No. 18-843

In the Supreme Court of the United States

IVAN PENA, ET AL.,
Petitioners,

V.

MARTIN HORAN, DIRECTOR, CALIFORNIA
DEPT. OF JUSTICE BUREAU OF FIREARMS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, INC., FIREARMS POLICY FOUNDATION, MADISON SOCIETY FOUNDATION, INC., SAN DIEGO COUNTY GUN OWNERS, CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, INC., and COMMONWEALTH SECOND AMENDMENT, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether California's "Unsafe Handgun Act," Cal. Penal Code § 31900 et seq., violates the Second Amendment by banning the sale of handguns that are in common use for traditional lawful purposes.

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INTEREST OF *AMICI CURIAE*[1]

Firearms Policy Coalition, Inc. (FPC) is a non-profit membership organization that serves its members and the public through programs including direct and grassroots advocacy, legal efforts, and education. The purposes of FPC include defending the United States Constitution and the People's rights, privileges, and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms.

Firearms Policy Foundation (FPF) is a non-profit membership organization that serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on the United States Constitution and the People's rights, privileges, and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms.

Madison Society Foundation, Inc. (MSF) is a non-profit membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible, law-abiding citizens. The organization spends time and resources on outreach, education, and training related to firearms and self-defense.

San Diego County Gun Owners (SDCGO) is a political membership organization whose purpose is to protect and advance Second Amendment rights of residents of San Diego County, California. SDCGO's

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[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for the parties were given timely notice of *amici's* intent to file this brief and gave their consent.

membership consists of Second Amendment supporters, people who own guns for self-defense or sport, firearms dealers, shooting ranges, and elected officials who want to restore and protect the right to keep and the right to bear arms in California.

California Association of Federal Firearms Licensees, Inc. (CAL-FFL) is a non-profit organization whose purpose is to protect and defend the Second Amendment rights of its members and the public through direct and grassroots issue advocacy, regulatory input, legal efforts, and education. CAL-FFL is the State of California's firearms industry association whose members include firearm manufacturers, distributors, retailers, shooting ranges, instructors, training professionals, and licensed collectors.

Commonwealth Second Amendment, Inc. (Comm2A) is a Massachusetts non-profit corporation dedicated to preserving the rights of individuals under the Second Amendment to the United States Constitution. Comm2A works to promote a better understanding of those rights and has expertise in the field of Second Amendment rights that will be of aid to the Court. The issues in this case impact Comm2A's interests and those of its supporters, many of whom are personally affected by Massachusetts' firearms laws similar to the statutes challenged here. More generally, Comm2A and its supporters are concerned about interference with their peaceful exercise of their federal constitutional rights under the Second Amendment.

SUMMARY OF ARGUMENT

Do all law-abiding Americans have a right to acquire safe, modern firearms that are widely available and in common use in virtually every state in the Union? Or is the right to keep and bear arms now such a "constitutional orphan" that residents of one state can be denied access to the actual marketplace of thousands of makes and models of safe, modern handguns sold throughout the United States?

Through its "Unsafe Handgun Act" and its handgun rostering requirements, the State of California has created an illusion of choice. In truth, the Handgun Roster has become a Second Amendment time capsule, where Californians in 2019 are forced to choose from a smaller and shrinking list of available, state-approved handgun models which pre-date the Roster's "microstamping" requirement. Many improvements in modern handgun design, including safety advances, are not available today to California citizens, and that is simply fine by the State. We show here that the Roster limitations, in fact, prevent highly important and substantial choices widely available to other Americans.

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This Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008) confirmed that the Second Amendment safeguards an important individual right to keep and bear arms for lawful purposes. The *Heller* majority concluded that an outright ban on handguns within the District of Columbia failed constitutional muster under any level of possible scrutiny, but the decision left for evaluation what test might be applied in future cases.

Id., 626-27, 128 S.Ct. 2783. And in *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020 (2010), this Court held that the Second Amendment is fully incorporated against the States through the Fourteenth Amendment. 561 U.S. at 777-78.

But in the years since *Heller* and *McDonald* were decided, the lower courts have struggled to apply those cases and the heightened constitutional scrutiny they require. And even following this Court's decision in *Caetano v. Massachusetts*, with its explicit *per curiam* admonition and concurring opinion by Justice Alito, many lower courts have remained in open defiance of *Heller* in particular.

Most of the circuits have adopted what they proclaim to be intermediate scrutiny for laws and regulations that are characterized to be something other than a total ban on all firearms. But even then, the actual standards applied by the lower courts have varied widely. Some circuits have demonstrated ongoing hostility to the core concept of *Heller*, and while claiming to apply a form of intermediate scrutiny borrowed from other areas of the law, have weakened constitutional jurisprudence in order to approve restrictions on Second Amendment rights that would never be tolerated for other fundamental rights.

In purporting to apply intermediate scrutiny in Second Amendment cases, courts often do a curious thing: they routinely give unprecedented levels of deference and fact-finding favoring the government, while minimizing and trivializing the claimants' complaints and contrary evidence. They do so, in part, by minimizing and then dismissing the severity of the burden. This case presents such an example. In

essence, the Ninth Circuit evaded the question of whether the State of California's transparent scheme to prevent law-abiding people from accessing thousands of safe, modern firearms in common use for lawful purposes is unconstitutional by reducing the Petitioners' claims to trivial concerns regarding mere consumer choices.

But the Petitioners here had legitimate and provable concerns: California's irrational and restrictive "safe handgun" requirements have resulted in a ban on all new modern semi-automatic handguns that may be offered for sale in the State of California since 2013. Contrary to the Ninth Circuit's relegations of these concerns as insubstantial, they are not, and the Petitioners' claims and evidence on this point should have been given proper consideration.

This case thus demonstrates why intermediate scrutiny – or any mode of scrutiny without bright lines to protect a fundamental right from *post-hoc* rationalization – cannot be allowed to continue. Lower courts have proven not to be faithful guardians of the enumerated right, replacing real scrutiny with the very interest balancing prohibited by *Heller*. The Court should grant the Petitioners' request here and prevent the further erosion of fundamental rights through a misapplication of "heightened scrutiny."

In conjunction with the Court's grant of certiorari in *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, N.Y.*, 883 F.3d 5 (2d Cir. 2018), *cert. granted*, 2019 WL 271961 (U.S. Jan. 22, 2019) (No. 18-280) ("*NYSRPA*"), this Court should grant review to draw clear and unambiguous lines restoring order and constitutional faithfulness among the lower courts by establishing proper constitutional scrutiny

to be applied in cases like this one. It should further and unambiguously declare that having access to arms in common use for lawful purposes, such as the modern handguns that California seeks to prohibit, is indeed constitutionally protected.

ARGUMENT

I. The Ninth Circuit Was Improperly Dismissive of the Actual Burdens on Second Amendment Rights Imposed by the Roster.

The Petitioners have challenged the provisions of California's "Unsafe Handgun Act," found generally at Cal. Penal Code § 31900 et seq., and the California Dept. of Justice's "Roster of Certified Handguns," ("Roster") the requirements of which are found generally at 11 Cal. Code of Regs. § 4046 et seq. Since 2007, all new models of semi-automatic pistols[2] offered for sale in gun stores in California must be equipped with certain purported safety components, including chamber load indicators and magazine detachment mechanisms. Cal. Pen. Code § 31910(b)(5). And since 2013, all new models of semi-automatic pistols must also be equipped with a much-debated microstamping feature, which is not a safety measure at all, but is only and even then disputedly a law enforcement tool, as the majority opinion below acknowledged. *Pena v. Lindley*, 898 F.3d 969, 974 (9th Cir. 2018) (citing Cal. Pen. Code § 31910(b)(7)).

Absent these required elements, no new semi-automatic handguns may be offered for sale, or sold by ordinary licensed firearms dealers in commercial transactions. Since 2001, the California Dept. of

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[2] The "vast majority" of handguns sold in the United States today are semi-automatic. *Heller v. D.C.*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting). The other categories of handguns on the State's Roster are revolvers and derringers.

Justice has been required to publish and maintain a "Roster" of handguns deemed not to be "unsafe handguns," by listing the manufacturer, model number, and model name. Cal. Pen. Code § 32015. California's Penal Code otherwise and generally prohibits the sale of "unsafe handguns," i.e., all handguns that are presumed to be "unsafe" merely by virtue of the fact that they have not been listed on the Roster. Cal. Pen. Code § 32000, subdiv. (a).

The Ninth Circuit has adopted a "two-step inquiry" in considering Second Amendment challenges to firearms regulations. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). This two-step approach first asks the courts to examine whether the challenged law burdens conduct protected by the Second Amendment, and if so, directs courts to apply an appropriate level of scrutiny. *Id.* This two-step approach has generally been adopted by the circuit courts. *See*, *Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018) (summarizing circuit cases).

In the opinion below, the Ninth Circuit bypassed the first step entirely, rather than wrestle with the involved question of whether the UHA regulations were "presumptively lawful" longstanding prohibitions, or were "conditions and qualifications on the commercial sale of arms." *Pena*, 898 F.3d at 976. The court's decision suggested that this was too difficult an inquiry, and that by avoiding the question, and simply presuming a burden on Second Amendment conduct, it would not have to engage in an extended discussion on the point, as it had in *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc), *cert. denied sub nom. Teixeira v. Alameda Cty., Cal.*, 138 S.Ct. 1988 (2018).

But in presuming a burden on Second Amendment rights, and bypassing the first step, the court also glossed over the important question of whether the UHA regulations implicated the core of the Second Amendment's right to bear arms for the purpose of self-defense within the home. 898 F.3d at 977. Indeed, if it had done so, it would have been required to apply a different standard altogether. *See*, *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960–61 (9th Cir. 2014) (when ascertaining the appropriate level of scrutiny, "just as in the First Amendment context," a court must consider: (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right), *cert. denied*, 135 S.Ct. 2799 (2015).

Instead, the court reframed the question on its own terms, and then marginalized it as one involving mere consumer choices, much as the en banc court had done in *Teixeira*, rather than confront what the Petitioners were actually contending: that consumers being deprived of meaningful choices in firearms essentially undermines the right to acquire arms to keep and bear in the first place. If the court had wished to consider it further, it would have found plenty of authority for this proposition. See, e.g., *Jackson*, 746 F.3d at 968 (a prohibition on the sale of certain types of ammunition burdened the core Second Amendment right); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (the right to possess firearms for protection implies a corresponding right to acquire them.)

Rather than confronting the core rights question, however, the court below explained away

the burdens as insubstantial. It simply concluded that "[b]ecause the restrictions do not substantially burden any such right, intermediate scrutiny is appropriate." *Pena*, 898 F.3d at 977. The court then began its analysis using an intermediate scrutiny standard.

A. The Burden on Second Amendment Rights is Substantial.

That the court below deflected and then minimized the severity of the burden on Second Amendment rights, affected not just the Petitioners' individualized concerns, but those of many would-be handgun purchasers in California. The Petitioners had pointed out the declining number of handguns available for sale on the Roster. But the court below trivialized the severity of the burden, and then blithely dismissed this concern out of hand, stating:

> [S]imply showing that the number of entries on the roster has decreased does not tell us much about whether the availability of 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.

Pena, 898 F.3d at 979, n.9 (emphasis original). The majority opinion then and simply concluded: "The mere fact of a declining number of rostered handguns does not satisfy Purchasers' obligation to show a substantial burden." *Id.*

The Ninth Circuit's casual brushing aside of the practical effects of a total ban on newer, safe, modern handguns here is yet another example of the disturbing trend within the Ninth Circuit and others

to treat the Second Amendment as "a disfavored right." *Silvester v. Becerra*, 138 S.Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari). Here and specifically, the Ninth Circuit did so by isolating separate infringements upon the right, and then recharacterizing and trivializing their individualized effects in order to casually dismiss the collective effect. Likewise, in *Teixeira*, a case which challenged a ban on new gun stores within a county, the Ninth Circuit framed the case as one involving a commercial right, not a right to have access to and acquire firearms, and dismissed one of the claims involving the ability to acquire other firearms services as seeking "a particular retail experience." *Teixeira*, 873 F.3d at 680 n.13. Judge Bea was moved to remark in dissent in that case that the majority's "characterization of the services to be offered by Appellants pooh-poohs the alleged needs and demands of the firearm buyers to meet those several needs and demands at a single gun store." *Id.,* at 696 (Bea, J., dissenting). Similarly, in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016), the Ninth Circuit considered the burden of making known, law-abiding gun owners nevertheless subject to additional waiting periods even after the State's background check was successfully passed for subsequent gun purchases. Notwithstanding the judgment of the district court following a three-day bench trial, the Ninth Circuit dismissed "the actual effect" of such laws as "very small[,]" stating somewhat condescendingly that "[t]here is […] nothing new in having to wait for the delivery of a weapon." 843 F.3d at 827.

In the present case, the Ninth Circuit was similarly dismissive of whether a regulatory scheme that effectively amounts to a complete ban on the sale

of new, modern, and safe semi-automatic handguns is really anything to complain about. Its casual treatment of such effect as insubstantial reminds us of this Court's prescient caution that such case-by-case determinations should be taken out of the hands of judges to determine for themselves whether the right "is really worth insisting upon." *Heller*, 554 U.S. at 634–35, 128 S.Ct. at 2821.

The district court, and the Ninth Circuit, accepted at face value the State's contention that the Petitioners "maintained access to nearly 1,000 types of firearms on the roster, all of which were approved for sale in California." *Id.*, 898 F.3d at 975. But in fact, this assertion is already outdated. While the Roster may once have had over 1,000 handguns in its database as touted, today it has shrunk to just some 763 approved handguns.[3] Of those, 27 are classified by the California Department of Justice as "Derringers," 268 as "revolvers," and the remaining 468 are "pistols" (generally semi-automatic in function). But even those numbers are deceptive. Of the 27 Derringer handguns currently listed, only 9 are distinguishable as unique makes and models presenting a substantive difference to a consumer (such as the base alloy used in its construction, its chambering in one caliber or another, and the like); a full two-thirds of these 27 Derringer listings are simply aesthetic variants having some non-material difference in its form or function, e.g., accent colors. Of the Roster's 268 revolvers, only about

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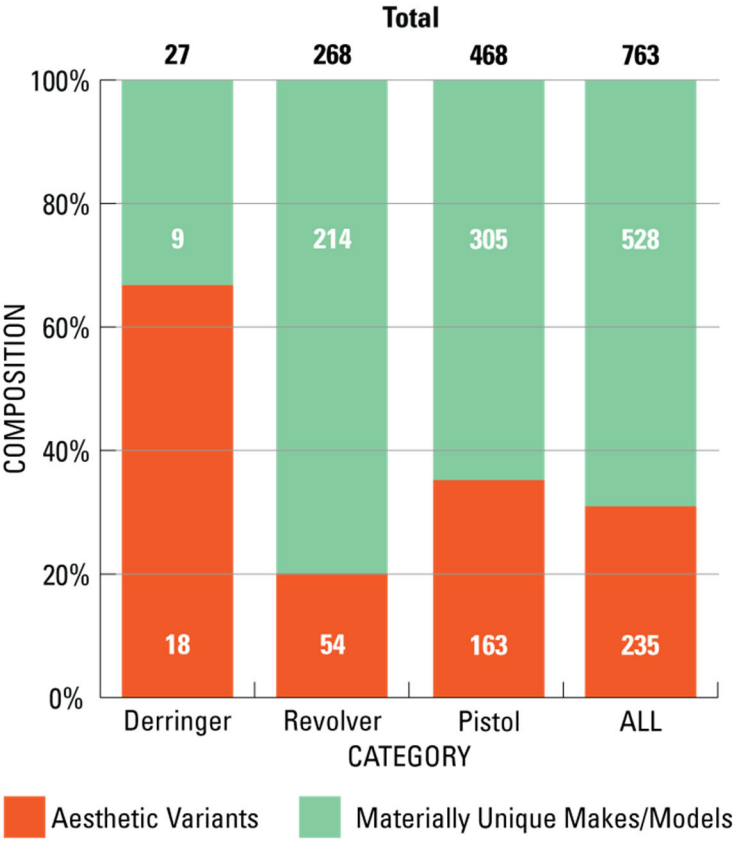
[3] Notably, there are currently 1,439 handguns listed as "de-certified" and removed from the Roster—nearly twice as many as exist on it today. See https://oag.ca.gov/firearms/certguns and https://oag.ca.gov/sites/oag.ca.gov/files/pdfs/firearms/removed.pdf.

214 are distinguishable as unique makes and models. And of the 468 semi-automatic pistols currently listed, over one third (163) are simply aesthetic variants, again, with very minor differences. In sum, as of today, the actual marketplace of unique makes, models, and calibers of handguns available for sale in California is only about 528 different handgun designs.[4] Accounting for these mere aesthetic variations, the Roster actually appears as follows:



[4] *Amici*'s findings and methodology of this count may be found at https://www.firearmspolicy.org/california-handgun-roster

The State of California, as endorsed by the Ninth Circuit's majority's opinion in *Pena*, is simply propping up an illusion of choice. As shown, there is an increasingly diminishing list of available of actual variations of handguns for sale, and that is simply fine by the State. Eventually, the state's choices will emulate what Henry Ford once remarked of his Model T: "Any customer can have a car painted any color that he wants so long as it is black." Henry Ford, *My Life and Work* 72 (1922).

In practical effect, though, California's "safe handgun" roster scheme is a long-term prohibition on the ownership of modern handguns – "the quintessential self-defense weapon[,]" *Heller*, 554 U.S. at 629 – through attrition. If the Petitioners' evidence was to be given any credit whatsoever, and the Legislature has indeed adopted what amounts to an effective ban on the sale of *new* semi-automatic handguns in California, as evidenced by ten years of advances in firearm technology not available to California citizens, then as Judge Bybee correctly deduced, the safe handgun requirements "would severely restrict what handguns Californians can purchase without advancing the State's interest in solving handgun crimes – or any government interest – one iota." 898 F.3d at 989 (Bybee, J., dissenting in part). And that is a proposition not to be so easily trivialized and dismissed. For taken to its logical terminus, the State of California could otherwise and theoretically use its Roster requirements to allow only *one* handgun to be sold under its approved list, and then claim that consumers still have the right to defend themselves. After all, the court below opined, "it is not the number of handguns on the roster that matters, it is the impact on self-defense in the home."

898 F.3d at 979, n.9. So it would follow that if only *one* state-approved model of handgun alone were to be found suitable for self-defense purposes, the core right of self-defense in the home would still not be impaired or burdened.

We think the Ninth Circuit could not so easily sweep the effect of this law under the rug by trivializing those concerns. The Petitioners should have had the opportunity to show that those concerns were indeed substantial.

B. The Handgun Roster Requirements Amount to a Categorical Ban on Firearms in Common Use.

If this all sounds like a familiar refrain, it is because history often rhymes, as Mark Twain is reported to have said. We recall that *Heller* itself sprang from review of a decision originally called *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), wherein the District of Columbia had attempted to prohibit all pistols not registered in the District prior to 1976. 478 F.3d at 400. The District of Columbia had attempted to justify such a broad sweep of its prohibition by claiming that "since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament." *Id*. The D.C. Circuit found "that argument frivolous." It continued:

> It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined – as we have done – that handguns are "Arms" referred to in the Second

> Amendment, it is not open to the District to ban them. *See Kerner,* 107 S.E. at 225 ("To exclude all pistols ... is not a regulation, but a prohibition, of ... 'arms' which the people are entitled to bear."). Indeed, the pistol is the most preferred firearm in the nation to "keep" and use for protection of one's home and family.

Parker, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008) (citing *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 225 (1921).

And of course, this Court's ultimate decision in *Heller* resoundingly rejected the District's argument as well, when the majority stated:

> It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.

Heller, 554 U.S. 570, 629, 128 S.Ct. 2783, 2818 (2008).

This case presents the opportunity for this Court to reaffirm that it meant what it said in *Heller*, and that the Second Amendment guarantees the right to keep weapons "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. at 625, 128 S.Ct. at 2815-16; *Caetano v. Massachusetts*, __ U.S. __, 136 S.Ct. 1027, 1030 (2016). Moreover, a ban that "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose" cannot stand constitutional

scrutiny under any standard. *Heller*, 554 U.S. at 628-29, 128 S.Ct. at 2817–18.

And thus, if California's UHA roster requirements amount to a *de facto* ban of all new handguns offered for sale in California, as Judge Bybee foresaw in his partial dissent, the restriction could not have been subject to a means-end scrutiny analysis in the first place, because the *practical* effect was a categorical ban. In such cases, means-end analysis is not to be invoked when a textual and historical analysis shows that the law at issue effectuates a ban against an entire category of protected firearms. In other words, *Heller* commands that state governments may only ban such classes of guns that have been banned in our "historical tradition," such as guns that are "dangerous and unusual," and thus are not the sort of lawful weapons that citizens have commonly possessed and used for self-defense. *Heller*, 554 U.S. at 627-628. If the law amounts to an impermissible ban on such a category of firearms, unless one of the narrow set of "longstanding" exceptions happens to apply, it must be struck down without resort to or need for any "level of scrutiny." *Id*., at 628-629.

As stated in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017):

> [U]nder [*Heller*], 'complete prohibition[s]' of Second Amendment rights are always invalid. […] It's appropriate to strike down such 'total ban[s]' without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right. [...] With this categorical approach to such bans, [*Heller*] ensured that

> judicial tests for implementing gun rights would not be misused to swallow those rights whole.

864 F.3d at 665 (citing *Heller*, 554 U.S. at 629). *See also*, 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, 1463 (2009) ("Absent [from *Heller*] is any inquiry into whether the law is necessary to serve a compelling government interest in preventing death and crime").

In this regard, *Heller* itself ultimately undertook the categorical approach, and held simply that the handgun ban at issue there "amount[ed] to a prohibition of an entire class of 'arms' [the handgun] that is overwhelmingly chosen by American society for that lawful purpose." *Heller*, 554 U.S. at 628. It continued that since the prohibition extended to the home, where the need for self-defense was most acute, that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearms in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster." *Id*., at 628-629.

Therefore, the Ninth Circuit in this case could not simply assume the existence of a Second Amendment burden in order to avoid the difficult question of the historical scope of the right, in order to skip straight into a scrutiny analysis. If the ban had *expressly* been stated to prohibit a named category of guns, *Heller* demanded that such a categorical ban could only be justified if they had been banned "in our 'historical tradition'—namely, guns that are 'dangerous and unusual' and thus are not 'the sorts of

lawful weapons that' citizens typically 'possess [ ] at home.'" *Heller II*, 670 F.3d at 1271–72 (Kavanaugh, J., dissenting) (citing *Heller*, 554 U.S. at 627). We see no reason why a clever but transparent statutory scheme that *amounts* to an effective ban of the sale of a category of weapons – that is, all semi-automatic handguns designed and produced after 2013 – should fare any differently.

These are not trivial concerns, but are realized in real-world, every day, practical burdens on the right. Newer generations of handguns that have been made available nationally incorporate better alloys, configurable grip options, facilitate better firearm manipulation and handling, and feature improvements in their concealability. These are not simply better generic, non-functional consumer choices, such as colors or styles. For example, newer-generation Glock pistols, among other makes, feature size-adjustable backstraps and improved grip textures that allow persons with smaller hands and of smaller stature generally to more easily manipulate and handle them. Magazine release mechanisms have been enlarged and are better placed, likewise, for shooters of all hand sizes. Magazine release mechanisms on newer-generation pistols like Glocks are also ambidextrous, that is, their position can be switched to accommodate both right-handed and left-handed shooters. Newly designed recoil springs supposedly dampen perceived recoil, aiding in accuracy. Improvements in alloys, combined with polymer frames, make many pistols more durable, lightweight, and resistant to corrosion. Changes in magazine architecture allow more rounds of ammunition to be "stacked" within one magazine in some models, which may be of particular importance

to citizens in jurisdictions having magazine capacity limits. And an increase in concealed carry firearms nationally has resulted in more offerings that are lightweight, and more easily concealable (thereby preventing accidental exposures of firearms on the person).

But alas, not for Californians. As an ironic and presumably unintended consequence, new gun owners in California are actually made *less* safe by not having access to these improvements. For *true* firearm safety is not just about government-mandated mechanical features, but arises from familiarity and ease of use, comfort, confidence, and above all else, training and practice. *See*, *Ezell*, 651 F.3d at 708 (the right to maintain proficiency in firearm use is "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense"). But a California citizen who wishes to purchase her first handgun from a local gun store, and perhaps knows nobody else who actually owns a gun or knows how to use one, has sharply limited choices. If she wants to buy a Glock pistol, for example, she is today limited to the third generation of Glock pistols that are now over 20 years old, and which might contain none of these new ergonomic, practical, and safety advances.

This result may be fine for a State that is less concerned with actual gun safety, and more concerned with restricting access to firearms generally. But for this and future generations of law-abiding California citizens who will have been deprived of these practical and safety improvements, it is not enough to say that they at least had *some* choices and that they should be content with those.

II. This Case Highlights Why Intermediate Scrutiny is Inappropriate in Second Amendment Cases

This case further demonstrates why the lower courts' defiance of *Heller*, and adopting balancing tests of the kind expressly prevented by that decision, cannot be countenanced, particularly where the regulation at issue effectively amounts to a ban of an entire class of commonly-held firearms.

As has been urged of this Court in the last few years, the lower courts' adoption of intermediate scrutiny in Second Amendment cases has simply become an unrecognizable distortion of that standard, for the reason that the lower court deference to legislative determinations to prohibit firearms no longer puts such prohibitions to any meaningful evidentiary test.

In criticizing the lower court opinion below, Judge Bybee was correct: in the face of conflicting evidence, the district court could not conclude, on summary judgment, that there was a reasonable fit between the microstamping requirement and the State's goal in solving handgun crimes. *Pena*, 898 F.3d at 989 (Bybee, J., concurring and dissenting). The majority opinion indeed "offer[ed] 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." *Id.*, at 994. He concluded: "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." *Id*.

Under *actual* intermediate scrutiny, and in other contexts, the government bears the burden of proof to demonstrate a reasonable fit between the

challenged regulation and a substantial governmental objective that the law ostensibly advances. *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480–81, 109 S.Ct. 3028, 3035 (1989). To carry this burden, even when deferring to a legislative body, the courts must still insure that the legislative body has drawn "reasonable inferences" based upon "substantial evidence" that will actually support its proffered justification. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195, 117 S.Ct. 1174, 1189 (1997) (involving commercial speech). And the regulation must often be more than merely "relevant" to the problem at hand. Indeed, staying within the related First Amendment context, the government is typically put to the evidentiary test to show that the harms it recites are not only real, but "that [the speech] restriction will in fact alleviate them to a material degree." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1177 (9th Cir. 2018) (citing *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188, 119 S.Ct. 1923 (1999). This same evidentiary burden should apply with equal force to Second Amendment cases, where important fundamental rights are also at stake. See *Ezell*, 651 F.3d at 706–07 ("Both *Heller* and *McDonald* suggest that First Amendment analogues are more appropriate, […] and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context[.]") (citing *Heller*, 554 U.S. at 582, 595, 635; *McDonald*, 130 S.Ct. at 3045).

However, in Second Amendment cases, as shown in this case, the courts essentially turn this evidentiary burden on its head. The opinion below did so, firstly, by minimizing the State's evidentiary burden and downplaying the very concept of

"evidence" in the first place: "It is important to note that we are weighing a legislative judgment, not evidence in a criminal trial," it noted. *Pena*, 898 F.3d at 979. It then examined the legislative history, which dealt with the alleged government interest at stake (unsolved handgun crimes), and allowed the Legislature to craft or delegate[5] the supposed cure. *Id.*, at 982. It then suggested that the Petitioners could not come up with a better idea. "Purchasers do not suggest a less invasive approach to curbing unsolved handgun homicides[,]" *id.*, as if to suggest that as long as any handgun homicides remain unsolved, it was incumbent upon the Petitioners and other law-abiding citizens to figure out how they might be solved.

In any event, this all sounds suspiciously like rational basis review, where the burden rests with the challenger to negate every conceivable basis that might support a challenged law. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 1006 (1973). And likewise, for rational basis review, "[a] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v.*

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[5]As Judge Bybee observed in his concurring and dissenting opinion, the California Department of Justice's regulations which set forth the demanding (some might say, arbitrary) testing protocols to satisfy the microstamping requirement were promulgated *after* the California Legislature decreed that microstamping would be a requirement. 898 F.3d at 991 (Bybee, J., concurring and dissenting). Therefore, it is hardly correct to say that the court deferred to legislative experimentation, but rather, to a legislature's decision to defer the matter to an agency – one which is generally hostile to the concept of firearm ownership in civilian hands.

Beach Commc'ns, Inc., 508 U.S. 307, 315, 113 S.Ct. 2096, 2102 (1993).

Here, armed with this relaxed approach to the "evidentiary standard" applicable to state legislatures, and in the name of legislative experimentation, the court below concluded that "California's evidence carries the day in the legislative context. The state produced evidence that compliance with the microstamping requirement is 'technologically possible[.]'" *Pena*, 898 F.3d at 983. It recognized the evidentiary deficiencies in the legislative record, but claimed that legislatures should get wide latitude in the name of legislative experimentation. At the same time, it gave short shrift to the Petitioners' evidence to the contrary, suggesting that the gun manufacturers were simply being recalcitrant. "Simply because no gun manufacturer is 'even considering trying' to implement the technology, it does not follow that microstamping is technologically infeasible." *Id*.

This is simply the type of interest-balancing that the *Heller* majority opinion expressly rejected. *See*, Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 706-707 (2012) (the lower courts "have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.")

The unnatural level of deference given to legislative conjecture, while wholly ignoring conflicting evidence to the contrary, leads us to

conclude that something is indeed "seriously amiss" in the lower courts' treatment of Second Amendment claims. *Jackson v. City & Cty. of San Francisco*, 135 S.Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of certiorari). It is time to resolve the issue. The petition should be granted to clarify and reaffirm that the heightened level of scrutiny commanded by *Heller* demands more respect of Second Amendment claims than what has been given by lower courts in the past decade, and that categorical bans disguised as safety measures cannot be justified at all.

CONCLUSION

In conjunction with this Court's recent grant of certiorari in *NYSPRA v. City of New York*, this Court has the opportunity to reassert what it meant in *Heller* and ensure the next ten years of Second Amendment litigation are guided by real constitutional scrutiny. The Court should grant the petition.

Respectfully submitted,

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