No. 18-_____

In The
Supreme Court of the United States

IVAN PENA, DONA CROSTON, ROY VARGAS, BRETT THOMAS, SECOND AMENDMENT FOUNDATION, INC., AND CALGUNS FOUNDATION, INC.,

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

PETITION FOR A WRIT OF CERTIORARI

DONALD E.J. KILMER, JR.
LAW OFFICES OF DONALD KILMER
1645 Willow Street, Suite 150
San Jose, CA 95125
408.264.8489
don@dklawoffice.com

ALAN GURA
Counsel of Record
GURA PLLC
916 Prince Street,
Suite 107
Alexandria, VA 22314
703.835.9085
alan@gurapllc.com

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

California generally makes handguns unavailable, except those "determine[d]" to be "not unsafe." 11 Cal. Code Regs. § 4070(a); Cal. Penal Code § 32000(a).

California's roster of "not unsafe" handguns is shrinking, as manufacturers cannot indefinitely support grandfathered models, and the state's design demands have grown more restrictive. Since 2013, California requires new semiautomatic handguns to stamp ejected shell casings with unique microscopic arrays, but this "microstamping" technology does not exist in the market. California thus bars the acquisition of *all* semiautomatic handguns designed since 2013. It also bans the acquisition of most semiautomatic handguns for lacking magazine disconnect mechanisms and loaded chamber indicators, though it instructs consumers to disregard these features. Various exemptions from the ban privilege law enforcement, the entertainment industry, and surviving spouses and domestic partners of police officers, among others. The Ninth Circuit upheld California's handgun prohibition under "intermediate scrutiny," albeit over a dissent as to the microstamping requirement.

The question presented is whether California's "Unsafe Handgun Act," Cal. Penal Code § 31900 et seq., violates the Second Amendment by banning handguns of the kind in common use for traditional lawful purposes.

RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Second Amendment Foundation, Inc. or Calguns Foundation, Inc.

LIST OF PARTIES

Petitioners are Ivan Pena, Dona Croston, Roy Vargas, Brett Thomas, Second Amendment Foundation, Inc., and Calguns Foundation, Inc., who were plaintiffs and appellants below.

Respondent is Martin Horan, Director of the California Department of Justice Bureau of Firearms. His predecessor, Stephen Lindley, was the defendant and appellee below. Lindley succeeded the initial defendant, Wilfredo Cid.

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Ivan Pena, Dona Croston, Roy Vargas, Brett Thomas, Second Amendment Foundation, Inc., and Calguns Foundation, Inc. respectfully petition this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case below.

OPINIONS BELOW

The Ninth Circuit's opinion, App. 1a-92a, is reported at 898 F.3d 969. The district court's opinion, App. 93a-135a, is unpublished, but available at 2015 WL 854684 and 2015 U.S. Dist. LEXIS 23575.

JURISDICTION

The court of appeals entered its judgment on August 3, 2018. On August 20, 2018, Chief Justice Roberts extended the time for filing this petition to and including December 31, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Second Amendment, Section One of the Fourteenth Amendment, and the relevant California statutes and regulations are reproduced at App. 136a-178a.

STATEMENT

"[T]he absolute prohibition of handguns held and used for self-defense in the home" is no longer "off the table." *District of Columbia* v. *Heller*, 554 U.S. 570 (2008).

No one should be surprised. Nearly three years ago, well-into the Ninth Circuit's project of administering the Second Amendment "the Death of the Thousand Cuts," *Teixeira* v. *Cnty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017) (en banc) (Tallman, J., dissenting), reasonable observers of the lower courts' revolt against *Heller* predicted that the opinion "may soon be regarded as mostly symbolic." Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921, 962-63 (2016). That time has arrived. With the decision below, the legality of handgun possession in the Nation's most populous state is a matter of legislative grace.

Employing the interest-balancing approach forbidden by *Heller* but everywhere in common use, the Ninth Circuit upheld California's presumption that all handguns are "unsafe," excepting only those increasingly rare specimens deemed "not unsafe" per the legislature's unreviewable judgment. Interest-balancing blesses California's innovation in not banning handguns outright, but slowly achieving the same result by requiring that handguns meet impossible administrative requirements, or contain impractical or even fictional features. The Ninth Circuit then shifted the blame to manufacturers, whom it accused of voluntarily declining to produce the only (fictional) handguns that the legislature deigned to tolerate. After all, legislative notions, unlike scientific or market realities reflecting the People's traditional expectations, are entitled to judicial deference.

The state would respond that its law is not (yet) a *complete* handgun prohibition. Some grandfathered models are indeed allowed, as are various exceptions and exemptions from the prohibition. But these provisions only belie claims that the scheme advances public safety. And they are by no means required to sustain the Ninth Circuit's decision. Anything approaching heightened scrutiny as that concept is understood outside the Second Amendment sphere would have terminated California's handgun rostering scheme.

But make no mistake: having re-imagined a categorical arms ban as merely the regulation of the manner in which guns are offered, *every* prohibition—including a complete handgun prohibition—is now redeemable under interest-balancing.

"If all of this feels complicated and backwards, welcome to the strange world of the Second Amendment." App. 42a.

Of course a prohibition need not be complete to offend the Constitution. A reader stuck with PAUL CLIFFORD because LOLITA is banned still leaves the library with a book, but no court would uphold that First Amendment violation merely because the government had not (yet) banned some critical mass of reading material. In accepting this defense of a law banning most handguns, the opinion below demonstrates just how far the Second Amendment stands below the status of other fundamental rights.

Absent this Court's intervention, the Second Amendment will remain illusory for most Americans. A writ of certiorari should be granted.

A. California's "Unsafe Handgun Act"

1. California's "Unsafe Handgun Act," Cal. Penal Code § 31900 et seq. ("UHA") generally prohibits the manufacture, import, or distribution of handguns that do not meet the state's design requirements. Cal. Penal Code §§ 31910, 32000, 32005.[1] Handguns meeting the state's design requirements are then tested to ensure compliance with drop safety and firing reliability standards before being placed on California's approved handgun roster. *Id.* §§ 31900, 31905, 32010, 32015.[2]

2. Most modern handguns in the United States are semiautomatics, not revolvers. *See Firearms Commerce in the United States, Annual Statistical Update 2018*, U.S. Dept. of Justice, BATFE, https://www.atf.gov/file/130436/download (last visited Dec. 24, 2018). Perhaps 70% of handguns sold in California are semiautomatics. ER 161.[3]

3. To be eligible for consideration as not "unsafe," all new semiautomatic handguns with detachable

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[1] All further statutory references are to the California Penal Code unless otherwise noted.

[2] Petitioners do not challenge the drop safety and firing reliability requirements, standing alone.

[3] "ER__" refers to the excerpts of record that petitioners filed with the Ninth Circuit.

magazines must have a "magazine disconnect mechanism" ("MDM"). If they utilize center-fire ammunition (in practical terms, all calibers above .22), new semiautomatics must have a chamber loaded indicator ("CLI"). Section 31910(b)(5), (6). An MDM prevents the handgun from firing a round left in its chamber if the magazine is detached. Section 16900. A CLI is "a device that plainly indicates that a cartridge is in the firing chamber," Section 16380. California regulators do not always agree that manufacturers' submitted CLIs provide adequate notice. ER 152-57.

Given the rarity of CLIs and MDMs, handguns lacking these features are in common use, comprising the overwhelming majority of handguns currently for sale in the United States. ER 126, 129. The sponsor of the bill imposing these roster requirements noted that CLIs and MDMs were available on only perhaps 11% and 14% of semiautomatic handguns, respectively, and hoped that the state's market size would alter the nature of guns in America. ER 159-61, 163. "[It] is arguable that a requirement in California would 'drive' the technology of chamber load indicators." ER 160. "It might also be assumed that a mandate in California would drive technology in the market for magazine disconnect devices." ER 161.

This has not come to pass. The CLI and MDM requirements thus ban from California's market many common handguns, including "the overwhelming majority" of Smith & Wesson's semiautomatic handguns, ER 126, two of Ruger's most popular models, ER 129,

and all Glock models introduced since 2008. *See* Br. Amicus Curiae of Glock, Inc., Dist. Ct. R. 66 at 1.

California requires handgun consumers to pass a written handgun safety test. Section 31610, et seq. The test teaches that MDMs and CLIs should not be relied upon. The first rule tested is: "Treat all guns as if they are loaded." ER 165. The test's study guide instructs that in order to verify a semiautomatic handgun is unloaded, one must remove the magazine and visually inspect the chamber to verify that it is empty. ER 170-72.

4. As of May 17, 2013, all semiautomatic handguns not already rostered cannot be submitted for roster listing unless they employ so-called "microstamping" technology, whereby a unique identifying "microscopic array of characters" located "in two or more places on the interior working parts of the pistol" are "transferred by imprinting on each cartridge case when the firearm is fired. . . ." Section 31910(b)(7)(A); ER 43-45.

No handgun performs microstamping. ER 194. No firearms manufacturer has submitted any microstamping-compliant handguns for testing, ER 196-97, and respondent has no information as to whether any manufacturer will ever produce microstamping handguns, ER 194. The Chief Executives of two of the country's largest firearms manufacturers, Sturm Ruger and Smith & Wesson; and a senior executive with the firearms industry's accredited standards development organization and leading trade association,

all testified that no plans exist to introduce microstamping because it cannot be practically implemented. ER 39-40, 126-27, 129-30. Moreover, studies demonstrate that microstamping can easily be defeated with sandpaper, or by replacing the firing pin—the most common firearm repair, which is also cheap and simple. ER 41.

In any event, no new semiautomatic handguns have been approved for sale in California for over five years, and none are forthcoming. Manufacturers had challenged the microstamping requirement on grounds that "[t]he law never requires impossibilities," Cal. Civil Code § 3531, but California's Supreme Court foreclosed that claim, holding that the bar on impossibilities does not authorize an exception to legislative mandates, *National Shooting Sports Found.* v. *State of California*, 5 Cal. 5th 428 (2018).

5. Once rostered, a handgun's listing may be renewed annually upon payment of a fee. Section 32015(b)(2); 11 Cal. Code Regs. 4071. The manufacturer must also certify that the handgun has not been modified. ER 36, ¶14. Firearms rostered prior to the implementation of each new additional mechanical requirement (CLI, MDM, microstamping) are thus "grandfathered." Manufacturers may submit new models for listing that are identical to rostered handguns but for minor cosmetic differences. Section 32030.

However, this "similar handgun" exception is quite narrow. Handguns are not considered similar, but rather "new" models requiring CLIs, MDMs, and

microstamping, upon the slightest update. Outsourcing a single minor component to a different vendor who utilizes a different manufacturing process, or improving the metallurgical composition of any part, triggers all current mechanical requirements. ER 38, ¶19.

Manufacturers must update their designs and production processes to remain competitive. ER 126, 129. They cannot practically maintain two separate product lines—an obsolete one for California, and a normally-evolved line for everyone else. ER 126, 129. Microstamping's infeasibility, combined with this restrictive approach to "similar" guns, effectively froze the design and manufacturing processes of all semiautomatic handguns nearly six years ago. ER 38-39. Over time, even previously "safe" handguns are forced off the roster as they are updated without CLIs, MDMs, and microstamping.

The effect is dramatic. "[T]he microstamping requirement is now forcing Ruger to cease semiautomatic handgun sales in California as its handguns are forced off the roster." ER 127. Smith & Wesson, which has already stopped selling many of its more popular handguns in California, believes that "it may be unrealistic" for it to maintain semiautomatic handgun sales in the state. ER 130. As noted *supra*, Glock cannot sell any handgun introduced since 2008 (the year *Heller* was decided).

At the end of 2013, the roster contained 1,273 handguns, including 883 semiautomatics. ER 132. By July, 2014, those numbers had dropped to 980

handguns, including 735 semiautomatics. Dist. Ct. R. 91 at 5. As of this writing, only 828 total handgun models remain, including 531 semiautomatics. *See Roster of Handguns Certified for Sale*, https://oag.ca.gov/firearms/certguns?make=All (last visited Dec. 24, 2018). In comparison, California has de-certified 1,323 handguns previously declared "not unsafe," including 1,024 semiautomatics. *See De-Certified Handgun Models*, Cal. Dep't of Justice Bureau of Firearms, http://oag.ca.gov/sites/oag.ca.gov/files/pdfs/firearms/removed.pdf (last visited Dec. 24, 2018).

6. The roster scheme exempts firearms defined as curios or relics under federal law, Sections 32000(b)(3), 32110(g); the purchase of any firearm by any law enforcement officer, Section 32000(b)(4), (6); the purchase of a law enforcement officer's service handgun by the officer's surviving spouse or partner, Section 32000(b)(5); pistols designed for use in Olympic target shooting events, Section 32105; certain single-action revolvers, Section 32100; and the sale, loan, or transfer of any firearm that is to be used as a film prop, Section 32110(h).

By its terms, the scheme does not reach individuals moving to California who import their unrostered handguns without intending to sell them. Section 32000(a). California also exempts from the rostering law the transfer of guns between private parties, intrafamilial transfers,[4] gifts and bequests, and various

[4] The UHA does not apply to transfers "exempt from the provisions of Section 27545." Section 32110(b). Section 27545

loans, of unrostered handguns that were lawfully acquired. Section 32110.

B. The Prohibition's Impact On Petitioners

1. Ivan Pena sought to purchase a handgun that had been declared "not unsafe," but which fell off the roster when its manufacturer discontinued the model and did not renew its listing. ER 136-37, 174, 210-13.

Roy Vargas was born without an arm below the right elbow. Accordingly, he sought to buy a Glock 21-SF with an ambidextrous magazine release, which is best suited for his needs. ER 141. California approved that handgun, albeit with a standard magazine release, *id.*, but rejected the manufacturer's efforts to approve the ambidextrous release version as a "similar" gun. ER 175-88. The state would allow Vargas to purchase the approved version, and have the factory retrofit that handgun with an ambidextrous release. ER 182-83.

Dona Croston sought to purchase an unrostered Springfield Armory handgun with a stainless steel/black finish. ER 138-39. Other models of this identical

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requires private parties to complete any transfers between them through a dealer, but an exemption is provided for intra-familial transfers, Section 27875. Californians may thus receive unrostered handguns from out-of-state relatives per Section 32110(b). While Section 27585 requires such importation be processed by a dealer, an exemption to this requirement is allowed for transfers by bequest or intestate succession.

gun are listed on California's roster, albeit in different color finishes: black, green, and dark earth. ER 189-91.

Brett Thomas sought to buy the same model of the handgun in controversy in *Heller*. That model does not appear on California's handgun roster. ER 142-44, 192.

2. Each individual petitioner has identified willing sellers outside California from whom they could legally obtain their desired handguns absent the "Unsafe Handgun Act." However, petitioners refrain from completing these transactions as they fear arrest, prosecution, fine and incarceration under the Act. Petitioners further complain of the limited access, reduced price competition, and increased costs in having handguns shipped from out of state owing to the handguns' unavailability in California, even were such importation legal. ER 137, 139, 141, 143. The individual petitioners are each members of petitioners Second Amendment Foundation ("SAF") and the Calguns Foundation ("CGF"), nonprofit membership organizations that work to secure Second Amendment rights.

C. Proceedings Below

1. Petitioners brought suit in the United States District Court for the Eastern District of California, challenging the UHA on Second Amendment and Equal Protection grounds. On cross-motions for summary judgment, the district court rejected petitioners' challenge.

Although Section 32000 prohibits the importation of prohibited handguns for sale, the district court termed the individual plaintiffs' fear of prosecution for completing their proposed transactions "imaginary or speculative." App. 109a (citation omitted).[5] And although the prohibition forces petitioners to procure their desired handguns from outside the state, the district court declined to recognize their injuries in the form of increased costs. Neither did the district court acknowledge petitioners' injury in reduced price competition for handguns. App. 110a.

The district court did, however, find that whether a loss of choice occasioned by California's broad handgun ban injured the individual petitioners called for resolving the merits of their claim. *Id.* It further found that SAF and CGF had direct organizational standing to challenge the Act. The district court thus declined to reach the representational standing question. App. 113a.

Applying the familiar two-step interest-balancing approach to Second Amendment cases, the district court held that petitioners' challenge failed at step one—California's "Unsafe Handgun Act" did not burden Second Amendment rights at all. The Act merely "impos[es] conditions and qualifications on the commercial sale of arms," App. 121a (quoting *Heller*, 554 U.S. at 626-27), and does not completely prohibit the commercial sale of arms, *id.* Moreover, the Act "does

[5] The state did not deny that it would enforce the UHA against petitioners.

not effectively ban firearms." App. 123a. Because petitioners could buy non-banned handguns, "[t]his degree of regulation is negligible and does not burden plaintiffs' rights under the Second Amendment." App. 125a.

After offering that the Act merely regulates the manner of exercising the right to bear arms, App. 125a-26a, the district court reiterated that the Act is among *Heller*'s "presumptively lawful regulatory measures" and thus "falls outside the historical scope of the Second Amendment." App. 126a-27a. "The UHA does not burden plaintiffs' Second Amendment rights." App. 127a. The district court thus did not reach step two, and did not apply any heightened scrutiny. *Id.*

The district court also rejected petitioners' equal protection claims. Petitioners had objected that the Act privileges people moving into the state, who can bring their pre-owned, unrostered handguns; and people with out-of-state relatives who can gift them unrostered handguns. But the district court offered that those without out-of-state relatives might still obtain unrostered handguns in private transfers in-state. And without acknowledging the prohibition on obtaining handguns outside one's state of residence, 18 U.S.C. §§ 922(a)(3) and (b)(3), the district court offered that plaintiffs could obtain unrostered handguns in other states. App. 132a.

The district court rebuffed petitioners' equal protection challenge to the exemption for filmed entertainment because the law did not prohibit anyone from participating in such productions. App. 133a. The court

did find that the law treated law enforcement personnel differently, but held that petitioners were not similarly situated. App. 133a-35a.

2. The Ninth Circuit affirmed. Without questioning petitioners' standing, the court set out what it titled "The Supreme Court's *Heller* Framework." App. 8a. "Whether the UHA violates Purchasers' Second Amendment rights is framed by a two-step inquiry established in *Heller*." App. 9a (no citation to *Heller* supplied).

a. The court proceeded on the assumption that the case concerns conduct—the acquisition of arms—rather than a prohibition as to *which* arms may be sold (or, in practical terms, obtained), based on their physical features. Approaching the case in this fashion, the Ninth Circuit court found it too difficult to perform a step one analysis. Pointing to *Heller*'s reservation of longstanding, presumptively lawful exceptions, the court threw up its hands. "Our sister circuits have struggled to unpack the different meanings of 'presumptively lawful.' " App. 10a (citations omitted). "Our circuit similarly has strained to interpret the phrase 'conditions and qualifications on the commercial sale of arms.' " App. 11a.

Instead, the court "assume[d] without deciding that the challenged UHA provisions *burden conduct* protected by the Second Amendment because [it] conclude[d] that the statute is constitutional irrespective of that determination." App. 12a (emphasis added). "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." *Id.*

b. "Consistent with our threshold decision not to assess whether the California restrictions fall within the Second Amendment," the Ninth Circuit refused to "answer conclusively whether the UHA's restrictions implicate the core Second Amendment right of self defense of the home." App. 13a-14a (internal quotation marks omitted). "Because the restrictions do not substantially burden any such right, intermediate scrutiny is appropriate." App. 14a. The court offered that any burden on Second Amendment rights would be slight, because the UHA does not ban the possession of existing handguns, and other firearms remain available for purchase. The court also reasoned that CLIs and microstamping do not impact a handgun's performance, and that MDMs rarely would. App. 14a-18a.

The Ninth Circuit then explained what it meant by "intermediate scrutiny."

> 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.

App. 18a (internal quotations omitted). "Nor do we substitute our own policy judgment for that of the legislature." App. 19a (citation omitted). "[C]ourts must

accord substantial deference to the predictive judgments of [legislatures]." *Id.* (citation omitted).

"It is not our function to appraise the wisdom of California's decision to require new semiautomatic gun models . . . to incorporate new technology." *Id.* (internal punctuation omitted). "[W]e must allow the government to select among reasonable alternatives in its policy decisions." App. 20a (internal quotation marks omitted). "It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." *Id.* (internal quotation marks omitted).

"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." *Id.* (citation omitted).

The court upheld the MDM, CLI, and microstamping requirements under this version of "intermediate scrutiny." App. 20a-34a. Explicitly applying rational basis review, the panel also affirmed the judgment against petitioners' equal protection claims. App. 34a-37a.

c. Judge Bybee dissented from the panel's opinion as to microstamping. He agreed that California's judgment as to microstamping's efficacy is effectively unreviewable, but faulted the majority for "largely ignor[ing]" petitioners' argument that California's microstamping standards are impossible. App. 39a.

Indeed, the majority "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." App. 66a.

The record, per Judge Bybee, did not resolve the question of whether the state's demands are practically feasible. App. 39a-40a. The effective ban on all new semiautomatic handgun models, owing to microstamping's absence, "has an important secondary effect—it means that no new handguns are being sold commercially with the MDM and CLI safety features either." App. 40a (footnote omitted).

This consequence—that California permits only grandfathered, pre-2013 semiautomatics, "has a totally perverse result." *Id.*

> If [the state] has adopted safety requirements that no gun manufacturer can satisfy, then the legislature has effectively banned the sale of new handguns in 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.

Id.

Judge Bybee detailed petitioners' evidence as to the impossibility of California's requirements. "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." App. 52a (footnote omitted).

> 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.

App. 53a. Judge Bybee noted "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." *Id.*

"The district court was well aware of these factual disputes," and avoided them by holding that the case did not implicate the Second Amendment. App. 54a. Judge Bybee criticized the panel majority for deciding the dispute by deferring to the legislature, and rejected seriatim the majority's various other arguments. App. 54a-59a.

> 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. . . .

App. 59a (internal quotation marks omitted).

But "[i]f microstamping technology is feasible and as reliable as the State believes it to be, there is no purpose for relying on predictive judgment." App. 67a. Judge Bybee would have required California to demonstrate its microstamping standard's feasibility.

Because he believed the microstamping requirement failed at step two, Judge Bybee performed the step one analysis that the majority had skipped. App. 70a-71a. He attempted, at some length, to explore the meaning of *Heller*'s presumptively lawful exception for "conditions and qualifications on the commercial sale of arms," concluding that "I have no particularly good solution to defining" the "impressively capacious and difficult to cabin" term. App. 86a-87a (citations omitted). But Judge Bybee determined, as the panel had assumed, that the microstamping requirement did not fit within this exception. App. 90a.

Judge Bybee also determined that the microstamping requirement lacked historical pedigree. "[A] history of forensics [is] not a history of the laws regulating firearms." *Id.* And he rejected the claim that microstamping is analogous to serializing handguns, particularly as the microstamping edict's impact on

Second Amendment rights is not "de minimis." App. 92a. The microstamping requirement having implicated Second Amendment rights at step one, and the state having failed to carry its burden on that matter at step two, Judge Bybee dissented with respect to the microstamping issue.

REASONS FOR GRANTING THE PETITION

I. The Lower Courts Are Profoundly Divided As To Whether The Second Amendment Secures Any Meaningful Rights.

The Ninth Circuit's decision exacerbates the split described in *Mance* v. *Whitaker*, Petition for Certiorari, No. 18-663 (filed Nov. 19, 2018). At surface level the conflict is serious enough. "Disagreement abounds . . . on a crucial inquiry: What doctrinal test applies to laws burdening the Second Amendment—strict scrutiny, intermediate scrutiny, or some other evaluative framework altogether?" *Mance* v. *Sessions*, 896 F.3d 390, 394-95 (5th Cir. 2018) (citations omitted) (Jones, J., dissenting from denial of rehearing en banc). At bottom, the split is more profound still: The lower courts disagree about "whether the Second Amendment is optional." Petition for Certiorari, No. 18-663, at 21.

As discussed at greater length in *Mance*, a few judges prefer analyzing Second Amendment claims under a history, tradition, and text analysis, *see, e.g.*, *Mance*, 896 F.3d at 395 (Jones, J., dissenting from denial of rehearing en banc), but virtually all courts

reflexively submit Second Amendment cases to a two-step interest balancing test. *See Binderup* v. *Attorney Gen'l*, 836 F.3d 336, 346 (3d Cir. 2016) (en banc) (collecting cases).

Two circuits apply a threshold "substantial burden" test by which judges dismiss Second Amendment challenges, without more, simply by declaring an infringement insubstantial. *See Teixeira*, 873 F.3d at 680 & n. 14; *United States* v. *Decastro*, 682 F.3d 160, 166 (2d Cir. 2012); *contra Heller*, 554 U.S. at 634 (courts may not decide whether Second Amendment "is *really worth* insisting upon"). This threshold test is incompatible with the two-step method's usual formulation, and at least one circuit has explicitly rejected it. *See Ezell* v. *City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017).

Some courts dispense with their two-step approach if the challenged provision completely destroys a right, *see Wrenn* v. *District of Columbia*, 864 F.3d 650, 665-66 (D.C. Cir. 2017), while others are divided as to whether they may ever depart from interest-balancing. *Compare Binderup*, 836 F.3d at 344 with *id.* at 363-64 (Hardiman, J., concurring).

Cases where the government loses a Second Amendment interest-balancing exercise are exceedingly rare. The interest-balancing exercise typically amounts to little more than the rubber-stamp "deference" on display below. There is, after all, a "tendency to relax purportedly higher standards of review for less-preferred rights." *Whole Woman's Health* v.

Hellerstedt, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting) (citations omitted).

Indeed, the Ninth Circuit's decision is but the latest entry in the category of "never mind what the Second Amendment protects, the regulation is constitutional." The court correctly assumed that practically banning most handguns raises a Second Amendment eyebrow, but refused to define any of the right's substantive aspects. Having reduced the right to a cipher, out came the rubber stamp in the familiar form of "deference" and "intermediate scrutiny."

This approach—assume-without-deciding that the Second Amendment contains a right too weak to overcome the "intermediate scrutiny" incantation—is now "well-trodden." App. 12a; *see*, *e.g.*, *Woollard* v. *Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky* v. *Cnty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012); *Heller* v. *District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*"). Yet even this arguably improved on the district court's decision, holding that a broad prohibition on acquiring most handguns, including *all* semiautomatics introduced over the past five years and going forward indefinitely, does not even implicate the Second Amendment.

Eleven years ago, this Court granted certiorari to resolve the circuit split as to whether the Second Amendment guarantees any meaningful individual right. The question persists. Some courts at least try to apply the Second Amendment. Others, as seen below, are less interested. When federal appellate courts get

into the habit of refusing to examine an allegedly "fundamental" "right" because, in their words, this Court's precedent presents an inscrutable "obstacle course," App. 12a, review is needed.

II. The Court Below Upheld A Broad Handgun Ban In Contravention Of This Court's Precedent.

1. In *Heller*, this Court held that the government cannot ban handguns, as these are Second Amendment "arms" of the kind "in common use" for traditional lawful purposes rather than "dangerous and unusual weapons." *Heller*, 554 U.S. at 627 (internal quotation marks and citations omitted). Legitimate safety concerns notwithstanding, all rights bar the government from doing what it would otherwise do for beneficent reasons. The Second Amendment's "core protection" cannot be "subjected to a freestanding 'interest-balancing' approach." *Id.* at 634.

All of that was tossed aside below. California's legislature believes handguns are "unsafe" if they do not microstamp. If handguns in the United States today do not eject microstamped casings, that is too bad . . . for consumers. If approximately 90% of all semiautomatic handguns lack both MDMs and CLIs, then Californians will have to do without them. The Ninth Circuit approved this approach utilizing the method *Heller* expressly rejected: interest-balancing. The court could not be bothered to examine the Second Amendment's substantive requirements (a "constitutional obstacle

course," App. 12a), it was disinterested in questioning the Act's efficacy, and it declared manufacturers lazy without bothering to review petitioners' evidence. After all, some handguns remain available (for now).

But would the decision have come out any differently were California's law more restrictive? Under the Ninth Circuit's logic, California could ban all revolvers and derringers. Never mind microstamping, these handguns do not eject shell casings at all when fired.[6] If microstamping's absence is merely a function of manufacturers' intransigence, California merely does consumers a favor by tolerating grandfathered handguns. Everything is up for balancing.

Petitioners appreciate that Judge Bybee's interest-balancing approach was somewhat less deferential to the government, particularly on the issue of feasibility. But his dissent missed the point as well. Interest-balancing should not be in the picture, period. Banning *any* handgun of the kind in common use for traditional lawful purposes, that is not dangerous and unusual, violates the Second Amendment.

So thoroughly have the lower courts internalized Second Amendment interest-balancing that the court below assigned *Justice Scalia* credit for prescribing that approach, writing of the "two-step inquiry established in *Heller*." App. 9a. It even set out the

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[6] Petitioners are unaware of any California requirement that criminals deposit clues at crime scenes.

interest-balancing approach under the heading, "The Supreme Court's *Heller* Framework." App. 8a.

In this way, *Heller*'s legacy is following the same ignominious path set out by *United States* v. *Miller*, 307 U.S. 174 (1939). *Miller*'s "holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms. . . ." *Heller*, 554 U.S. at 622. In *Miller*, "[i]t is entirely clear that the Court's basis for saying that the Second Amendment did not apply was not that the defendants were 'bear[ing] arms' . . . for 'nonmilitary use.' Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection." *Id.* (citation omitted).

Yet absent correction by this Court, the lower courts distorted *Miller* "into unrecognizability." Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 Cumb. L. Rev. 961, 981 (1996) (footnote omitted). "For seven decades, [*Miller*] was widely understood to have endorsed [the] view" that the Second Amendment secures only a so-called "collective" right. ACLU, *Second Amendment*, https://www.aclu.org/other/second-amendment (last visited Dec. 24, 2018).

And now, only ten years after *Heller*, the lower courts read that decision as sanctioning the use of interest-balancing to uphold handgun bans. This Court should not wait another sixty years to correct this error.

2. Even if this Court's precedent allows the use of means-ends scrutiny to determine a fundamental right's content, or if categorical arms prohibitions can be resolved by interest-balancing, the Ninth Circuit's version of "intermediate scrutiny" amounted to nothing more than the rational basis review *Heller* prohibits. The lower court described its "test" almost exclusively in negative terms. It offered little more than obsequious explanations of what it could *not* do to question the government's intrusion upon a fundamental right. When the Ninth Circuit wrote "that [it] is not our task" to question California's legislative judgments, App. 20a, it meant that its task is to uphold whatever the legislature decrees.

Yet petitioners did not ask the lower court to "appraise the wisdom" of California's law. App. 19a. Petitioners asked the court to appraise the law's *constitutionality*. The Second Amendment, too, is a legislative determination of sorts. This Court's precedent still holds that the Second Amendment has a higher claim to the Ninth Circuit's "deference."

III. This Case Presents An Excellent Vehicle To Resolve The Lower Courts' Second Amendment Conflicts.

This case is well-constructed to address the lower courts' Second Amendment conflicts.

Petitioners plainly have standing. The handguns they seek to obtain are not "unsafe" as that term is understood outside California's legislature. To the extent

that constitutional avoidance might have been partially in play, with respect to the microstamping edict, California's Supreme Court has shuttered that avenue. And this Court could clarify the Second Amendment landscape without necessarily going beyond what it has already determined in *Heller*: how to address handgun bans. This case does not call upon the Court to apply the Second Amendment in any new contexts, nor does it call upon this Court to consider the existence of any corollary rights. Enforcing *Heller*, or explaining why it makes no difference here, would suffice.

The Second Amendment has sufficiently percolated over the past decade. This Court should not wait for California to tighten its handgun ban—and for other recalcitrant Second Amendment violators to gain any further encouragement from the denial of yet another petition seeking *Heller*'s enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD E.J. KILMER, JR.
LAW OFFICES OF DONALD KILMER
1645 Willow Street, Suite 150
San Jose, CA 95125
408.264.8489
don@dklawoffice.com

ALAN GURA
Counsel of Record
GURA PLLC
916 Prince Street,
Suite 107
Alexandria, VA 22314
703.835.9085
alan@gurapllc.com

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