maj. Op. at 27–28. I can find no reference in the legislative history to Lizotte's stress test discussed above or the public displays of microstamping's application cited in his declaration. As far as I can tell, Lizotte never testified before the state legislature nor submitted any materials to

them other than a press release. The only direct reference to him in the legislative history involves staff members of a legislative committee soliciting his brief response to one of the studies critical of microstamping. *See supra* note 8. These deficiencies are glaring, and I cannot conclude that the legislature relied on substantial evidence in determining that microstamping is technologically feasible—even before considering the contrary evidence.

Surprisingly—and perhaps telling—the State has failed to address on appeal Plaintiffs' concerns regarding whether manufacturers can successfully implement microstamping. The majority attempts to fill this void by relying on a form of deference that is inapplicable to the question of whether gun manufacturers can comply with the UHA's testing protocol. Given the conflict of evidence on this very point, the majority should not conclude that the microstamping requirement survives intermediate scrutiny.

III

My analysis thus far has addressed only step 2 of our Second Amendment framework: the application of the appropriate level of scrutiny. *See Jackson*, 746 F.3d at 960. The majority avoids step 1 by assuming without deciding that the CLI, MDM, and microstamping requirements "burden[] conduct protected by the Second Amendment. . . ." *Id.* (quoting *Chovan*, 735 F.3d at 1136); *see* Maj. Op. at 13–14. Because a state can also prevail on a Second Amendment claim at step 1 by

establishing that the Amendment is not implicated, skipping this step is appropriate only when the state prevails at step 2 by establishing that the law at issue survives application of the appropriate level of scrutiny. Stated otherwise, a court *must* engage in the step 1 inquiry if the law would fail to pass constitutional muster at step 2. Thus, in order for me to conclude that we should reverse and remand as to the microstamping requirement, I must address the threshold question of whether microstamping implicates the Second Amendment. This analysis requires addressing the district court's conclusion that the UHA is "presumptively lawful" because it is a "law[] imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–27 & n.26.

The majority—which will soon appear prophetic—states that courts "have spilled considerable ink" addressing this precise issue. Maj. Op. at 11. What follows, I fear, is no exception. I first trace the development of Second Amendment precedent post-*Heller* and offer a roadmap to deciding what conduct falls outside of the Second Amendment's protection. I conclude by applying this roadmap to the microstamping requirement.

A

Because the Second Amendment "codified a *pre-existing* right," its protections encompass "the historical understanding of the scope of the right." *Heller*, 554 U.S. at 592, 625. The scope of the Second Amendment

may be defined not only by what was historically protected, but also by what the government was historically permitted to regulate. We have said that the first question we must answer in a Second Amendment challenge is "whether the challenged law falls within a 'well-defined and narrowly limited' category of prohibitions 'that have been historically unprotected.'" *Jackson*, 746 F.3d at 960 (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791–92 (2011)).

In *Heller*, the Supreme Court identified three categories of regulatory measures that we may presume to be consistent with the historical scope of the Second Amendment:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding [1] prohibitions on the possession of firearms by felons and the mentally ill, or [2] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or [3] laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626–27. The Court, however, did not elaborate on these enumerated categories, their intricacies, or their justifications, and instead left that for another time. *See id.* at 635 ("[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when these exceptions come before us."); *see also McDonald*

v. City of Chicago, 561 U.S. 742, 786 (2010) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as [quoting the three enumerated categories]. We repeat those assurances here."). It added that "these presumptively lawful regulatory measures" were only examples and not an exhaustive list. *Heller*, 554 U.S. at 626 n.26.[16]

Because *Heller*'s examples of longstanding or historical exceptions to the Second Amendment are not exclusive, we have said that regulations that fall *outside the enumerated* categories are immune from further Second Amendment inquiry only if the government has come forward with "persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical [protection] of the Second Amendment." *Jackson*, 746 F.3d at 960. A regulation "does not burden conduct protected by the Second Amendment if the record contain[s] evidence that [the subjects of the regulation] have been the subject of longstanding, accepted regulation. . . ." *Fyock*, 779 F.3d at 997. These "longstanding, accepted regulations" may come from the early-twentieth century and need not trace their roots back to the Founding, so long as their "historical prevalence

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[16] To these three categories of laws, the Court added that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes. . . ." *Heller*, 554 U.S. at 625 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)); *see id.* at 627 (acknowledging that the Second Amendment incorporates the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons' " (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 148–49 (1769))).

and significance is properly developed in the record." *Id.*; *see also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) ("*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("[W]e do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791."). We recently upheld a state restriction on concealed weapons under this standard. *Peruta*, 824 F.3d at 939 (upholding a concealed carry permit system based on historical evidence of such regulations going back to the thirteenth century).

How we treat the *enumerated* categories is, surprisingly, a more difficult question. *See United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011) ("The full significance of these pronouncements is far from self-evident."); *see also Skoien*, 614 F.3d at 640 ("We do not think it profitable to parse these passages of *Heller* as if they contained an answer. . . ."). There are two important questions that must be answered about these enumerated categories. First, does "presumptively lawful" mean "conclusively lawful"? That is, is a law falling within these three categories subject to a rebuttable or an irrebuttable presumption of lawfulness? Second, what is the scope of each of these categories? In this case, in which California has argued that the challenged restrictions are "conditions and qualifications on the commercial sale of arms," what does that phrase mean? The stakes are significant: we have

suggested that gun restrictions falling within these three enumerated categories are to the Second Amendment what libel, obscenity, and fighting words are to the First Amendment: categories that are not covered at all by the Amendment. *See Jackson*, 746 F.3d at 960; *cf. United States v. Alvarez*, 567 U.S. 709, 717–18 (2012); *New York v. Ferber*, 458 U.S. 747, 763 (1982). If California's microstamping restriction falls within one of these categories—and either the presumption of lawfulness is irrebuttable or Plaintiffs have failed to rebut the presumption—the Second Amendment does not apply and the case should end at step 1.

1

We have not had occasion to decide what "presumptively lawful" means in this context, but I think that if a regulation is *presumptively* lawful, then that is a starting point; that I might begin from the premise that the regulation is lawful, but am open to being persuaded otherwise. It is contrary to my instincts to read "presumptively lawful" as "conclusively lawful." Nevertheless, the answer has proven elusive, as the circuits have splintered over the question.[17]

The Third Circuit was the first court of appeals to address this interpretative problem. It explained the problem, and the choices, as follows:

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[17] The cases have been helpfully compiled in David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193, 214–26 (2017).

> [T]he phrase 'presumptively lawful' could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny.

Marzzarella, 614 F.3d at 91; *accord United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) ("It is unclear to us whether *Heller* was suggesting that 'longstanding prohibitions' such as these were historically understood to be valid limitations on the right to bear arms or did not violate the Second Amendment for some other reason."). Although the Third Circuit considered "[b]oth readings [to be] reasonable interpretations," it thought "the better reading, based on the text and the structure of *Heller*, is the former—in other words, that these longstanding limitations are exceptions to the right to bear arms." *Marzzarella*, 614 F.3d at 91. In a subsequent decision, however, the Third Circuit rejected a facial challenge to a statute as presumptively regulating unprotected conduct, but held that the presumption could be rebuttable in the context of an as-applied challenge. *United States v. Barton*, 633 F.3d 168, 172–73 (3d Cir. 2011) ("By describing the felon disarmament ban as 'presumptively' lawful, the Supreme Court implied that the presumption may be rebutted." (citation omitted)), *overruled on other grounds by Binderup v. Att'y Gen.*, 836 F.3d 336, 348–51 (3d Cir.

2016) (en banc) (disagreeing over what a challenger needs to show to rebut the presumption for an as-applied challenge).

Moreover, as if this were not confusing enough, in *Marzzarella*, the Third Circuit elsewhere suggested that it might have to take one approach with respect to disqualified persons and sensitive places, and a different approach with respect to commercial regulations. As the court explained, in contrast to "prohibitions" on certain persons and "laws forbidding" carrying firearms in sensitive places,

> [c]ommercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment. . . . In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.

Marzzarella, 614 F.3d at 92 n.8; *see also id.* at 92 (noting that "the Second Amendment affords no protection for the possession of dangerous and unusual weapons, possession by felons and the mentally ill, and the carrying of weapons in certain sensitive places" but omitting "conditions and qualifications on the commercial sale of arms" from the list). If I have read the Third Circuit's precedent correctly, it regards

facial challenges to laws prohibiting possession of guns by felons and the mentally disabled and to laws forbidding the possession of guns in sensitive places to be not just "presumptively lawful," but lawful and thus outside of further Second Amendment scrutiny. It permits, however, as-applied challenges to such laws. With respect to conditions and qualifications on commercial sale, though, the Third Circuit has said it will not apply an irrebuttable presumption to anything arguably within the category, but rather it will depend on the "nature and extent of the imposed condition." *Id.* at 92 n.8.

The Fifth Circuit sort of sided with the Third Circuit, but (like the Third Circuit) with a qualification. It agreed that it was

> difficult to map *Heller*'s "longstanding," "presumptively lawful regulatory measures" onto [the] two-step framework. It is difficult to discern whether "longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . or laws imposing conditions and qualifications on the commercial sale of arms," by virtue of their presumptive validity, either (i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny.

Nat'l Rifle Ass'n, 700 F.3d at 196 (second alteration in original) (citations omitted). The court concluded: "For now, we state that a longstanding, presumptively lawful regulatory measure . . . would likely fall outside the

ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework." *Id.* Thus, the Fifth Circuit appeared to agree that the presumption was irrebuttable, but qualified it by stating that such a regulation, if longstanding, "would *likely* be upheld at step one" because it "would *likely* fall outside" the scope of the Second Amendment. Two "likely's" in one sentence strongly suggests that the phrase "presumptively lawful" is more a mindset than a rule.

The D.C. Circuit simply found "presumptively lawful" to mean that a law carries a presumption that can be rebutted: "*Heller* tells us 'longstanding' regulations are 'presumptively lawful'; that is, they are presumed not to burden conduct within the scope of the Second Amendment." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1253 (D.C. Cir. 2011) (citation omitted). It then explained that

> [t]his is a reasonable presumption because a regulation that is "longstanding," which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment. A plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right. . . . We uphold the requirement of mere registration because it is longstanding, hence "presumptively lawful," and the presumption stands unrebutted.

Id.; *accord Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1129 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) ("It is a close call, but Bonidy has on balance not rebutted that presumption."); *Peterson v. Martinez*, 707 F.3d 1197, 1218 n.1 (10th Cir. 2013) (Lucero, J., concurring) ("A plaintiff may rebut the resumption of validity by showing that the regulation at issue has 'more than a de minimis effect upon his right.'" (quoting *Heller II*, 670 F.3d at 1253)).

I think that the most natural reading of "presumptively lawful" is exactly what it says: a law within the enumerated categories carries a presumption of lawfulness. But it must be a presumption that is subject to rebuttal. The Supreme Court introduced the enumerated categories with the assumption that these restrictions are "longstanding." *Heller*, 554 U.S. at 626. I agree with the D.C. Circuit that restrictions within these categories that are longstanding are more likely outside the scope of the Second Amendment. *See Heller II*, 670 F.3d at 1253; *see also Jackson*, 746 F.3d at 960; *Chovan*, 735 F.3d at 1137. At the very least, a plaintiff who has identified a restriction that is not longstanding has the opportunity to demonstrate how it affects his Second Amendment rights.

2

In *Jackson*, we observed that *Heller*'s enumerated categories, like categories of nonprotected speech, are "well-defined and narrowly limited." 746 F.3d at 960

(quoting *Brown*, 564 U.S. at 791); *cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."). Elsewhere, the Supreme Court has described categories of nonprotected speech such as libel, obscenity, and fighting words as "historic and traditional categories long familiar to the [public]." *United States v. Stevens*, 559 U.S. 460, 468 (2010). Two of the three enumerated categories—"prohibitions on the possession of firearms by felons and the mentally ill" and "laws forbidding the carrying of firearms in sensitive places"—seem to fit well in the class of "well-defined," "narrowly limited," "historic," and long familiar."[18]

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[18] We have had little difficulty upholding restrictions that fall into these two categories. For example, when a felon challenged a state's ban on his possession of firearms, we simply repeated *Heller*'s language and upheld the ban. *See Wilson v. Lynch*, 835 F.3d 1083, 1091 (9th Cir. 2016) (noting that if a person falls into one of the exceptions for being a felon or mentally ill, "her claims would fail categorically" and thus the only outlet is challenging whether she is, in fact, a felon or mentally ill), *cert. denied*, 137 S. Ct. 1396 (2017); *see also United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016); *Van der Hule v. Holder*, 759 F.3d 1043, 1050–51 (9th Cir. 2014); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). The same is true with respect to challenges to prohibitions on gun possession in a "sensitive area," such as a federal building. *See Bonidy*, 790 F.3d at 1125–26. In these cases, whether a law bans the possession of a firearm by a felon, or in a federal building, is a relatively simple inquiry. *Cf. United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (upholding a ban on machine guns as qualifying as "dangerous and unusual weapons").

The phrase "conditions and qualifications on the commercial sale of arms," however, is not so familiar, narrow, or well defined. Indeed, we recently wrote that "[t]he language in *Heller* regarding the regulation of 'the commercial sale of arms,' . . . is sufficiently opaque with regard to that issue that, rather than relying on it alone . . . , we conduct a full textual and historical review [to determine if the regulation passes Second Amendment scrutiny]." *Teixeira*, 873 F.3d at 682–83. This opaqueness probably explains why in several cases we have assumed without deciding that a given regulation burdened conduct protected by the Second Amendment in the face of an argument that it fell into this sales exception. In each case we avoided having to parse the category by upholding the restriction under intermediate scrutiny. *ee* [sic] *Silvester v. Harris*, 843 F.3d 816, 827–29 (9th Cir. 2016) (assuming a ten-day waiting period on the purchase of a firearm burdened conduct protected by the Second Amendment and applying intermediate scrutiny); *Wilson v. Lynch*, 835 F.3d 1083, 1092 (9th Cir. 2016) (applying intermediate scrutiny to a regulation prohibiting possessors of medical marijuana card from buying firearms); *cf. Jackson*, 746 F.3d at 967–68 (applying intermediate scrutiny to a ban on the sale of hollow-point ammunition). In fact, so far as I can tell, neither we nor any other circuit court has held that a given regulation was exempt from Second Amendment inquiry because it was a condition and qualification on the commercial sale of arms. *Cf. Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring) (applying the categorical-exemption approach without citing cases having done the same).

Because the category is not self-explanatory, I have to start from a slightly different premise: the Supreme Court in *Heller* could not have meant that anything that *could* be *characterized* as a condition and qualification on the commercial sale of firearms is immune from more searching Second Amendment scrutiny. *See Marzzarella*, 614 F.3d at 92 n.8. Take, for example, a law saying that a condition for the commercial sale of firearms is that sales may take place only between 11 p.m. and midnight, on Tuesdays. Or a law imposing a $1,000,000 point-of-sale tax on the purchase of firearms for self-defense (presumably, to fund firearms training and education). Even though these restrictions can be characterized as "conditions and qualifications on the commercial sale of arms," we would have to find such restrictions inconsistent with the "scope of the Second Amendment." After *Heller*, it seems clear that challenges to these laws would easily overcome any presumption of lawfulness.

So what constitutes a condition and qualification on commercial sales? I know of no accepted or common understanding of this phrase. At a minimum, the Court must have meant that rules of general applicability do not violate the Second Amendment just because they place conditions on commercial sales, including sales of handguns used for self-defense. Fire codes, sales taxes, and commercial licenses are ordinary conditions on commercial sales generally. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983) ("It is beyond dispute that the States and the Federal Government can

subject newspapers to generally applicable economic regulations without creating constitutional problems."). As part of the cost of doing business, such regulations may raise the cost of commercial sales, a cost that is typically passed on to the consumer. The fact that such costs of doing business raise the costs of goods and may affect the willingness of consumers to purchase the goods does not, for that reason, violate the Second Amendment—no more than taxes collected on the sales of religious materials restrict Free Exercise rights under the First Amendment. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 17–20 (1989) (rejecting the argument that an exemption from sales tax for religious publications was compelled by the Free Exercise Clause); *see Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) ("It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."); *see also Bowen v. Roy*, 476 U.S. 693 (1986) (upholding requirement that a welfare recipient obtain a social security number against a Free Exercise Clause challenge); *United States v. Lee*, 455 U.S. 252 (1982) (upholding the imposition of social security taxes against a Free Exercise Clause challenge). We accept such restrictions on our rights—including our fundamental rights to speak, publish, and exercise our religion—because laws of general applicability cover a broad range of activities and, hence, must have broad, popular acceptance and support.

The analogy to the First Amendment begins to break down, however, once we move beyond rules of general applicability. In the First Amendment context, laws that single out certain kinds of speech or religion are subject to strict judicial scrutiny. *See*, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 413 (1989); *Minneapolis Star*, 460 U.S. at 582–83. The courts have been vigilant even when a law appears to be one of general applicability, but in fact has singled out a particular religion, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larson v. Valente*, 456 U.S. 228 (1982), or a point of view or a mode of expression, *see Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

It is thus harder to know what to do with the "conditions and qualifications on the commercial sale of arms" category once we get to arms-sales-specific restrictions. There are surely some restrictions that, to return to our First Amendment analogy, are the equivalent of time, place, and manner restrictions. *See United States v. Decastro*, 682 F.3d 160, 165 (2d Cir. 2012) (characterizing commercial-sale restrictions as time, place, and manner restrictions). These might include zoning restrictions, *see Teixeira*, 873 F.3d at 673, and other health and safety rules imposed on a commercial site that are unique to arms sales, *see Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc). These restrictions might also be abused—think of my example of a law restricting commercial sales to one hour on Tuesdays—but such restrictions, if reasonable, are *presumptively* lawful, and any plaintiff bringing a Second

Amendment challenge will bear the burden of rebutting the presumption. These restrictions go to *where* and *when* such commercial sales can take place.[19] *See generally* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009).

The question of *what* can be sold to qualified buyers at an appropriate location and time comes much closer to the core of the Second Amendment. The law at issue in *Heller* banned all *possession* of handguns in the District of Columbia, but I think it obvious that D.C. could not have taken the intermediate step of banning all *sales* of handguns in the District. *See Marzzarella*, 614 F.3d at 92 n.8. To return, yet again, to the language of the First Amendment, what may be sold (to anyone) fairly goes to the content of the Second Amendment right to acquire the arms that we may keep and bear for our defense. A law that permits only the commercial sale of water pistols and Nerf guns is not what the Second Amendment guaranteed.

Admittedly, I have no particularly good solution to defining what is and what is not a condition and qualification on commercial sales. As with the term

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[19] Other point-of-sale restrictions such as background checks and waiting periods are better characterized as regulations in support of *who* may lawfully possess (much less purchase) firearms. Such restrictions are conveniently enforced at the point of sale but are more easily defended as restrictions on "the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626.

"regulate Commerce" in the Constitution, U.S. CONST. art. I, § 8, cl. 3, the phrase "conditions and qualifications on the commercial sale of arms" is impressively capacious and difficult to cabin. *See Gonzales v. Raich*, 545 U.S. 1, 15–16 (2005) (noting that our interpretations have "evolved over time"). But the Court's generous treatment of "Commerce" in Article I goes to the regulatory powers entrusted to Congress, one of the core powers Congress was given to knit together the union following the Articles of Confederation. *See id.* at 16 ("The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation."). By contrast, giving "commercial sale" a similarly broad construction here would serve to restrict rights guaranteed by the Bill of Rights. I am reluctant to give the term such a broad construction. Moreover, I am left with the strong impression that *Heller* did not exempt from Second Amendment scrutiny *any* condition and qualification on firearm ownership that might be enforced at the point of sale.

In my view, the better approach to the conditions and qualifications on commercial sale category is that taken by the D.C. Circuit in *Heller II*. We should apply the presumption of lawfulness to a longstanding regulation of commercial sales of arms. The plaintiff would be able to "rebut this presumption by showing the regulation does have more than a de minimis effect upon his [Second Amendment] right." *Heller II*, 670 F.3d at 1253. This proposed framework would capture the

spirit of *Heller*. It places little burden on the government to show that its regulations are longstanding. *See United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (requiring the government to "demonstrate[] that the challenged statute 'regulates activity falling outside the [historic] scope of the Second Amendment'" with more than "inconclusive" or ambiguous evidence (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011))). At the same time, it gives the plaintiff an opportunity to show that the regulations substantially infringe Second Amendment rights. The closer the regulations get to the core of the Second Amendment, the less willing we should be to deem them "presumptively lawful" and outside the scope of the Second Amendment. Where the presumption is rebutted, the government would have to defend its regulation under an appropriate level of scrutiny.

B

With this understanding of what the step 1 inquiry entails, I now turn to the question of whether the microstamping requirement burdens conduct protected by the Second Amendment. The State makes two arguments. Its primary contention is that the microstamping requirement is presumptively lawful as a condition and qualification on the commercial sale of arms. Alternatively, the State claims that the requirement, even if not a condition on commercial sales, is still outside the scope of the Second Amendment because it is a "longstanding, accepted regulation." *Fyock*, 779 F.3d at 997; *see also Jackson*, 746 F.3d at 960. I address each argument in turn.

As is evident from my discussion above, not everything that the State enforces at the point of sale should be deemed a condition and qualification on the commercial sale of arms. I conclude that zoning and commercial licensing requirements are the kind of time, place, and manner restrictions governing the when and where in commercial sales that may be presumptively valid as conditions and qualifications on the commercial sale of arms. Beyond that, things get complicated, and whether restrictions on commercial sales of firearms fall entirely outside the scope of the Second Amendment will depend on the nature of the restriction.

The microstamping requirement is not a condition California imposes on time, place, or manner of sale, but on the kinds of handguns Californians may purchase. It is true that the restriction is generally enforced at the point of sale, but that, as I have explained, is not a complete answer to Plaintiffs' complaints. Plaintiffs argue that the microstamping requirement restricts the supply of weapons available in the first place—and that surely is a burden on the right of self-defense.

I am thus unwilling to assume that California's restriction on the types of arms that can be sold commercially is so plainly a condition and qualification that it is "presumptively lawful" and thus immune from any Second Amendment inquiry. Whatever the contours of the commercial sales category, *Heller* cannot mean that the State can ban the sales of arms—whether it

does so directly or indirectly by imposing conditions on features that commercially sold firearms must possess. Accordingly, I cannot conclude that the microstamping requirement falls within the commercial sales exception.

2

In the alternative, the State claims that there is "historical precedent for California's Unsafe Handgun Act." I construe this discussion of history as an attempt to recognize a new category of presumptively lawful regulatory measures under *Heller*. *See Heller*, 554 U.S. at 627 n.26. In such an inquiry, the burden lies with the State. *See Ezell*, 651 F.3d at 702–03. Moreover, historical exceptions must not be described at an "inappropriately high level of generality—akin to saying that because the government traditionally could prohibit defamation, it can also prohibit speech criticizing government officials." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting).

The State claims that microstamping has a historical provenance because police have long used ballistic testing of fired rounds to determine which gun, and type of gun, the round came from. But this historical evidence is inadequate for the State's purpose. The history of ballistic testing merely shows that the police have examined bullets and casings for distinctive markings inadvertently left by the barrels. This is a history of forensics, not a history of the laws regulating firearms. The State has supplied no evidence that rifling was done for the purpose of identifying the

weapon, or that this inadvertent consequence of gun manufacturing was required by law.

Alternatively, the State argues that microstamping is similar to the longstanding requirement that weapons have a serial number. Federal law has required serial numbers on firearms since 1934, and the courts have upheld these requirements post-*Heller*. The Third Circuit in *Marzzarella* observed that requiring serial numbers was a longstanding rule that had nothing to do with the gun's utility: "[T]he presence of a serial number does not impair the use or functioning of a weapon in any way. . . . With or without a serial number, a pistol is still a pistol." 614 F.3d at 94. Thus, the Third Circuit concluded, any burden would be "*de minimis*." *Id.* In other words, the only possible reason anyone would want an unmarked firearm is for illegal purposes, and that would fall outside the bounds of *Heller*'s emphasis on the Second Amendment protecting law-abiding citizens. *Id.* at 95. *Marzzarella* does not help the State at this point in the analysis, however, because the Third Circuit declined to adopt the government's claim that the serial number requirement did not impair Second Amendment rights. Instead, the court concluded that the law passed muster under either heightened or strict scrutiny. *Id.*; *see also id.* at 97–99 (applying heightened scrutiny); *id.* at 99–101 (applying strict scrutiny). In other words, the case supporting the State's best historical example does not support the State's claim that its requirement falls outside the scope of the Second Amendment.

From the State's argument, I garner that there is at least a ninety-year history of requiring that newly-manufactured guns be imprinted with a serial number on some portion of the weapon in accordance with a process in place since the Industrial Revolution and that doing so does not affect the gun's utility. In other words, there is a history of imposing a restriction that burdens nothing except for someone's desire to act unlawfully. Even assuming that microstamping is just a variation on the serial number requirement, the State's history is not sufficient to persuade me that there should exist a new class of laws immune from Second Amendment inquiry, particularly when Plaintiffs allege that they cannot satisfy the microstamping requirement. That is far greater than a "*de minimis*" burden. *Marzzarella*, 614 F.3d at 94.

Accordingly, the district court erred in holding that, at step 1, the microstamping requirement does not burden conduct protected by the Second Amendment. Because I additionally conclude that granting summary judgment in favor of the State on the microstamping requirement is improper at step 2, I respectfully dissent as to this claim.

* * *

"I will not add to this long paper by an apology for its length. If I am wrong, there can be no good apology; and if I am right, none is necessary." Pet. for Reh'g, *Hickman v. McCurdy*, 30 Ky. (7 J.J. Marsh) 555, 573 (1832), 1832 WL 2229, at *12.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IVAN PEÑA, et al., Plaintiffs, v. STEPHEN LINDLEY, in his official capacity as Chief of the California Department of Justice Bureau of Firearms, Defendant.	No. 2:09-CV-01185-KJM-CKD ORDER (Filed Feb. 26, 2015)

On cross-motions, the parties move for summary judgment on claims related to the constitutionality of California's Unsafe Handgun Act ("UHA"). The court heard argument on December 16, 2013, with Alan Gura and Donald Kilmer appearing for plaintiffs and Anthony Hakl III appearing for defendant. Subsequent to the hearing, the court directed supplemental briefing. In light of the supplemental briefing, plaintiffs' pending motion to supplement the record, ECF No. 82, is DENIED as moot. For the following reasons, the court DENIES plaintiffs' motion and GRANTS defendant's motion.

I. BACKGROUND

A. PARTIES

Individual plaintiffs Ivan Peña, Roy Vargas, Doña Croston, and Brett Thomas are law-abiding citizens of the United States and California. Pls.' Second Am. Compl. ("SAC") ¶¶ 1–4, ECF No. 53; Pls.' Resp. to Def.'s Undisputed Facts ¶¶ 4, 9, 14, 19, ECF No. 73-1. Each is a member of plaintiff Second Amendment Foundation, Inc. ("SAF"), and plaintiffs Vargas and Croston are "supporter[s] of and participant[s] in" the activities of plaintiff Calguns Foundation, Inc. ("CGF"). SAC ¶¶ 1–4. Plaintiffs Peña and Thomas are board members of CGF. *Id.* ¶¶ 1, 4.

Plaintiff SAF is

> a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including California. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control.

Id. ¶ 5; *see also* Pls.' Resp. to Def.'s Undisputed Facts ¶ 2. Plaintiff CGF is

> a non-profit organization incorporated under the laws of California with its principal place of business in San Carlos, California. The purposes of CGF include supporting the

> California firearms community by promoting education for all stakeholders about California and federal firearm laws, rights and privileges, and defending and protecting the civil rights of California gun owners. CGF represents these members and supporters, which include California firearm retailers and consumers. CGF brings this action on behalf of itself and its supporters, who possess all the indicia of membership.

SAC ¶ 6; *see also* Pls.' Resp. to Def.'s Undisputed Facts ¶ 3.

Plaintiffs name as defendant Stephen Lindley in his official capacity as the Chief of the California Department of Justice Bureau of Firearms. SAC ¶ 7; Pls.' Resp. to Def.'s Undisputed Facts ¶ 1. In this capacity, defendant is responsible for formulating, administering, enforcing, and executing the challenged laws. SAC ¶ 7.

B. UNSAFE HANDGUN ACT

The UHA is a penal statute that prohibits the manufacture, sale, gifting, or lending of any handgun in California that does not meet certain requirements. Cal. Penal Code §§ 31910, 32015(a). It finds its genesis in 1997, when the California Legislature passed S.B. 500, which attempted to ban guns, known as "Saturday Night Specials," that did not comply with federal safety standards. S.B. 500, 1997–1998 Leg., Reg. Sess. § 1 (Cal. 1997) (as passed by Senate, Sept. 9, 1997, but not enacted); Assem. Comm. on Appropriations, 1997–1998

Leg.-Comm. Analysis of S.B. 500, Reg. Sess. at 1 (Cal. July 30, 1997). Noting that "[t]he leading cause of death among young people ages 10 to 17 in California [in 1996] was firearm violence," "[t]he overwhelming majority of [which] were caused by the cheaply manufactured Saturday Night Special," the Legislature sought to require that any handgun sold or manufactured in California undergo independent laboratory testing and be certified by the California Department of Justice ("DOJ") as "safe." Assem. Comm. on Appropriations, 1997–1998 Leg.-Comm. Analysis of S.B. 500, Reg. Sess. at 2 (Cal. July 30, 1997). Finding that the bill would "fail to keep guns out of the hands of criminals," while "depriv[ing] law-abiding, legitimate gun users of the needed protection of handguns," however, Governor Peter Wilson vetoed the legislation, saying that S.B. 500's "net [was] cast much too wide. . . ." S.B. 500 Veto Message from Governor Wilson to Members of the Cal. Senate (Sept. 26, 1997).

The next year, the Legislature passed a narrower version of S.B. 500, known as S.B. 15 or the UHA, which the Governor signed into law. The UHA established a comprehensive regulatory scheme applicable to all handguns sold commercially in California. S.B. 15, 1999–2000 Leg., Reg. Sess. § 1 (Cal. 1999). Specifically, the UHA criminalized the manufacture, import, lending, or sale of any "unsafe handgun," permitting "imprisonment in a county jail [for a period] not exceeding one year." Cal. Penal Code § 32000. The term "unsafe handgun" is defined to include any revolver or semiautomatic pistol that is "not already listed on the

roster" of "tested handguns determined not to be unsafe" by the California Department of Justice. *Id.* §§ 31910, 32015(a).

The purpose of the UHA was twofold. First, it was intended to reduce crime by eliminating the sale of cheap handguns. *Fiscal v. City & Cnty. of San Francisco*, 158 Cal. App. 4th 895, 912 (2008); *see also* Assem. Comm. on Appropriations, 1999–2000 Leg.-Comm. Analysis of S.B. 15, Reg. Sess. at 2 (Cal. July 7, 1999) (Bureau of Alcohol, Tobacco and Firearms statistics show that four of five guns used in criminal acts are cheap guns that do not meet drop safety and other gun specification requirements). Second, it was meant to ensure handguns "fire when they are supposed to and that they do not fire when dropped" by requiring that all handguns be subject to a "drop test," which the bill's author submitted is "fair and reasonable for weapons sold to the public for self-protection. If a weapon is not reliable for self-defense it has no business being sold in California." S. Rules Comm., 1999–2000 Leg.-Comm. Analysis of S.B. 15, Reg. Sess. at 11 (Cal. Apr. 28, 1999). To be considered safe, revolvers must meet firing and drop safety requirements and must have a "safety device . . . that causes the hammer to retract to a point where the firing pin does not rest upon the primer of the cartridge." Cal. Penal Code § 31910(a). Pistols must also meet the firing and drop safety requirements and must have a "positive manually operated safety device." *Id.* § 31910(b)(1)–(3). If a handgun not on the roster is sufficiently similar to a model already listed, then the similar model may be listed without

undergoing testing, upon certification by the applicant in an affidavit that the model is indeed similar. *Id.* § 32030. Sufficient similarity means differing only in purely cosmetic feature[s] not affecting the "dimensions, material, linkage, or function[] of the magazine well, the barrel, the chamber, or any of the components of the firing mechanism of the firearm," or differing only in finish or the material from which the grips are made. *Id.*

Manufacturers and importers who seek to have a handgun listed bear the costs of creating and maintaining the rostering program. Cal. Code Regs. tit. 11, § 4072. There is a $200.00 annual listing fee for each model, payable by the manufacturer or importer. *Id.* §§ 4071, 4072. If the responsible party fails to make this payment, the gun is delisted. *Id.* § 4071(d). If a manufacturer or importer discontinues manufacturing or importing the model, then a fully licensed wholesaler, distributor, or dealer may submit a written request and pay the listing fee to maintain the model on the roster. *Id.* § 4070(d). Similarly, if a listing has lapsed or was removed for lack of payment, a manufacturer, importer, or "other responsible party" may submit a written request to have the model relisted. *Id.* § 4070(e). " 'Responsible party' includes, but is not limited to, firearm manufacturers/importers and law enforcement agencies." *Id.* § 4049(s).

The UHA was amended in 2003, requiring among other things that center fire[1] semiautomatic[2] pistols not listed by January 2007 come equipped with two additional safety features:

- a "chamber load indicator," which is "a device that plainly indicates that a cartridge is in the firing chamber"; and
- a magazine disconnect mechanism, which is a "mechanism that prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted in the semiautomatic pistol."

Cal. Penal Code §§ 32010(d), 16380, 16900. Not every chamber load indicator ("CLI") meets the statutory requirement. Rather, each CLI must be "designed and intended to indicate to a reasonably foreseeable adult user of the pistol, without requiring the user to refer to a user's manual or any other resource other than the pistol itself, whether a cartridge is in the firing

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[1] Center fire ammunition "fires when the primer at the bottom-center of the cartridge case is struck and thus ignited by the gun's firing pin." Pls.' Corrected Mot. Summ. J. ("Pls.' Mot.") at 1 n.1, ECF No. 67-1.

[2] A semiautomatic gun fires "only one shot with each pull of the trigger." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1263 (D.C. Cir. 2011) (internal quotation marks omitted). The energy of the just-fired bullet causes ejection of the spent case and the loading of the next cartridge, enabling rapid firing. Pls.' Mot. at 1 n.2.

chamber." *Id.* § 16380. Rimfire[3] semiautomatic pistols do not require a CLI but do require a magazine-disconnect mechanism ("MDM"). *See id.* § 32010(d). The CLI requirement took effect in January 2007, while the MDM requirement took effect a year earlier, in January 2006. Handguns that appeared on the roster prior to an effective date are grandfathered in and need not comply with the respective requirements. *See id.*

In 2007, the Legislature also passed the Crime Gun Identification Act ("CGIA"). Assem. B. 1471, 2007–2008 Leg., Reg. Sess. § 1 (Cal. 2007). This legislation imposed a microstamp-technology requirement, amending the UHA to expand the definition of "unsafe" handguns to include "semiautomatic pistols that are not designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol . . . and that are transferred by imprinting on each cartridge case when the firearm is fired." Assem. B. 1471, 2007–2008 Leg., Reg. Sess. Leg. Counsel Digest (Cal. 2007). In theory, a gun equipped with the technology imprints every bullet fired with a "microstamp" that identifies the weapon and owner.

According to the bill's author, the CGIA "is about catching criminals." Assem. Comm. on Pub. Safety, 2007–2008 Leg.-Comm. Analysis of Assem. B. 1471, Reg. Sess. at 2 (Cal. Apr. 17, 2007). Proponents claimed

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[3] Rimfire ammunition incorporates the primer into the bottom rim of the case; when the rim is struck by the firing pin, the primer ignites the gun powder. Pls.' Mot. at 2 n.3. For technical reasons, plaintiffs assert, CLIs are not feasible for firearms that use rimfire ammunition. *Id.*

generally it would: "(a) help law enforcement solve handgun crimes; (b) help reduce gang-violence; and (c) help reduce gun trafficking of new semiautomatic handguns." *Id.* Moreover, they claimed the legislation would "place[ ] no additional burden [on] gun owners," because the "additional cost w[ould] be $0.50 to $2 a gun and no new licenses or permits [would be] required." *Id.*

The opposition countered that "[m]andating [micro-stamping technology] . . . at th[at] time would be excessively premature as it [could] [ ]not be scientifically justified, and it ha[d] not been proven to be practical in implementation." *Id.* at 4. Further, the opposition noted that as of 2007, "micro-stamping [wa]s a 'sole source' technology" and that the costs "would not be contained by realistic competition," "result[ing] [in] higher costs for retailers and their customers." *Id.* at 4–5.

The Legislature addressed opponents' concern about microstamping's status as a sole-source technology, conditioning implementation of the requirement on DOJ certification "that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions." Cal. Penal Code § 31910(b)(7)(A). Thus, although the microstamping bill was signed into law in October 2007, Assem. B. 1471, 2007–2008 Leg., Reg. Sess. (Cal. 2007), the requirement did not take effect until May 2013, when the DOJ issued the required certification. DOJ

Information Bulletin, Ex. N at 2, ECF No. 61-21.[4] Guns listed prior to the May 2013 date are grandfathered. DOJ Information Bulletin at 3. Despite the DOJ certification, "[n]o handguns currently available for sale in the United States have microstamping technology that satisfies the requirements of California's Handgun Roster Law," Interrog. No. 4, Ex. O at 3, ECF No. 61-22, and no manufacturer has submitted a handgun that complies with the UHA's microstamping provision for approval, Interrog. No. 8, Ex. N at 4, ECF No. 61-23.

Finally, the UHA includes several exemptions from the rostering scheme, some of which were added in 2010:

- "Firearms listed as curios or relics" under federal law,[5] Cal. Penal Code § 32000(b)(3);

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[4] The court takes judicial notice of the issuance of the DOJ certification because it can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see Estate of Fuller v. Maxfield & Oberton Holdings, LLC*, 906 F. Supp. 2d 997, 1004 (N.D. Cal. 2012) (citing *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) ("It is appropriate to take judicial notice of this information, as it was made publicly available by government entities. . . .")).

[5] Federal law defines curios or relics as "[f]irearms which are of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons." 27 Fed. Reg. § 478.11. Additionally, a firearm must fall within one of three categories to be considered a relic, such as "[f]irearms which were manufactured at least 50 years prior to the current date, but not including replicas thereof." *Id.*

- The sale or purchase of a handgun to the DOJ or other law enforcement organizations, including their "sworn members," for "use in the discharge of their official duties," *id.* § 32000(b)(4);
- Certain single-action[6] revolvers, *id.* § 32100; and
- The sale, loan, or transfer of any semiautomatic pistol to be used solely as a prop during the course of a movie, television, or video production, *id.* § 32110(h).

See Pls.' Undisputed Facts ¶ 39, ECF No. 63. Private party transfers, in which two parties who are not licensed firearm dealers wish to enter into a sale, are likewise unencumbered by the UHA. *See* Cal. Penal Code § 32110(a). Additional exemptions exist, but plaintiffs do not challenge them.

C. SUMMARY OF CLAIMS

Plaintiffs bring two claims: (1) violation of the Second Amendment and (2) violation of the Equal Protection Clause of the Fourteenth Amendment. SAC ¶¶ 63, 65. They seek injunctive relief, declaratory relief, costs of suit, and any other relief the court deems appropriate.

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[6] "Single-action" refers to a gun's trigger function. In a single-action gun, the trigger drops the hammer only after the gun is cocked. Pls.' Mot. at 6 n.4.

Plaintiffs argue the UHA violates the Second Amendment because it bars the purchase of certain handguns that are "in common use" and therefore, constitutionally protected under *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008). These handguns may not be manufactured or sold in California because they: (1) have not been tested for firing and drop safety; (2) are not listed due to nonpayment of an annual listing fee; (3) do not have a CLI, MDM, or both; or (4) do not have microstamping technology. Pls.' Mot. at 13. Plaintiffs stated at hearing that their facial and as-applied challenges are "the same" but wished to "preserve [their] arguments." Dec. 16, 2013 Hr'g Tr. 5:11–17, ECF No. 79.

Each plaintiff identifies a particular handgun that he or she seeks to purchase from a willing seller but cannot buy because that handgun is not on the UHA roster:

- Plaintiff Peña seeks to purchase an unlisted Para USA (Para Ordnance) P1345SR/ Stainless Steel .45 ACP 4.25". This gun was previously listed on the roster but removed in December 2005. Def.'s Resp. to Pls.' Undisputed Facts ¶¶ 43–44, ECF No. 74-8.
- Plaintiff Vargas, who was born without an arm below the right elbow, seeks to purchase an unlisted Glock 21 SF with an ambidextrous magazine release. *Id.* ¶¶ 46–47, 49. This model is not listed,

but the same model without the ambidextrous magazine release is listed. Further, the UHA permits plaintiff to buy the listed model and have it subsequently fitted with the ambidextrous magazine release. *Id.* ¶¶ 50–51. Glock attempted to roster the model with the ambidextrous magazine release, but the DOJ determined it was not sufficiently similar to the listed model to be listed without independent testing. Decl. of Leslie McGovern ("McGovern Decl.") ¶ 9, ECF 74-1.

- Plaintiff Croston seeks to purchase an unlisted Springfield Armory XD-45 Tactical 5" Bi-Tone stainless steel/black handgun in .45 ACP, model number XD9623. Def.'s Resp. to Pls.' Undisputed Facts ¶ 54. This gun is grandfathered onto the roster but only in other colors. This particular color is not listed because, plaintiffs assert, it was released after the CLI and MDM requirements went into effect. SAC ¶¶ 50–52. Plaintiffs also assert that the XD-45 has a CLI but that the DOJ decided it was inadequate.[7] *Id.* ¶ 53.

[7] There is no evidence in the record indicating why the DOJ considered model number XD9623's CLI inadequate. There is, however, a letter from the DOJ to Debra Else at Springfield Armory stating that models XD9611, XD9660, and XD9665 were not listed because their CLIs did not comply with DOJ regulations for CLIs, codified at title 11 section 4060(d)(1) of the California Code of Regulations. Pls.' Mot. for Summ. J., Ex. A at 4, ECF No. 61-8. These models' CLIs did not comply because they did not inform a "reasonably foreseeable adult user of the pistol," without consulting a user's manual, that there was a round in the chamber. *Id.*

Defendant's undisputed evidence shows that the XD9623 was never submitted for rostering, whether as a similar gun or for testing in its own right. McGovern Decl. ¶ 5.

- Plaintiff Thomas seeks to purchase an unlisted High Standard Buntline style revolver, the handgun at issue in *Heller*. SAC ¶¶ 54–55. This model of revolver has never been submitted for DOJ testing. McGovern Decl. ¶ 7.

Plaintiffs assert the UHA violates the Equal Protection Clause because it bars individual plaintiffs from possessing handguns that it permits other people to possess. SAC ¶ 65. In plaintiffs' estimation, the UHA "arbitrarily distinguishes between otherwise identical firearms, inherently making arbitrary distinctions among the people who would possess them, and arbitrarily bars people from possessing handguns deemed safe for others." Pls.' Mot. at 9. Thus, they conclude, it is unconstitutional. *Id.*

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at 5. The DOJ made this determination by asking six randomly selected "non-sworn" employees of the Firearms Division whether they could tell these models were loaded by looking at the CLIs; only one employee of the six could in fact tell. *Id.* Defendant provides a declaration from Leslie McGovern, Associate Governmental Program Analyst at the DOJ, which states that the XD9623 has never been submitted for testing, an assertion plaintiffs' evidence does not contradict. McGovern Decl. ¶ 5.

D. PROCEDURAL HISTORY

Plaintiffs filed suit in April 2009. Compl. at 10, ECF No. 1. Due to the Ninth Circuit's then-pending decision in *Nordyke v. King*, the previously assigned district judge stayed the action in October 2009. October 2, 2009 Order at 5, ECF No. 24. In part to permit reconsideration in light of *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 3026 (2010), the *Nordyke* opinion was delayed. It ultimately issued, after rehearing en banc, in June 2012. *Nordyke v. King*, 681 F.3d 1041, 1043 (9th Cir. 2012) (en banc).[8] This court subsequently lifted the stay in this case in August 2012. Minute Order, ECF No. 42.

After the court lifted the stay, plaintiffs amended the complaint to account for the microstamping provision, which had since taken effect, making other amendments as well. *See*, *e.g.*, SAC ¶¶ 7, 19. Plaintiffs filed the operative Second Amended Complaint in June 2013, *id.* at 12, and defendants answered the following month, Def.'s Answer at 5, ECF No. 54. The parties simultaneously filed the instant cross-motions in October 2013, and plaintiffs filed a corrected memorandum in support of their motion in November 2013. Following the hearing in December 2013, the court ordered supplemental briefing, June 5, 2014 Order at 1–2, ECF

[8] *Nordyke* emphasizes "the crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate . . . as lawmaker, and the government acting as proprietor. . . ." 681 F.3d at 1044–45 (citation and internal quotation marks omitted). Those facts are not before the court; thus, *Nordyke* is of limited utility here. *See id.*

No. 89, and both parties filed briefs, Def.'s Supp. Br. at 1, ECF No. 90; Pls.' Supp. Br. at 1, ECF No. 91. Plaintiffs filed notices of supplemental authority on February 14, 2014, October 2, 2014, and February 12, 2015. ECF Nos. 83, 92, 93.

II. STANDING

A. INDIVIDUAL STANDING

Article III's "case or controversy" language imposes on "the party invoking federal jurisdiction" the burden of establishing constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Clapper v. Amnesty Int'l*, ___ U.S. ___, 133 S. Ct. 1138, 1146 (2013). To meet this burden, a plaintiff must show injury that is "[1] concrete, particularized, and actual or imminent; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling." *Id.* (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). "[T]he irreducible constitutional minimum" requires that "the plaintiff suffer[ ] . . . invasion of a legally protected interest." *Lujan*, 504 U.S. at 560; *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). Further, when seeking injunctive relief, a plaintiff must show "a very significant possibility of future harm." *Mortensen v. Cnty. of Sacramento*, 368 F.3d 1082, 1086 (9th Cir. 2004) (internal quotation marks omitted). On summary judgment, a "plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the . . . motion will be

taken to be true." *Lujan*, 504 U.S. at 561 (citations and internal quotation marks omitted).

Here, the individual plaintiffs claim that because the UHA "constitute[s] a massive ban on handguns," Pls.' Mot. at 9, including the handguns plaintiffs seek to purchase, they are injured in several ways. Plaintiffs say they suffer: (1) "fear [of] arrest, prosecution, fine and incarceration if [they] complete[] th[ese] purchases," *id.* at 6–7; (2) "increased costs in transporting and transferring . . . firearms from out-of-state dealers that they would not suffer if the firearms were available for sale in California," *id.* at 13; (3) "a significant loss of . . . price competition," *id.*; and (4) "a significant loss of choice," *id.*

Plaintiffs have not established injury on the first asserted basis. Where "persons hav[e] no fears of state prosecution except those that are imaginary or speculative, [they] are not to be accepted as appropriate plaintiffs. . . ." *Younger v. Harris*, 401 U.S. 37, 42 (1971). Here, although each plaintiff claims to "fear arrest, prosecution, fine and incarceration" for purchase of an unlisted weapon, the UHA criminalizes only those who "manufacture[] or cause[] to be manufactured, import[] into the state for sale, keep[] for sale, offer[] or expose[] for sale, give[] or lend[]" such weapons. Cal. Penal Code § 32000. The statute does not criminalize the purchase or mere possession of an unlisted weapon. *Id.* Because this alleged injury is therefore "imaginary or speculative," it is insufficient to confer standing. *Younger*, 401 U.S. at 42.

Plaintiffs have also failed to establish injury on the second and third asserted bases. Although "palpable economic injuries have long been recognized as sufficient to lay the basis for standing," *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972), here, plaintiffs have adduced no "specific facts" to support their "mere allegations" as required under *Lujan*, 504 U.S. at 561. The record is devoid of affidavit testimony or other evidence indicating the actual "costs [of] transporting and transferring . . . firearms from out-of-state," or plaintiffs' likelihood of incurring such costs. Pls.' Mot. at 9. Similarly, plaintiffs have not directed the court's attention to data evincing loss of price competition in California resulting from the UHA. Plaintiffs have not established injury sufficient to confer standing on these bases.

Plaintiffs' fourth and final asserted basis presents a closer question. Plaintiffs claim injury because the UHA causes "a significant loss of choice" in plaintiffs' selection of "handguns whose possession and use is secured by the Second Amendment." Pls.' Mot. at 9. Injury requires "'invasion of a legally protected interest.'" *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, 2685 (2013) (quoting *Lujan*, 504 U.S. at 560); *see also Jackson*, 746 F.3d at 967. To determine whether an invasion has occurred, the court must first define the right at issue. Thus, determining whether prosecution of third-party gun sellers and manufacturers, who are not before the court, invades plaintiffs' Second Amendment rights is necessary to resolution of both standing and the merits of plaintiffs' claims.

Accordingly, "standing and the merits are inextricably intertwined." *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319 (1973).

In such cases, the court must address the merits, as it does below. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (addressing merits where Court "could not resolve the question [of] . . . standing without addressing the constitutional issue"); *Holtzman*, 414 U.S. at 1319 ("If applicants are correct on the merits they have standing. . . . The case in that posture is in the class of those where standing and the merits are inextricably intertwined."). *But see Baker v. Carr*, 369 U.S. 186, 208 (1962) ("It would not be necessary to decide whether appellants' allegations of impairment of their [constitutional rights] . . . will, ultimately, entitle them to relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it."). In so doing, however, the court does not assume injury has occurred. *Cf. Lujan*, 504 U.S. at 560 (holding injury may not be "hypothetical").

B. ORGANIZATIONAL STANDING

An organization may sue in its own or in a representative capacity. *See United Food & Commercial Workers v. Brown Group*, 517 U.S. 544, 556 (1996). If suing in its own capacity, it must establish the same elements as an individual plaintiff. *Lujan*, 504 U.S. at 560. In a representative capacity, however, "an association has standing to bring suit on behalf of its

members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Here, organizational plaintiffs CGF and SAF join the five individual plaintiffs in the action. As noted, CGF's purposes "include supporting the California firearms community by promoting education for all stakeholders about California and federal firearm laws, rights and privileges, and securing, defending and protecting the civil rights of California gun owners, who are its members and supporters." Decl. of Gene Hoffman, Jr. ("Hoffman Decl.") ¶ 3, ECF No. 61-7. SAF's purposes "include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control." Decl. of Alan Gottlieb ¶ 4, ECF No. 61-6. Both organizations attest that the UHA "regularly cause[s] the expenditure of resources . . . as people turn to [the] organization[s] for advice and information." *Id.* ¶ 6; Hoffman Decl. ¶ 5. Also as noted, plaintiffs Peña, Croston and Thomas are members of both CGF and SAF. Decl. of Ivan Peña ¶¶ 2–3, ECF No. 61-2; Decl. of Doña Croston ¶¶ 2–3, ECF No. 61-3; Decl. of Brett Thomas ¶¶ 2–3, ECF No. 61-5. Vargas is a member of SAF and a "participant in CGF activities." Decl. of Roy Vargas ¶¶ 2–3, ECF No. 61-4.

The organizational plaintiffs have established direct standing. "An organization may establish a sufficient injury in fact if it substantiates by affidavit . . . that a challenged statute or policy frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (citation and internal quotation marks omitted). However, "[a]n organization cannot manufacture . . . injury by incurring litigation costs or . . . choosing to spend money fixing a problem that otherwise would not affect the organization. . . . It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (internal quotation marks omitted). As the UHA imposes a number of regulations on firearms, it adversely affects the missions of CGF and SAF, both of which endeavor to protect the right of Californians to possess firearms. Further, the organizations attest to expending resources addressing the UHA that, in its absence, they could conserve or expend in other ways. Finally, there is no indication the injury is "manufacture[d]," as the UHA would increase the organizations' expenditures, even barring direct involvement in the instant litigation.

Having found direct standing, the court declines to address representational standing.

III. STANDARD

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Material" facts are those that "might affect the outcome of the suit under the governing law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and an "issue of fact [is] . . . 'genuine'" where established by the presence or absence of "specific facts," not mere "metaphysical doubt," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A moving party is entitled to judgment as a matter of law "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. . . ." *Id.* at 587 (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)); *accord* Fed. R. Civ. P. 50(a) ("If a party has been fully heard on an issue . . . and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law. . . .").

The moving party bears the initial burden of showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party does so successfully, the burden shifts to the nonmoving party, who "must establish that there is a genuine issue of material fact. . . ." *Matsushita Elec. Indus. Co.*, 475 U.S. at 585. In carrying their burdens, both parties must "cit[e] to particular parts of materials in the record . . .

or show[ ] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). On summary judgment, the court views all evidence and draws all inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587–88; *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008).

IV. ANALYSIS

A. SECOND AMENDMENT

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. Const. amend. II. This language "confers an individual right to keep and bear arms," *Heller*, 554 U.S. at 622, "the core lawful purpose of [which] is self-defense," *id.* at 630; *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014). The right, however, "is not unlimited." *Heller*, 554 U.S. at 626. Instead, it is tempered by "presumptively lawful regulatory measures," *id.* at 627 n.26, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and "laws imposing conditions and qualifications on the commercial sale of arms," *id.* at 626–27.

To determine whether a statute violates the Second Amendment, the Ninth Circuit has adopted a two-step approach "bear[ing] strong analogies to the Supreme Court's free-speech caselaw." *Jackson*, 746 F.3d at 960; *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). Under this framework, the court "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, . . . appl[ies] an appropriate level of [heightened] scrutiny." *Chovan*, 735 F.3d at 1136. "[T]he rare law that 'destroys' the [Second Amendment] right[ ] requir[es] . . . per se invalidation." *Peruta*, 742 F.3d at 1170.

In this case, defendant contends the UHA does not burden the Second Amendment at step one because it is "presumptively lawful." Def.'s Opp'n to Pls.' Mot. ("Def.'s Opp'n") at 6, ECF No. 74. Alternatively, if the court reaches step two, defendant argues the UHA withstands even intermediate scrutiny. *Id.* at 10. For different reasons, plaintiffs also maintain the court need not apply means-ends scrutiny; because the UHA prohibits protected arms, they argue it is per se invalid. Pls.' Opp'n to Def.'s Mot. Summ. J. ("Pls.' Opp'n") at 12, ECF No. 73. Relying on *Chovan*, plaintiffs argue in the alternative that the UHA imposes a substantial burden on the Second Amendment and the statute fails under either strict or intermediate scrutiny. *Id.* at 12–15.

Amicus Glock, Inc. asserts that the UHA burdens the Second Amendment because it bans handguns "that are in 'common use' by 'law-abiding citizens for lawful purposes.'" Glock Amicus Curiae Br. at 5

(quoting *Heller*, 554 U.S. at 625, 627), ECF No. 66. Accordingly, Glock advocates the application of heightened scrutiny: "The proper constitutional test for analyzing the challenged portions of California's roster requirements as applied to commercial sales is intermediate scrutiny analogous to that used when considering restrictions on commercial speech protected by the First Amendment." *Id.* at 2. Additionally, Glock contends the UHA does not survive intermediate scrutiny because its various exceptions and exemptions render it underinclusive. *Id.* at 8–9.

1. Step 1: Burden on Conduct Protected by Second Amendment

The court asks first whether, "based on a 'historical understanding of the scope of the right,'" "the challenged law burdens conduct protected by the Second Amendment. . . ." *Jackson*, 746 F.3d at 960 (quoting *Heller*, 554 U.S. at 625). "[A] challenged law falls outside the historical scope," and thus does not burden protected conduct, where: (1) "the regulation is one of [several] 'presumptively lawful regulatory measures'";[9] or (2) "the record includes persuasive

[9] The Supreme Court provided a non-exhaustive list of "presumptively lawful regulatory measures," stating:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in [*Heller*] should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools or government buildings, or laws imposing

historical evidence establishing "that the regulation . . . imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* (citing *Heller*, 554 U.S. at 627 n.26; *Chovan*, 735 F.3d at 1137). Additionally, as the test does not qualify the term "burdens," the question is not one of degree. *See id.*; *Chovan*, 735 F.3d at 1136. Thus, if the regulated conduct burdens the Second Amendment, even minimally, and the government cannot show that the regulation is a "presumptively lawful regulatory measure[]" or "fall[s] outside the historical scope of the Second Amendment," review proceeds to the second step. *Jackson*, 746 F.3d at 960.

> conditions and qualifications on the commercial sale of arms.

554 U.S. at 626–27. The language itself is ambiguous as to whether the Court here deems all regulatory measures falling within these categories "longstanding" and therefore presumptively lawful, or whether only "longstanding" regulatory measures within these categories are presumptively lawful. However, the Ninth Circuit has suggested the former reading is correct:

> In the first step, we ask whether the challenged law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the [Second Amendment] right, or whether the challenged law falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected.

Jackson, 746 F.3d at 960 (alteration in original) (citations and internal quotation marks omitted); *see also United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) (equating "habitual drug users" with "felons and mentally ill people" and rejecting Second Amendment challenge without undertaking historical analysis).

Defendant argues the UHA does not burden plaintiffs' Second Amendment rights for two reasons. Def.'s Opp'n at 5–7. Defendant points out handguns remain widely available in California: over one million handgun transactions, a figure that grows by the hundreds of thousands annually, have occurred in California since plaintiffs filed suit, and the current handgun roster includes more than one thousand models. *Id.* at 5. Moreover, plaintiffs, who already own guns suitable for self-defense, are able to acquire more through alternate, legal avenues, *id.*, a factor which has led courts to uphold regulations akin to the UHA, *id.* at 6 (citing serial-number statute in *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) and gun-registration law in *Heller II*, 670 F.3d at 1251–58).

Second, defendant contends the UHA is a law "imposing conditions and qualifications on the commercial sale of arms" and is, therefore, "presumptively lawful." *Id.* at 5–6 (quoting *Heller*, 554 U.S. at 626–27 & n.26). Likening the UHA's safety-feature requirements to founding-era gunpowder-storage laws, defendant insists the statute does not burden the right of self-defense even "remotely." *Id.* at 6 (quoting *Heller*, 554 U.S. at 632). Therefore, defendant concludes, the UHA does not infringe the core Second Amendment right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.*

Plaintiffs respond that because there is a right to keep and bear arms, there must be a corresponding right to acquire them. Pls.' Mot. at 10 (citing, *inter alia, Marzzarella*, 614 F.3d at 92 n.8). Although conceding

the State may ban "dangerous and unusual" arms, *id.* (citing *Heller*, 554 U.S. at 627), plaintiffs argue "the acquisition of handguns of the kind in common use for lawful purposes, the sort of handguns that law-abiding citizens would expect to keep," "cannot be prohibited—even if the state would prefer people use different (or no) firearms," *id.* at 11. Relying on *Heller*, they assert handguns are protected by the Second Amendment because the guns are "in common use" and that the UHA not only burdens but bans them. *See* Pls.' Mot. at 9 (quoting 554 U.S. at 627).

Plaintiffs accordingly contend that this court need determine only whether the unlisted handguns, effectively banned in California because they are deemed "unsafe," are arms "in common use" within the meaning of the Second Amendment. Pls.' Opp'n at 12. If they are not, then plaintiffs' challenge ends because the arms are not protected; if they are, then an injunction must issue because the arms may not be banned. *Id.* In plaintiffs' estimation, the UHA amounts to a ban of new handguns that do not have microstamping, CLI, or MDM technology; have not been submitted by the manufacturer for testing; or for which no annual listing fee has been paid. Pls.' Mot. at 13. Plaintiffs analogize to First Amendment doctrine and assert that permitting California to ban these types of handguns is akin to permitting it to ban entire categories of books. Pls.' Opp'n at 1.

"In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and

extent of the imposed condition." *Marzzarella*, 614 F.3d at 92 n.8. Here, the UHA criminalizes the manufacture and sale of new guns deemed "unsafe," Cal. Penal Code § 32000, permitting commercialization of only handguns that appear on a state roster, *id.* § 32015. To be added to the roster, a new handgun must comply with specified requirements, depending on the type of gun and listing date: inclusion of microstamping (as of May 2013), CLI (as of January 2006 or 2007), and MDM features (same), *id.* § 31910; firing and drop safety testing (as of 1999), *id.*; and payment of a listing fee (as of 1999), *id.* § 32015(b)(1). The UHA thereby "impos[es] conditions and qualifications on the commercial sale of arms. . . ." *Heller*, 554 U.S. at 626–27.

The law does not, however, "prohibit[ ] the commercial sale of firearms." *Marzzarella*, 614 F.3d at 92 n.8; *see also United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011) (noting *Heller*'s distinction between "regulations" and "prohibitions"). Whereas the "imposi[tion] of conditions and qualifications on the commercial sale of arms" is "presumptively lawful," *Heller*, 554 U.S. at 627 n.26, the prohibition of commercial sale "would be untenable," *Marzzarella*, 614 F.3d at 92 n.8, because it would "effect[ ] a '*destruction* of the [Second Amendment] right,' " *Peruta*, 742 F.3d at 1168 (quoting *Heller*, 554 U.S. at 629) (emphasis in original). As opposed to "conditions and qualifications," *Heller*, 554 U.S. at 627, "[a] 'prohibition' does more than merely alter or restrain a person's behavior; it is an edict, decree, or order which forbids, prevents, or excludes," *Barton*, 633 F.3d at 175 (internal quotation

marks omitted); *see also Jackson*, 746 F.3d at 964 ("[A] ban is not merely regulatory; it *prohibits*. . . ." (internal quotation marks omitted, emphasis in original)). Thus, categorical prohibitions "go too far."[10] *Peruta*, 742 F.3d at 1170. In *Heller*, for example, the Court invalidated the contested law, without subjecting it to constitutional scrutiny, because it was a "complete ban on handguns in the home. . . ." *Id.* at 1170 (citing *Heller*, 554 U.S. at 629). Similarly, in *Peruta*, the court summarily struck down the law in question because it was a "near-total prohibition on keeping [arms]. . . ." *Id.* In *Silvester v. Harris*, the subject of plaintiffs' second notice of supplemental authority, a fellow district judge found a ten-day waiting period to purchase a firearm an unconstitutional burden on the rights of those who already owned firearms. 2014 WL 4209563, at *28 (E.D. Cal. Aug. 25, 2014) (discussing longstanding presumptively lawful regulations as discussed in *Heller*, finding that waiting periods do not qualify, but noting

[10] The court notes, however, that "*Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation. . . ." *Teixera v. Cnty. of Alameda*, No. 12-cv-03288-WHO, 2013 WL 4804756, at *6 (N.D. Cal. Sept. 9, 2013) (alteration in original) (internal quotation marks omitted). Thus, " 'although the Second Amendment protects an individual's right to bear arms, it does not necessarily give rise to a corresponding right to sell a firearm.' " *Id.* (quoting *United States v. Chafin*, 423 F. App'x 342, 344 (4th Cir. 2011) (unpublished)); *cf. United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973) ("[T]he protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others.").

laws "prohibiting the sale of certain types of firearms" may qualify).

The UHA is distinguishable from the the [sic] laws at issue in *Heller* and *Peruta*; the UHA does not effectively ban firearms. Under the instant statutory scheme, the commercial sale of firearms proceeds robustly: "[s]ince this lawsuit was filed, there have been approximately 1.5 million legal handgun transactions in California," Pls.' Resp. to Def.'s Undisputed Facts ¶ 25, and as of February 11, 2015, the handgun roster included 795 models,[11] *Roster of Handguns Certified for Sale*, Cal. Dep't of Justice, Office of the Attorney Gen. (accessible at http://certguns.doj.ca.gov/). Plaintiffs concede "California's handgun rostering laws [do not] bar access to *all* handguns." Pls.' First Notice of Supplemental Authority at 4, ECF No. 83 (emphasis in original). In other words, the UHA does not "amount[ ] to a prohibition of an entire class of 'arms' " requiring per se invalidation. *Heller*, 554 U.S. at 628. Further,

[11] The court notes that in their proposed supplemental brief plaintiffs assert that the number of listed handguns declined ten percent between October 2013 and January 2014 and that "the number . . . will continue its steep decline." Pls.' Mot. to Supplement R. at 2, ECF No. 82-1. "[A]bsent relief from the microstamping requirement," they continue, "semi-automatic handguns will all but disappear from the California consumer market in due course." *Id.* Even if the court considered this argument, plaintiffs do not offer evidence sufficient to support a finding of imminent disappearance and the court would have no reason to address hypothetical facts not before it. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) ("A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character. . . .").

each individual plaintiff admits to both having obtained and being able to obtain handguns capable of use for self-defense. Def.'s Opp'n at 5. Plaintiffs nonetheless say "[t]hat [whether] *some* handguns are allowed is beside the point." Pls.' First Notice of Supplemental Authority at 4 (emphasis in original). "Rather, [they] claim that particular unrostered handguns are constitutionally-protected [sic], such that barring access to *those* handguns violates their Second Amendment rights, in the precise way that Plaintiffs would exercise those rights." *Id.* (emphasis in original). In essence, plaintiffs' position is that choosing the manner in which their Second Amendment rights are to be exercised—specifically, their selection of particular arms—is part and parcel of the right itself and the state's imposition of "conditions and qualifications" that deprive plaintiffs of their choices is unconstitutional. *See id.*

The court is not persuaded by plaintiffs' argument. "*Heller* did not purport to 'clarify the entire field' of Second Amendment jurisprudence and does not provide explicit guidance on the constitutionality of regulations which are less restrictive than . . . near-total ban[s]. . . ." *Jackson*, 746 F.3d at 959 (quoting *Heller*, 554 U.S. at 635). The Court in *Heller* addressed only a "handgun ban [that] amount[ed] to a prohibition of an entire class of 'arms' [handguns] that [was] overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Heller*, 554 U.S. at 628. Because that "law totally ban[ned] handgun possession," it "amount[ed] to a destruction of the right," and

was "clearly unconstitutional." *Id.* at 628–29. As discussed above, however, the equivalent circumstance is not present here. The UHA does not adversely impact the access to and sale of firearms generally; plaintiffs' Second Amendment rights are satisfied by the scheme's allowing the purchase of nearly 1000 types of rostered firearms. This degree of regulation is negligible and does not burden plaintiffs' rights under the Second Amendment.

Further, the Court noted in *Heller* that "the right [protected by the Second Amendment is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. Rejecting reasoning analogous to plaintiffs' here, the Ninth Circuit held in *Peruta* that California "has the power to" decide the manner in which Second Amendment rights may be exercised: "[A]s the historical sources have repeatedly noted, the state has a right to prescribe a particular manner of carry, provided it does not cut[ ] off the exercise of the citizen right altogether to bear arms, or, under the color of prescribing the mode, render[ ] the right itself useless." 742 F.3d at 1172 (alterations in original) (internal quotation marks omitted). "California's favoring [one mode of carry over another] . . . does not offend the Constitution, so long as it allows one. . . ." *Id.* Consequently, "[i]nsistence upon a particular mode of carry" "fall[s] outside the scope of the right to bear arms. . . ." *Id.*; *see also Heller*, 554 U.S. at 626.

Here, plaintiffs insist they have the right to determine "the precise way [in which they] . . . would

exercise" their Second Amendment rights; they demand access to handguns of their choosing. Pls.' First Notice of Supplemental Authority at 4. California, however, has "express[ed] a preference for" handguns it deems safe, just as it has for "concealed rather than open carry" of arms. *Peruta*, 742 F.3d at 1172. The state "has the power to do so" subject to the limiting principle that the regulation not "cut[ ] off the exercise of the right of the citizen altogether to bear arms, or, under the color of prescribing the mode, render[ ] the right itself useless." *Id.* (internal quotation omitted, alteration in original); *cf. Poe v. Ullman*, 367 U.S. 497, 539 (1961) ("In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in the provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are the powers of government inherent in every sovereignty." (internal quotation marks omitted)). The court finds plaintiffs' "[i]nsistence upon . . . particular" handguns to "fall outside the scope of the right to bear arms." *Peruta*, 742 F.3d at 1172; *see also Heller*, 554 U.S. at 626. It need pursue the inquiry no further. *See Jackson*, 746 F.3d at 960; *Chovan*, 735 F.3d at 1136. The court also rejects plaintiffs' contention that "particular unrostered handguns are constitutionally-protected [sic]. . . ." Pls.' First Notice of Supplemental Authority at 4. The Second Amendment does not protect guns, but rather conduct. *Chovan*, 735 F.3d at 1136.

The UHA is "one of the 'presumptively lawful regulatory measures' identified in *Heller*" and, as such, "falls outside the historical scope" of the Second

Amendment.[12] *Jackson*, 746 F.3d at 960. As the *Jackson* court employed the disjunctive in its articulation of the rule, no evaluation of "historical evidence" is required here. *See id.* ("To determine whether a . . . law falls outside the historical scope of the Second Amendment," the court "ask[s] whether the regulation is one of the presumptively lawful regulatory measures identified in *Heller* or whether the record includes persuasive historical evidence establishing that the regulation . . . imposes prohibitions . . . fall[ing] outside" the Amendment's scope. (internal quotation marks omitted)); *see also Dugan*, 657 F.3d at 999.

The UHA does not burden plaintiffs' Second Amendment rights.

2. Step 2: Scrutiny Required?

Because the UHA does not burden the Second Amendment at the first step, the court need not proceed to the second step. Heightened scrutiny is not triggered. *See id.* at 961 ("If a prohibition falls within the historical scope of the Second Amendment, [the court] . . . proceed[s] to the second step. . . ."); *accord*

[12] Because this court finds the UHA presumptively lawful, the court's holding is distinguishable from the holding in *Mance v. Holder*, 2015 U.S. Dist. LEXIS 16679 (N.D. Tex. Feb. 11, 2015), which plaintiffs submitted with their third notice of supplemental authority. ECF No. 93. In *Mance*, the court found a federal interstate handgun transfer ban was not presumptively lawful, and that it burdened plaintiffs' Second Amendment rights; the court struck down the restriction after applying strict scrutiny, which is not the standard applicable here.

NRA v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 195 (5th Cir. 2012) ("If a challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster."); *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011) ("[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right . . . then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.").

Rational basis review is likewise improper here as it "is a mode of analysis . . . use[d] when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws." *Heller*, 554 U.S. at 628 n.27. In such cases, "'rational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee." *Id.* "[T]he same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech . . . or the right to keep and bear arms." *Id.* Otherwise, "the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws[ ] and . . . have no effect." *Id.*

Instead, "[w]here a challenged statute apparently falls into one of the categories signaled by the Supreme Court as constitutional, courts have relied on the 'presumptively lawful' language to uphold laws in relatively summary fashion." *Hall v. Garcia*, No. C 10-03799 RS, 2011 WL 995933, at *2 (N.D. Cal. Mar. 17, 2011) (citing *United States v. Vongxay*, 594 F.3d 1111,

1115 (9th Cir. 2010); *United States v. Davis*, 304 F. App'x 473, 474 (9th Cir. 2008); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010)); *see also Dugan*, 657 F.3d at 999 (equating "habitual drug users" with "felons and mentally ill people" for Second Amendment purposes and summarily terminating analysis).

The court denies plaintiffs' Second Amendment challenge, without the need for further discussion.

B. EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This directive requires "that all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Indeed, "to trigger equal protection review at all, [a challenged law] must treat similarly situated persons disparately." *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1084 (9th Cir. 2012) (internal quotation marks omitted). Persons are not similarly situated where they "are different in fact," such that the "distinctions . . . drawn [by the challenged law] have some relevance to the purpose for which classification is made." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (internal quotation marks omitted).

To establish an equal protection violation, a plaintiff must "show that the [challenged] law is applied in a discriminatory manner or imposes different burdens

on different classes of people." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). Accordingly, "'[t]he first step in equal protection analysis is to identify the [challenged law's] classification of groups.'" *Id.* (quoting *Country Classic Dairies, Inc. v. Mont. Dep't of Commerce Milk Ctrl. Bureau*, 847 F.2d 593, 596 (9th Cir. 1988)). "Once the plaintiff establishes [the] classification, it is [then] necessary to identify a 'similarly situated' class against which the plaintiff's class can be compared." *Id.* (citing *Attorney Gen. v. Irish People, Inc.*, 684 F.2d 928, 946 (D.C. Cir. 1982)).

Only after identification of a classification does the court proceed to "[t]he next step [and] determine the level of scrutiny." *Id.* (alterations and internal quotation marks omitted). "[I]f a law neither burdens a fundamental right nor targets a suspect class," it need only "bear[] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Such review requires that a "classification . . . be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993).

Plaintiffs argue the UHA creates several privileged classes exempt from compliance with the roster: (1) people who move into the state, (2) people who have out-of-state family, (3) law enforcement personnel, (4) "curios" or "relics" as defined by statute, (5) people involved in movie or television production and (6) guns with certain CLIs. Pls.' Mot. at 18–19. Because persons in these classifications, in contrast to the general population, need not comply with the UHA, plaintiffs

argue there is disparate treatment. *Id.* Plaintiffs do not claim any classifications are suspect or quasi-suspect but assert the law infringes the fundamental Second Amendment right to keep and bear arms. *Id.* at 16–17. They thus argue strict scrutiny is proper and summary judgment on this claim warranted. *Id.* at 17–18.

For his part, defendant contends as a threshold matter that plaintiffs have failed to identify distinct classifications that the statute treats disparately. Def.'s Mot. Summ. J. ("Def.'s Mot.") at 19, ECF No. 55. Further, according to defendant, plaintiffs are neither similarly situated to any properly identified class nor subject to disparate treatment. *Id.*; Def.'s Opp'n at 10–11. Even were equal protection review proper, he continues, the UHA neither burdens a fundamental right nor targets a suspect or quasi-suspect class. Def.'s Mot. at 19; Def.'s Opp'n at 11. Defendant thus concludes the law is subject to only rational basis review, and summary judgment should be granted in his favor. Def.'s Mot. at 19; Def.'s Opp'n at 11.

1. Curios, Relics, and CLIs

The court first finds that "curios" or "relics" and guns with certain CLIs are not subject to equal protection. The Equal Protection Clause guarantees only "that all persons similarly situated . . . be treated alike," *City of Cleburne*, 473 U.S. at 439; it "relates to equality between persons as such," *McGowan v. Maryland*, 366 U.S. 420, 427 (1961). Thus, as plaintiffs here claim disparate treatment of objects, not persons, the

argument fails. The pertinent provisions do not treat persons disparately. They classify certain types of guns as exempt or define guns with certain CLIs as "safe" but apply the exemptions and definitions equally and identically to all persons. *See* Cal. Penal Code §§ 32000(b)(3), 32010(d)(1)–(2), 16380.

2. Incoming Residents, Out-of-State Family, and Movie Production

The court also finds that the UHA does not treat (1) people who move into the state, (2) people who have out-of-state family, or (3) people involved in movie or television production differently from other persons. Plaintiffs argue that because "unrostered guns are permitted by private importation or as intra-family gifts," "[t]he roster . . . privileges people who move into the state[ ] or who have family out-of-state [sic]." Pls.' Mot. at 18. However, California residents, including those who have no out-of-state family, are not prevented from possessing unlisted guns, receiving them as intra-family gifts from in-state relatives, or bringing them into the state for noncommercial purposes. The law thus exempts specific types of transactions without regard to the persons involved. *See* Cal. Penal Code § 32000(a) (punishing "any person in [California] who manufactures or causes to be manufactured, imports into the state for sale, keeps for sale, offers or exposes for sale, gives, or lends any unsafe handgun"); *id.* law revision commission comments (2010) (noting "exception for infrequent transfer of handgun between members of same immediate family").

Similarly, plaintiffs protest the "exceptions for movie and television production." Pls.' Mot. at 19. However, the law states only that it "shall not apply to . . . [t]he sale loan or transfer of any semiautomatic pistol that is to be used solely as a prop during the course of a motion picture, television or video production by an authorized participant therein," without dictating who may or may not be such a participant, Cal. Penal Code § 32110(h). Equal protection is concerned with "law [being] applied in a discriminatory manner or impos[ing] different burdens on different classes of people," *Freeman*, 68 F.3d at 1187; *McGowan*, 366 U.S. at 427, a condition that does not obtain here. Equal protection analysis is not triggered by this provision either.

3. Law Enforcement

Plaintiffs' assertion that the UHA treats law enforcement personnel differently, is, however, persuasive. Whereas the law's prohibitions apply to "any person in this state" who engages in specified actions, *see* Cal. Penal Code § 32000(a), transactions involving "sworn members" of law enforcement personnel "for use in the discharge of their official duties" are exempt, *id.* § 32000(b)(4).[13] This provision results in disparate

[13] The UHA does not apply to:

> The sale or purchase of a handgun, if the handgun is sold to, or purchased by, the Department of Justice, a police department, a sheriff's official, a marshal's office, the [California] Department of Corrections and Rehabilitation, the California Highway Patrol, any

treatment because exempting a group of people from compliance with the UHA "imposes different burdens on different classes of people." *Freeman*, 68 F.3d at 1187. That said, active law enforcement personnel and laymen are not similarly situated to plaintiffs.

"Differen[ces] in fact," *Rinaldi*, 384 U.S. at 309, exist between law enforcement personnel and laymen. Law enforcement personnel shoulder a duty to ensure public safety and thus assume different responsibilities, risks, and rights. *See Silveira v. Lockyer*, 312 F.3d 1052, 1089 (9th Cir. 2002) (finding it "manifestly rational for . . . peace officers to possess and use firearms more potent than those available to the rest of the populace in order to maintain public safety"), *abrogated on other grounds by Heller*, 554 U.S. at 592. These differences are directly "relevan[t] to the purpose for which classification is made" in the UHA, namely, public safety. *Rinaldi*, 384 U.S. at 309. Accordingly, plaintiffs have not "identif[ied] a 'similarly situated' class against which the plaintiff[s]' class can be compared." *Freeman*, 68 F.3d at 1187. Equal protection analysis is, therefore, not triggered by the law enforcement exemption. *Id. But see Silveira*, 312 F.3d at 1088–89 (rejecting, under rational basis review, equal protection

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> district attorney's office, any federal law enforcement agency, or the military or naval forces of this state or of the United States for use in the discharge of their official duties. This section does not prohibit the sale to, or purchase by, sworn members of these agencies of a handgun.

Cal. Penal Code § 32000(b)(4).

challenge to California gun law's disparate treatment of off-duty and retired peace officers and laymen).

The court grants summary judgment on the equal protection claim in favor of defendant.

V. CONCLUSION

For the reasons set forth above:

1. Plaintiffs' motion for summary judgment, ECF No. 61, is DENIED; and

2. Defendant's motion for summary judgment, ECF No. 55, is GRANTED.

IT IS SO ORDERED.

DATED: February 25, 2015.

/s/ Kimberly J. Mueller
UNITED STATES
DISTRICT JUDGE

APPENDIX C

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Penal Code § 16380

As used in this part, "chamber load indicator" means a device that plainly indicates that a cartridge is in the firing chamber. A device satisfies this definition if it is readily visible, has incorporated or adjacent explanatory text or graphics, or both, and is designed and intended to indicate to a reasonably foreseeable adult user of the pistol, without requiring the user to refer to a user's manual or any other resource other than the pistol itself, whether a cartridge is in the firing chamber.

Cal. Penal Code § 16900

As used in this part, "magazine disconnect mechanism" means a mechanism that prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted in the semiautomatic pistol.

Cal. Penal Code § 27545

Where neither party to the transaction holds a dealer's license issued pursuant to Sections 26700 to 26915, inclusive, the parties to the transaction shall complete the sale, loan, or transfer of that firearm through a licensed firearms dealer pursuant to Chapter 5 (commencing with Section 28050).

Cal. Penal Code § 27585

(a) Commencing January 1, 2015, a resident of this state shall not import into this state, bring into this state, or transport into this state, any firearm that he or she purchased or otherwise obtained on or after January 1, 2015, from outside of this state unless he or she first has that firearm delivered to a dealer in this state for delivery to that resident pursuant to the procedures set forth in Section 27540 and Article 1 (commencing with Section 26700) and Article 2 (commencing with Section 26800) of Chapter 2.

(b) Subdivision (a) does not apply to or affect any of the following:

(1) A licensed collector who is subject to and complies with Section 27565.

(2) A dealer, if the dealer is acting in the course and scope of his or her activities as a dealer.

(3) A wholesaler, if the wholesaler is acting in the course and scope of his or her activities as a wholesaler.

(4) A person licensed as an importer of firearms or ammunition or licensed as a manufacturer of firearms or ammunition, pursuant to Section 921 et seq. of Title 18 of the United States Code and the regulations issued pursuant thereto if the importer or manufacturer is acting in the course and scope of his or her activities as a licensed importer or manufacturer.

(5) A personal firearm importer who is subject to and complies with Section 27560.

(6) A person who complies with subdivision (b) of Section 27875.

(7) A person who complies with subdivision (b), (c), or (d) of Section 27920.

(8) A person who is on the centralized list of exempted federal firearms licensees pursuant to Section 28450 if that person is acting in the course and scope of his or her activities as a licensee.

(9) A firearm regulated pursuant to Chapter 1 (commencing with Section 18710) of Division 5 of Title 2 acquired by a person who holds a permit issued pursuant to Article 3

(commencing with Section 18900) of Chapter 1 of Division 5 of Title 2, if that person is acting within the course and scope of his or her activities as a licensee and in accordance with the terms and conditions of the permit.

(10) A firearm regulated pursuant to Chapter 2 (commencing with Section 30500) of Division 10 acquired by a person who holds a permit issued pursuant to Section 31005, if that person is acting within the course and scope of his or her activities as a licensee and in accordance with the terms and conditions of the permit.

(11) A firearm regulated pursuant to Chapter 6 (commencing with Section 32610) of Division 10 acquired by a person who holds a permit issued pursuant to Section 32650, if that person is acting within the course and scope of his or her activities as a licensee and in accordance with the terms and conditions of the permit.

(12) A firearm regulated pursuant to Article 2 (commencing with Section 33300) of Chapter 8 of Division 10 acquired by a person who holds a permit issued pursuant to Section 33300, if that person is acting within the course and scope of his or her activities as a licensee and in accordance with the terms and conditions of the permit.

(13) The importation of a firearm into the state, bringing a firearm into the state, or transportation of a firearm into the state, that is regulated by any of the following statutes, if the acquisition of that firearm occurred

outside of California and is conducted in accordance with the applicable provisions of the following statutes:

(A) Chapter 1 (commencing with Section 18710) of Division 5 of Title 2, relating to destructive devices and explosives.

(B) Section 24410, relating to cane guns.

(C) Section 24510, relating to firearms that are not immediately recognizable as firearms.

(D) Sections 24610 and 24680, relating to undetectable firearms.

(E) Section 24710, relating to wallet guns.

(F) Chapter 2 (commencing with Section 30500) of Division 10, relating to assault weapons.

(G) Section 31500, relating to unconventional pistols.

(H) Sections 33215 to 33225, inclusive, relating to short-barreled rifles and short-barreled shotguns.

(I) Chapter 6 (commencing with Section 32610) of Division 10, relating to machineguns.

(J) Section 33600, relating to zip guns, and the exemptions in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, as they relate to zip guns.

(c) The provisions of this section are cumulative and do not restrict the application of any other law. However, an act or omission punishable in different ways by this section and different provisions of this code shall not be punished under more than one provision.

Cal. Penal Code § 27875

(a) Section 27545 does not apply to the transfer of a firearm by gift, bequest, intestate succession, or other means from one individual to another, if all of the following requirements are met:

(1) The transfer is infrequent, as defined in Section 16730.

(2) The transfer is between members of the same immediate family.

(3) Within 30 days of taking possession of the firearm, the person to whom it is transferred shall submit a report to the Department of Justice, in a manner prescribed by the department, that includes information concerning the individual taking possession of the firearm, how title was obtained and from whom, and a description of the firearm in question. The reports that individuals complete pursuant to this subdivision shall be made available to them in a format prescribed by the department.

(4) Until January 1, 2015, the person taking title to the firearm shall first obtain a valid handgun safety certificate if the firearm is a handgun, and commencing January 1, 2015, a valid firearm safety certificate for any firearm, except that in the case of a handgun, a

valid unexpired handgun safety certificate may be used.

(5) The person receiving the firearm is 18 years of age or older.

(b) Subdivision (a) of Section 27585 does not apply to a person who imports a firearm into this state, brings a firearm into this state, or transports a firearm into this state if all of the following requirements are met:

(1) The person acquires ownership of the firearm from an immediate family member by bequest or intestate succession.

(2) The person has obtained a valid firearm safety certificate, except that in the case of a handgun, a valid unexpired handgun safety certificate may be used.

(3) The receipt of any firearm by the individual by bequest or intestate succession is infrequent, as defined in Section 16730.

(4) The person acquiring ownership of the firearm by bequest or intestate succession is 18 years of age or older.

(5) Within 30 days of that person taking possession of the firearm and importing, bringing, or transporting it into this state, the person shall submit a report to the Department of Justice, in a manner prescribed by the department, that includes information concerning the individual taking possession of the firearm, how title was obtained and from whom, and a description of the firearm in question. The reports that individuals complete pursuant to this subdivision shall be

made available to them in a format prescribed by the department.

Cal. Penal Code § 31610

(a) It is the intent of the Legislature in enacting this article to require that persons who obtain firearms have a basic familiarity with those firearms, including, but not limited to, the safe handling and storage of those firearms. It is not the intent of the Legislature to require a firearm safety certificate for the mere possession of a firearm.

(b) This section shall become operative on January 1, 2015.

Cal. Penal Code § 31910

As used in this part, "unsafe handgun" means any pistol, revolver, or other firearm capable of being concealed upon the person, for which any of the following is true:

(a) For a revolver:

(1) It does not have a safety device that, either automatically in the case of a double-action firing mechanism, or by manual operation in the case of a single-action firing mechanism, causes the hammer to retract to a point where the firing pin does not rest upon the primer of the cartridge.

(2) It does not meet the firing requirement for handguns.

(3) It does not meet the drop safety requirement for handguns.

(b) For a pistol:

(1) It does not have a positive manually operated safety device, as determined by standards relating to imported guns promulgated by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives.

(2) It does not meet the firing requirement for handguns.

(3) It does not meet the drop safety requirement for handguns.

(4) Commencing January 1, 2006, for a center fire semiautomatic pistol that is not already listed on the roster pursuant to Section 32015, it does not have either a chamber load indicator, or a magazine disconnect mechanism.

(5) Commencing January 1, 2007, for all center fire semiautomatic pistols that are not already listed on the roster pursuant to Section 32015, it does not have both a chamber load indicator and if it has a detachable magazine, a magazine disconnect mechanism.

(6) Commencing January 1, 2006, for all rimfire semiautomatic pistols that are not already listed on the roster pursuant to Section 32015, it does not have a magazine disconnect mechanism, if it has a detachable magazine.

(7)

(A) Commencing January 1, 2010, for all semiautomatic pistols that are not already listed on the roster pursuant to Section 32015, it is not designed and equipped with a microscopic array of characters that

identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two 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, provided that the Department of Justice certifies that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions.

(B) The Attorney General may also approve a method of equal or greater reliability and effectiveness in identifying the specific serial number of a firearm from spent cartridge casings discharged by that firearm than that which is set forth in this paragraph, to be thereafter required as otherwise set forth by this paragraph where the Attorney General certifies that this new method is also unencumbered by any patent restrictions. Approval by the Attorney General shall include notice of that fact via regulations adopted by the Attorney General for purposes of implementing that method for purposes of this paragraph.

(C) The microscopic array of characters required by this section shall not be considered the name of the maker, model, manufacturer's number, or other mark of identification, including any distinguishing number or mark assigned by the Department of Justice, within the meaning of Sections 23900 and 23920.

Cal. Penal Code § 32000

(a) A person in this state who manufactures or causes to be manufactured, imports into the state for sale, keeps for sale, offers or exposes for sale, gives, or lends an unsafe handgun shall be punished by imprisonment in a county jail not exceeding one year.

(b) This section shall not apply to any of the following:

> (1) The manufacture in this state, or importation into this state, of a prototype handgun when the manufacture or importation is for the sole purpose of allowing an independent laboratory certified by the Department of Justice pursuant to Section 32010 to conduct an independent test to determine whether that handgun is prohibited by Sections 31900 to 32110, inclusive, and, if not, allowing the department to add the firearm to the roster of handguns that may be sold in this state pursuant to Section 32015.
>
> (2) The importation or lending of a handgun by employees or authorized agents of entities determining whether the weapon is prohibited by this section.
>
> (3) Firearms listed as curios or relics, as defined in Section 478.11 of Title 27 of the Code of Federal Regulations.
>
> (4) The sale or purchase of a handgun, if the handgun is sold to, or purchased by, the Department of Justice, a police department, a sheriff's official, a marshal's office, the

Department of Corrections and Rehabilitation, the Department of the California Highway Patrol, any district attorney's office, any federal law enforcement agency, or the military or naval forces of this state or of the United States for use in the discharge of their official duties. This section does not prohibit the sale to, or purchase by, sworn members of these agencies of a handgun.

(5) The sale, purchase, or delivery of a handgun, if the sale, purchase, or delivery of the handgun is made pursuant to subdivision (d) of Section 10334 of the Public Contract Code.

(6) Subject to the limitations set forth in subdivision (c), the sale or purchase of a handgun, if the handgun is sold to, or purchased by, any of the following entities or sworn members of these entities who have satisfactorily completed the firearms portion of a training course prescribed by the Commission on Peace Officer Standards and Training pursuant to Section 832:

(A) The Department of Parks and Recreation.

(B) The Department of Alcoholic Beverage Control.

(C) The Division of Investigation of the Department of Consumer Affairs.

(D) The Department of Motor Vehicles.

(E) The Fraud Division of the Department of Insurance.

(F) The State Department of State Hospitals.

(G) The Department of Fish and Wildlife.

(H) The State Department of Developmental Services.

(I) The Department of Forestry and Fire Protection.

(J) A county probation department.

(K) The Los Angeles World Airports, as defined in Section 830.15.

(L) A K-12 public school district for use by a school police officer, as described in Section 830.32.

(M) A municipal water district for use by a park ranger, as described in Section 830.34.

(N) A county for use by a welfare fraud investigator or inspector, as described in Section 830.35.

(O) A county for use by the coroner or the deputy coroner, as described in Section 830.35.

(P) The Supreme Court and the courts of appeal for use by marshals of the Supreme Court and bailiffs of the courts of appeal, and coordinators of security for the judicial branch, as described in Section 830.36.

(Q) A fire department or fire protection agency of a county, city, city and county, district, or the state for use by either of the following:

(i) A member of an arson-investigating unit, regularly paid and employed in that capacity pursuant to Section 830.37.

(ii) A member other than a member of an arson-investigating unit, regularly paid and employed in that capacity pursuant to Section 830.37.

(R) The University of California Police Department, or the California State University Police Departments, as described in Section 830.2.

(S) A California Community College police department, as described in Section 830.32.

(c)

(1) Notwithstanding Section 26825, a person licensed pursuant to Sections 26700 to 26915, inclusive, shall not process the sale or transfer of an unsafe handgun between a person who has obtained an unsafe handgun pursuant to an exemption specified in paragraph (6) of subdivision (b) and a person who is not exempt from the requirements of this section.

(2)

(A) A person who obtains an unsafe handgun pursuant to paragraph (6) of subdivision (b) shall, when leaving the handgun in an unattended vehicle, lock the handgun in the vehicle's trunk, lock the handgun in a locked container and place the container out of plain view, or lock the handgun in a locked container that is permanently affixed to the vehicle's interior and not in plain view.

(B) A violation of subparagraph (A) is an infraction punishable by a fine not exceeding one thousand dollars ($1,000).

(C) For purposes of this paragraph, the following definitions shall apply:

(i) "Vehicle" has the same meaning as defined in Section 670 of the Vehicle Code.

(ii) A vehicle is "unattended" when a person who is lawfully carrying or transporting a handgun in the vehicle is not within close proximity to the vehicle to reasonably prevent unauthorized access to the vehicle or its contents.

(iii) "Locked container" has the same meaning as defined in Section 16850.

(D) Subparagraph (A) does not apply to a peace officer during circumstances requiring immediate aid or action that are

within the course of his or her official duties.

(E) This paragraph does not supersede any local ordinance that regulates the storage of handguns in unattended vehicles if the ordinance was in effect before the date of the enactment of the act that added this subparagraph.

(d) Violations of subdivision (a) are cumulative with respect to each handgun and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by this section and other provisions of law shall not be punished under more than one provision, but the penalty to be imposed shall be determined as set forth in Section 654.

Cal. Penal Code § 32005

(a) Every person who is licensed as a manufacturer of firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and who manufactures firearms in this state shall certify under penalty of perjury and any other remedy provided by law that every model, kind, class, style, or type of pistol, revolver, or other firearm capable of being concealed upon the person that the person manufactures is not an unsafe handgun as prohibited by Sections 31900 to 32110, inclusive.

(b) Every person who imports into the state for sale, keeps for sale, or offers or exposes for sale any

firearm shall certify under penalty of perjury and any other remedy provided by law that every model, kind, class, style, or type of pistol, revolver, or other firearm capable of being concealed upon the person that the person imports, keeps, or exposes for sale is not an unsafe handgun as prohibited by Sections 31900 to 32110, inclusive.

Cal. Penal Code § 32010

(a) Any pistol, revolver, or other firearm capable of being concealed upon the person manufactured in this state, imported into the state for sale, kept for sale, or offered or exposed for sale, shall be tested within a reasonable period of time by an independent laboratory certified pursuant to subdivision (b) to determine whether that pistol, revolver, or other firearm capable of being concealed upon the person meets or exceeds the standards defined in Section 31910.

(b) On or before October 1, 2000, the Department of Justice shall certify laboratories to verify compliance with the standards defined in Section 31910. The department may charge any laboratory that is seeking certification to test any pistol, revolver, or other firearm capable of being concealed upon the person pursuant to Sections 31900 to 32110, inclusive, a fee not exceeding the costs of certification.

(c) The certified testing laboratory shall, at the manufacturer's or importer's expense, test the firearm and submit a copy of the final test report directly to the Department of Justice along with a prototype of the

weapon to be retained by the department. The department shall notify the manufacturer or importer of its receipt of the final test report and the department's determination as to whether the firearm tested may be sold in this state.

(d)

(1) Commencing January 1, 2006, no centerfire semiautomatic pistol may be submitted for testing pursuant to Sections 31900 to 32110, inclusive, if it does not have either a chamber load indicator, or a magazine disconnect mechanism if it has a detachable magazine.

(2) Commencing January 1, 2007, no centerfire semiautomatic pistol may be submitted for testing pursuant to Sections 31900 to 32110, inclusive, if it does not have both a chamber load indicator and a magazine disconnect mechanism.

(3) Commencing January 1, 2006, no rimfire semiautomatic pistol may be submitted for testing pursuant to Sections 31900 to 32110, inclusive, if it has a detachable magazine, and does not have a magazine disconnect mechanism.

Cal. Penal Code § 32015

(a) On and after January 1, 2001, the Department of Justice shall compile, publish, and thereafter maintain a roster listing all of the handguns that have been tested by a certified testing laboratory, have been

determined not to be unsafe handguns, and may be sold in this state pursuant to this part. The roster shall list, for each firearm, the manufacturer, model number, and model name.

(b)

(1) The department may charge every person in this state who is licensed as a manufacturer of firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, and any person in this state who manufactures or causes to be manufactured, imports into the state for sale, keeps for sale, or offers or exposes for sale any handgun in this state, an annual fee not exceeding the costs of preparing, publishing, and maintaining the roster pursuant to subdivision (a) and the costs of research and development, report analysis, firearms storage, and other program infrastructure costs necessary to implement Sections 31900 to 32110, inclusive. Commencing January 1, 2015, the annual fee shall be paid on January 1, or the next business day, of every year.

(2) Any handgun that is manufactured by a manufacturer who manufactures or causes to be manufactured, imports into the state for sale, keeps for sale, or offers or exposes for sale any handgun in this state, and who fails to pay any fee required pursuant to paragraph (1), may be excluded from the roster.

(3) If a purchaser has initiated a transfer of a handgun that is listed on the roster as not

unsafe, and prior to the completion of the transfer, the handgun is removed from the roster of not unsafe handguns because of failure to pay the fee required to keep that handgun listed on the roster, the handgun shall be deliverable to the purchaser if the purchaser is not otherwise prohibited from purchasing or possessing the handgun. However, if a purchaser has initiated a transfer of a handgun that is listed on the roster as not unsafe, and prior to the completion of the transfer, the handgun is removed from the roster pursuant to subdivision (d) of Section 32020, the handgun shall not be deliverable to the purchaser.

Cal. Penal Code § 32020

(a) The Attorney General may annually retest up to 5 percent of the handgun models that are listed on the roster described in subdivision (a) of Section 32015.

(b) The retesting of a handgun model pursuant to subdivision (a) shall conform to the following:

(1) The Attorney General shall obtain from retail or wholesale sources, or both, three samples of the handgun model to be retested.

(2) The Attorney General shall select the certified laboratory to be used for the retesting.

(3) The ammunition used for the retesting shall be of a type recommended by the manufacturer in the user manual for the handgun. If the user manual for the handgun model

makes no ammunition recommendation, the Attorney General shall select the ammunition to be used for the retesting. The ammunition shall be of the proper caliber for the handgun, commercially available, and in new condition.

(c) The retest shall be conducted in the same manner as the testing prescribed in Sections 31900 and 31905.

(d) If the handgun model fails retesting, the Attorney General shall remove the handgun model from the roster maintained pursuant to subdivision (a) of Section 32015.

Cal. Penal Code § 32025

A handgun model removed from the roster pursuant to subdivision (d) of Section 32020 may be reinstated on the roster if all of the following are met:

(a) The manufacturer petitions the Attorney General for reinstatement of the handgun model.

(b) The manufacturer pays the Department of Justice for all of the costs related to the reinstatement testing of the handgun model, including the purchase price of the handguns, prior to reinstatement testing.

(c) The reinstatement testing of the handguns shall be in accordance with subdivisions (b) and (c) of Section 32020.

(d) The three handgun samples shall be tested only once for reinstatement. If the sample fails it may not be retested.

(e) If the handgun model successfully passes testing for reinstatement, and if the manufacturer of the handgun is otherwise in compliance with Sections 31900 to 32110, inclusive, the Attorney General shall reinstate the handgun model on the roster maintained pursuant to subdivision (a) of Section 32015.

(f) The manufacturer shall provide the Attorney General with the complete testing history for the handgun model.

(g) Notwithstanding subdivision (a) of Section 32020, the Attorney General may, at any time, further retest any handgun model that has been reinstated to the roster.

Cal. Penal Code § 32030

(a) A firearm shall be deemed to satisfy the requirements of subdivision (a) of Section 32015 if another firearm made by the same manufacturer is already listed and the unlisted firearm differs from the listed firearm only in one or more of the following features:

(1) Finish, including, but not limited to, bluing, chrome-plating, oiling, or engraving.

(2) The material from which the grips are made.

(3) The shape or texture of the grips, so long as the difference in grip shape or texture does not in any way alter the dimensions, material, linkage, or functioning of the magazine well, the barrel, the chamber, or any of the components of the firing mechanism of the firearm.

(4) Any other purely cosmetic feature that does not in any way alter the dimensions, material, linkage, or functioning of the magazine well, the barrel, the chamber, or any of the components of the firing mechanism of the firearm.

(b) Any manufacturer seeking to have a firearm listed under this section shall provide to the Department of Justice all of the following:

(1) The model designation of the listed firearm.

(2) The model designation of each firearm that the manufacturer seeks to have listed under this section.

(3) A statement, under oath, that each unlisted firearm for which listing is sought differs from the listed firearm only in one or more of the ways identified in subdivision (a) and is in all other respects identical to the listed firearm.

(c) The department may, in its discretion and at any time, require a manufacturer to provide to the department any model for which listing is sought under this section, to determine whether the model complies with the requirements of this section.

Cal. Penal Code § 32100

(a) Article 4 (commencing with Section 31900) and Article 5 (commencing with Section 32000) shall not apply to a single-action revolver that has at least a five-cartridge capacity with a barrel length of not less than three inches, and meets any of the following specifications:

> (1) Was originally manufactured prior to 1900 and is a curio or relic, as defined in Section 478.11 of Title 27 of the Code of Federal Regulations.
>
> (2) Has an overall length measured parallel to the barrel of at least seven and one-half inches when the handle, frame or receiver, and barrel are assembled.
>
> (3) Has an overall length measured parallel to the barrel of at least seven and one-half inches when the handle, frame or receiver, and barrel are assembled and that is currently approved for importation into the United States pursuant to the provisions of paragraph (3) of subsection (d) of Section 925 of Title 18 of the United States Code.

(b) Article 4 (commencing with Section 31900) and Article 5 (commencing with Section 32000) shall not apply to a single-shot pistol with a break top or bolt action and a barrel length of not less than six inches and that has an overall length of at least 10 1/2 inches when the handle, frame or receiver, and barrel are assembled. However, Article 4 (commencing with Section 31900) and Article 5 (commencing with Section 32000)

shall apply to a semiautomatic pistol that has been temporarily or permanently altered so that it will not fire in a semiautomatic mode.

Cal. Penal Code § 32105

(a) The Legislature finds a significant public purpose in exempting pistols that are designed expressly for use in Olympic target shooting events. Therefore, those pistols that are sanctioned by the International Olympic Committee and by USA Shooting, the national governing body for international shooting competition in the United States, and that were used for Olympic target shooting purposes as of January 1, 2001, and that fall within the definition of "unsafe handgun" pursuant to paragraph (3) of subdivision (b) of Section 31910 shall be exempt, as provided in subdivisions (b) and (c).

(b) Article 4 (commencing with Section 31900) and Article 5 (commencing with Section 32000) shall not apply to any of the following pistols, because they are consistent with the significant public purpose expressed in subdivision (a): * * * *

(c) The department shall create a program that is consistent with the purpose stated in subdivision (a) to exempt new models of competitive firearms from Article 4 (commencing with Section 31900) and Article 5 (commencing with Section 32000). The exempt competitive firearms may be based on recommendations by USA Shooting consistent with the regulations contained in the USA Shooting Official Rules or may be

based on the recommendation or rules of any other organization that the department deems relevant.

Cal. Penal Code § 32110

Article 4 (commencing with Section 31900) and Article 5 (commencing with Section 32000) shall not apply to any of the following:

(a) The sale, loan, or transfer of any firearm pursuant to Chapter 5 (commencing with Section 28050) of Division 6 in order to comply with Section 27545.

(b) The sale, loan, or transfer of any firearm that is exempt from the provisions of Section 27545 pursuant to any applicable exemption contained in Article 2 (commencing with Section 27600) or Article 6 (commencing with Section 27850) of Chapter 4 of Division 6, if the sale, loan, or transfer complies with the requirements of that applicable exemption to Section 27545.

(c) The sale, loan, or transfer of any firearm as described in paragraph (3) of subdivision (b) of Section 32000.

(d) The delivery of a pistol, revolver, or other firearm capable of being concealed upon the person to a person licensed pursuant to Sections 26700 to 26915, inclusive, for the purposes of the service or repair of that firearm.

(e) The return of a pistol, revolver, or other firearm capable of being concealed upon the person by a

person licensed pursuant to Sections 26700 to 26915, inclusive, to its owner where that firearm was initially delivered in the circumstances set forth in subdivision (a), (d), (f), or (I).

(f) The delivery of a pistol, revolver, or other firearm capable of being concealed upon the person to a person licensed pursuant to Sections 26700 to 26915, inclusive, for the purpose of a consignment sale or as collateral for a pawnbroker loan.

(g) The sale, loan, or transfer of any pistol, revolver, or other firearm capable of being concealed upon the person listed as a curio or relic, as defined in Section 478.11 of Title 27 of the Code of Federal Regulations.

(h) The sale, loan, or transfer of any semiautomatic pistol that is to be used solely as a prop during the course of a motion picture, television, or video production by an authorized participant therein in the course of making that production or event or by an authorized employee or agent of the entity producing that production or event.

(i) The delivery of a pistol, revolver, or other firearm capable of being concealed upon the person to a person licensed pursuant to Sections 26700 to 26915, inclusive, where the firearm is being loaned by the licensee to a consultant-evaluator.

(j) The delivery of a pistol, revolver, or other firearm capable of being concealed upon the person by a person licensed pursuant to Sections 26700 to 26915,

inclusive, where the firearm is being loaned by the licensee to a consultant-evaluator.

(k) The return of a pistol, revolver, or other firearm capable of being concealed upon the person to a person licensed pursuant to Sections 26700 to 26915, inclusive, where it was initially delivered pursuant to subdivision (j).

Cal. Pub. Contracts Code § 10334

(a) No state employee shall acquire any goods from the state, unless the goods are offered to the general public in the regular course of the state's business on the same terms and conditions as those applicable to the employee. "State employee," as used in this section, means any employee of the state included within Section 82009 of the Government Code, and all officers and employees included within Section 4 of Article VII of the California Constitution, except those persons excluded from the definition of "designated employee" under the last paragraph of Section 82019 of the Government Code.

(b) Notwithstanding subdivision (a), any peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, employed by the State of California for a period of more than 120 months who has been duly retired through a service retirement or a peace officer retiring from a job-incurred disability not related to a mental or emotional disorder and who has been granted the legal right to carry a concealed firearm pursuant to Article 2

(commencing with Section 25450) of Chapter 2 of Division 5 of Title 4 of Part 6 of the Penal Code may be authorized by the person's department head to purchase his or her state-issued handgun. Disability retired peace officers need not meet the 120-month employment requirement. The cost of the handgun shall be the fair market value as listed in the annual Blue Book of Gun Values or replacement cost, whichever is less, of the handgun issued as determined by the appointing power, plus a charge for the cost of handling. The retiring officer shall request to purchase his or her handgun in writing to the department within 30 calendar days of his or her retirement date.

(c) Notwithstanding subdivision (a), any peace officer described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code employed by the State of California who is authorized to carry firearms may purchase his or her state-issued service firearm if the person's department head directs the department to change its state-issued service weapon system. The cost of the service firearm shall be the fair market value as listed in the annual Blue Book of Gun Values or replacement cost, whichever is less, of the firearm issued as determined by the department head, plus a charge for the cost of handling. The requesting officer shall request to purchase his or her firearm in writing to the department within 10 calendar days of receiving the new state-issued weapon.

(d) Notwithstanding subdivision (a), the spouse or domestic partner of a peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3

of Part 2 of the Penal Code who was employed by the State of California and who died in the line of duty, may be authorized by his or her spouse's or domestic partner's department head to purchase his or her state-issued handgun. The cost of the handgun shall be the fair market value of the handgun as listed in the annual Blue Book of Gun Values or replacement cost, whichever is less, as determined by the appointing power, plus a charge for the cost of handling. The spouse or domestic partner shall request to purchase the handgun in writing to the department within 30 calendar days of his or her spouse's or domestic partner's death. A sale of a firearm pursuant to this subdivision shall be made pursuant to Chapter 5 (commencing with Section 28050) of Division 6 of Title 4 of Part 6 of the Penal Code, as required by Section 27545 of the Penal Code.

11 Cal. Code Regs. § 4059

(a) Pursuant to Penal Code section 32010, subdivision (a), any pistol, revolver, or other firearm capable of being concealed upon the person manufactured in this state, imported into the state for sale, kept for sale, or offered or exposed for sale, shall be tested by a DOJ-Certified Laboratory. The handguns submitted for testing shall not be modified in any way from those that would be sold if certification is granted. If it is determined by the DOJ that the handguns submitted for testing are modified in any way from those that are being sold after certification has been granted, that

model will be immediately removed from the Roster of Certified Handguns.

(b) Pursuant to Penal Code section 32030, a handgun model shall be deemed not to be unsafe if another handgun model has already been determined not to be unsafe and the untested handgun differs from the tested handgun only as specified in subdivision (a) of that section. Such handguns will be reviewed on a case-by-case basis by the DOJ to determine whether or not a new test will be required.

(c) Other than the DOJ, only the manufacturer/importer of a handgun model is authorized to submit that handgun model to a DOJ-Certified Laboratory for testing.

(d) Three handguns of each model to be tested shall be submitted to the DOJ-Certified Laboratory. Manufacturers/Importers may supply any information that they believe may be needed by the laboratory for proper and safe operation of the handgun. The following information shall be supplied in the English language with each handgun model submitted for testing:

> (1) Instructions for field disassembly/assembly and diagram(s) identifying all parts.
>
> (2) Cleaning instructions. These may be different from and in addition to the instructions that are provided when the handgun model is sold.
>
> (3) A description of each safety feature designed into the handgun, how each safety

feature is intended to function, and for those under shooter control, how the shooter should operate (activate/deactivate) each safety feature.

(4) A statement regarding the ammunition the manufacturer/importer markets and/or recommends that the handgun being tested is designed to handle. This may also include information on ammunition known to be beyond the design limits of the handgun and/or known not to function in the handgun.

(5) On or after January 1, 2010, upon DOJ's certification that the microstamping technology described in Penal Code section 31910, subdivision (b)(7) is available to more than one manufacturer unencumbered by any patent restrictions, a statement by the manufacturer indicating that for each handgun of the make and model of semiautomatic pistol submitted for testing: (i) the pistol is designed and equipped with a FIN etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol that are transferred by imprinting on each cartridge case expended from the pistol when the pistol is fired; and (ii) the pistol's complete FIN can be identified from the one or more etchings on each cartridge casing.

(6) On or after January 1, 2010, upon DOJ's certification that the microstamping technology described in Penal Code section 31910, subdivision (b)(7) is available to more than one manufacturer unencumbered by any patent

restrictions, the FIN for each handgun of the make and model of semiautomatic pistol to be tested. The FIN shall also be displayed or recorded on the manufacturer's packaging of any semiautomatic pistol which is manufactured, caused to be manufactured, imported into the state for sale, kept for sale, offered or exposed for sale, given, or lent in the state and subject to the microstamping requirement set forth in Penal Code section 31910, subdivision (b)(7). The FIN must be clearly marked as the FIN wherever the serial number of the pistol is displayed or recorded on the packaging of such a pistol.

(e) The manufacturer/importer shall be allowed, but not required, to provide the standard ammunition to be used during the firing test provided that, if applicable, it is the more powerful cartridge marketed/recommended by the manufacturer/importer. The manufacturer/importer shall be allowed to inspect any laboratory supplied standard ammunition before testing begins. The manufacturer/importer or DOJ-Certified Laboratory shall indicate the ammunition lot number on the Compliance Test Report. Notwithstanding the above, the DOJ may allow a handgun to be tested with newly designed non-standard ammunition that is not yet "available for purchase at consumer-level retail outlets." Any such ammunition shall be commercially produced and factory loaded.

11 Cal. Code Regs. § 4070

(a) Within ten (10) days of the receipt of the Compliance Test Report, Form BOF 021 (Rev. 01/2012), and one prototype handgun, from the DOJ-Certified Laboratory; and the receipt of the initial annual listing fee from the manufacturer/importer, the DOJ will determine whether the handgun is not unsafe and may be sold in California. After the determination that the model may be listed, the DOJ will add the handgun model to the Roster of Certified Handguns. The listing will be valid for one year from the date the model was added to the Roster, and shall be renewed as set forth in section 4071 of these regulations.

(b) Within ten (10) days of the receipt of the initial annual listing fee and a request from a manufacturer/importer to have a handgun model added to the Roster pursuant to Penal Code section 32030, the DOJ will determine whether the handgun model may be listed without testing. After the determination that the model may be listed, the DOJ will add the handgun model to the Roster. The listing will be valid for one year from the date the model was added to the Roster, and shall be renewed as set forth in section 4071 of these regulations.

(c) A handgun model may be removed from the Roster for any of the following reasons:

> (1) If the annual maintenance fee is not paid as set forth in Penal Code section 32015, subdivision (b).

(2) If it is determined that the handgun models submitted for testing were modified in any way from those that were sold after certification was granted.

(3) If it is determined that the handgun is in fact unsafe based upon further testing.

(d) A handgun model may remain on the Roster after a manufacturer/importer discontinues manufacturing/importing the model or goes out of business provided that all of the following requirements are met:

(1) Evidence is provided that the manufacturer/importer has either discontinued manufacturing/importing the handgun model or gone out of business.

(2) The manufacturer/importer is no longer offering the handgun model to licensed firearms dealers.

(3) Either a fully licensed wholesaler, distributor, or dealer submits a written request to continue the listing and agrees to pay the annual maintenance fee as set forth in section 4072 of these regulations. The request shall be submitted to the DOJ stating that all of the above conditions have been met.

(e) A manufacturer/importer or other responsible party may submit a written request to list a handgun model that was voluntarily discontinued or was removed for lack of payment of the annual maintenance fee. The written request must state that no modifications have been made to the model and be submitted

to the DOJ together with the annual listing fee as set forth in section 4072 of these regulations. If approved, the listing will be valid for one year from the date the model was added to the Roster, and shall be renewed as set forth in section 4071 of these regulations.

11 Cal. Code Regs. § 4071

A handgun model listing on the Roster of Certified Handguns must be renewed prior to expiration in order to remain valid. The following is the procedure for renewal of a listing:

(a) The DOJ will mail a renewal notice to each manufacturer/importer or other responsible person 60 days prior to the expiration of the handgun model listing.

(b) The manufacturer/importer or other responsible person wishing to renew the listing shall submit to the DOJ a copy of the renewal notice with the annual maintenance fee set forth in section 4072 of these regulations.

(c) Once these requirements are met and the request has been processed, the DOJ will send a notification that the listing has been renewed.

(d) If the; manufacturer/importer or other responsible person fails to comply with these renewal requirements, the handgun model listing shall expire by operation of law at midnight on the date of expiration of the listing and the model will be removed from the Roster.

11 Cal. Code Regs. 4072

(a) Pursuant to Penal Code section 32015, subdivision (b) the DOJ shall recover the full costs of creating and maintaining the Roster of Certified Handguns by collecting fees from manufacturers/importers of or other parties responsible for handgun models that are listed on the Roster of Certified Handguns.

(b) Standard Fees:

(1) Initial annual listing fee: $ 200 for each model

(2) Annual maintenance fee for listing: $ 200 for each model

(c) Annual maintenance fees are non-refundable. There is no refund or rebate for discontinuation prior to completion of a full year's listing on the Roster.

11 Cal. Code Regs. 4073

(a) Handguns may be selected for retesting randomly, or in instances where the DOJ has reason to believe, or the DOJ has received a substantiated written expressed concern, that a handgun may not be compliant with the law, the DOJ may independently choose a model for retesting. The DOJ will randomly select a laboratory to conduct retesting. The selected laboratory will be in good standing and will not have conducted the original test that resulted in the selected handgun's approval.

(b) All three handgun samples selected for retesting shall be identical to the model originally submitted to the DOJ for approval, including, but not limited to: caliber, finish, sights, magazine, and grips. The DOJ will pay all costs associated with the retest under section 4073 of these regulations.

(c) If a handgun model fails retesting, the DOJ shall remove the handgun model from the Roster of Certified Handguns within 48 hours of receipt and review of the Retest Compliance Test Report (on a form prescribed by the DOJ).

(1) If a handgun model selected for retesting fails, and that model was originally tested under Penal Code sections 31905 and 31900, all other handguns that were approved as "similars" under Penal Code section 32030 based on the results of that original test, will simultaneously be removed from the Roster.

(2) If a handgun model selected for retesting fails, and that model was originally approved as a "similar" under Penal Code section 32030, the handgun originally submitted for testing under Penal Code sections 31905 and 31900, as well as all other handguns that were approved as "similars" based on the original test, will simultaneously be removed from the Roster.

(d) Upon receipt and review of a Retest Compliance Test Report showing a handgun failing the testing procedure, a Notice of Removal will be sent by DOJ

within 48 hours to the manufacturer or importer who originally submitted the handgun for testing or listing.

(e) Handguns removed from the Roster as a result of failed retesting will not be credited or refunded any fees, including, but not limited to, initial annual listing fees and annual maintenance fees.

11 Cal. Code Regs. § 4074

(a) The DOJ will only recognize reinstatement testing requests made by a responsible party. The requestor will be responsible for the reinstatement testing costs and the annual maintenance fee as set forth in section 4072 of these regulations. Reinstatement testing costs must be paid prior to testing.

(b) Reinstatement testing will be conducted in accordance with section 4073 of these regulations. Reinstatement testing shall be conducted by the same laboratory that performed the original retest, using the same ammunition brand and cartridge, and test personnel, unless otherwise authorized by the DOJ.

(c) Upon the successful reinstatement of a handgun the DOJ may, on a case-by-case basis, reinstate "similar" handguns without retesting in accordance with Penal Code section 32030.

(d) If a handgun model has passed the required reinstatement testing, the DOJ-Certified Laboratory shall submit to the DOJ a completed Reinstatement Test Compliance Report (on a form prescribed by the DOJ) and one of the tested handguns within ten (10)

working days of the completion of the testing. The Reinstatement Compliance Report shall require all of the information identified in section 4062, subdivision (a) of these regulations, and be signed by the person authorized to sign on behalf of the DOJ-Certified Laboratory. Failure to submit the required Reinstatement Compliance Test Report to the DOJ within the time frame above shall not invalidate the results. However, the DOJ-Certified Laboratory may be subject to inspection by the DOJ to determine whether grounds exist to revoke the DOJ-Certification.

(e) If the handgun model fails reinstatement testing, the DOJ-Certified Laboratory shall provide to the DOJ a Reinstatement Test Compliance Report (on a form prescribed by the DOJ) within ten (10) working days of the completion of the testing. Failure to submit the required Reinstatement Compliance Test Report to the DOJ within the time frame above shall not invalidate the results. However, the DOJ-Certified Laboratory may be subject to inspection by the DOJ to determine whether grounds exist to revoke the DOJ-Certification.

(f) Reinstatement testing fees are not refundable regardless of test results.

(g) Handguns reinstated to the Roster upon successful completion of the reinstatement process will be subject to renewal at the annual expiration date established prior to removal from the Roster.

11 Cal. Code Regs. 4075

(a) On or after January 1, 2010, upon DOJ's certification of a microstamping technology pursuant to Penal Code section 31910, subdivision (b)(7) any person or corporation may apply to the Attorney General for approval of an alternative method of microstamping technology.

(b) The application for such approval must be in writing, and must include the following information:

> (1) A description of the alternative method of microstamping technology, including a statement explaining how the alternative microstamping method identifies the specific serial number of a pistol from spent cartridge casings discharged by that pistol.
>
> (2) Verification that the alternative method of microstamping technology is unencumbered by any patent restrictions. For purposes of this paragraph, "verification" includes, but is not limited to, the following information: A search, initiated, and paid for by the applicant and conducted by a licensed patent attorney, of the United States Patent Office records within the past 30 days indicating that the alternative method of microstamping technology is unencumbered by any patent restrictions.
>
> (3) A report from a DOJ-Certified Laboratory indicating that the alternative method of microstamping technology has been tested by the DOJ-Certified Laboratory as follows:

(A) The DOJ-Certified Laboratory conducted a firing test as described in Penal Code section 31905 and complied with section 4060, subdivisions (e) and (g) of these regulations for each of the pistols.

(B) The DOJ-Certified Laboratory examined the first two and last two expended cartridge casings from each pistol (collected pursuant to section 4060, subdivisions (e) and (g) of these regulations) and, using a stereo zoom microscope described in section 4052 of these regulations, was able to identify the specific serial number of the firing pistol on each expended cartridge.

(C) The DOJ-Certified Laboratory took digital photographs sufficient to adequately document the markings made on the cartridge cases by the microstamp and included such photographs in the application for certification of an alternative microstamping method.

(c) Upon receipt of a complete application, the Attorney General shall determine both of the following in order to approve the alternative method of microstamping:

(1) That the alternative method of microstamping technology is a method of equal or greater reliability and effectiveness than the method of microstamping described in Section 4060, subdivision (h) of these regulations based upon findings that (1) the method satisfies the

requirements of paragraphs (1) and (2) of subdivision (b) of this section; (2) the method utilizes a unique identifier that can be used to ascertain the serial number of the firing pistol; and (3) the method permits the firing weapon to be identified after examination of the spent cartridge casings through AFS.

(2) Certification that the alternative method of microstamping technology is unencumbered by any patent restrictions.

(d) The Attorney General shall notify the applicant in writing of the intent to approve, or the denial of any application for approval of alternative method of microstamping, within 90 days of receiving a complete application. However, notification of the intent to approve an alternative method of microstamping shall not constitute approval by the Attorney General of that alternative method of microstamping technology.

(e) If the approval or denial determinations are delayed by circumstances beyond the control of the Attorney General, the Attorney General shall notify the applicant in writing about when the approval or denial determinations are expected to be made.

(f) Certification and approval of an alternative method of microstamping technology by the Attorney General shall only be made by notice via regulations adopted by the Attorney General for purposes of implementing the alternative method of microstamping technology.