No. 18-843

In The Supreme Court of the United States

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

Petitioners,

v.

MARTIN HORAN, DIRECTOR, CALIFORNIA DEPARTMENT 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* PROFESSORS OF SECOND AMENDMENT LAW, CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS, MOUNTAIN STATES LEGAL FOUNDATION, JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP, INDEPENDENCE INSTITUTE, AND MILLENNIAL POLICY CENTER IN SUPPORT OF PETITIONERS

JOSEPH G.S. GREENLEE
MILLENNIAL POLICY CENTER
3443 S. Galena St., #120
Denver, CO 80231
(970) 485-3303
josephgreenlee@gmail.com

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 E. 16th Ave.
Denver, CO 80203
(303) 279-6536
david@i2i.org

[Additional Counsel Listed on Inside Cover]

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

CODY J. WISNIEWSKI
MOUNTAIN STATES LEGAL FOUNDATION
2596 S. Lewis Way
Lakewood, CO 80227
(303) 292-2021
cody@mountainstateslegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI CURIAE*[1]

***Amici* professors** are law professors who teach and write on the Second Amendment: Randy Barnett (Georgetown), Royce Barondes (Missouri), Robert Cottrol (George Washington), Nicholas Johnson (Fordham), Nelson Lund (George Mason), Joyce Malcolm (George Mason), George Mocsary (Southern Illinois), Joseph Olson (Mitchell Hamline), Glenn Reynolds (Tennessee), and Gregory Wallace (Campbell). As described in Appendix I, the above professors were cited extensively by this Court in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Oft-cited by lower courts as well, these professors include authors of the first law school textbook on the Second Amendment, as well as many other books and law review articles on the subject.

The Citizens Committee for the Right to Keep and Bear Arms is a non-profit organization dedicated to protecting firearms rights through grassroots organizing.

Mountain States Legal Foundation is a nonprofit, public interest legal foundation dedicated to the preservation of individual liberty through litigation aimed at securing and protecting constitutional freedoms and the rule of law. The Foundation's *amicus*

---

[1] All parties were timely notified and consented to the filing of this brief. No counsel for any party authored it in whole or in part. No person or entity other than *amici* funded its preparation or submission.

brief in *District of Columbia v. Heller* was cited in this Court's opinion.

Jews for the Preservation of Firearms Ownership is a non-profit educational civil rights corporation that focuses on firearms ownership and responsibility. Its work centers on the history of gun control.

Independence Institute is a non-partisan public policy research organization. The Institute's *amicus* briefs in *Heller* and *McDonald v. City of Chicago* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

Millennial Policy Center is a research and educational center that develops and promotes policy solutions to advance freedom and opportunity for the Millennial Generation.

SUMMARY OF ARGUMENT

Since 2013, California has outlawed all new models of semiautomatic handguns.

The mechanism for prohibition is a requirement that all new models include microstamping features; microstamping in general is feasible, but the conditions of California's particular requirements are literally impossible to satisfy. Thus, this case presents the novel issue of whether a constitutional right can be

conditioned on meeting an impossible government requirement.

The law grandfathers some handgun models from before 2013 but prohibits all new models. According to *District of Columbia v. Heller*, constitutional rights cannot be fossilized at some particular moment in time. 554 U.S. 570 (2008). The notion that the Second Amendment can be limited to only the types of arms in existence in a given year "border[s] on the frivolous." *Id.* at 582.

The court below disregarded *Heller*'s express language. Moreover, to review a law banning the commercial sale of all new models of semiautomatic handguns, the court applied a special, feeble version of intermediate scrutiny. Contrary to this Court's instructions in *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 438 (2002), the court refused to consider rebuttal evidence and upheld the ban by relying on speculation.

ARGUMENT

I. California's ban on new models of semiautomatic handguns is unprecedented.

There have been many Second Amendment challenges since this Court's ruling in *District of Columbia*

v. Heller, 554 U.S. 570 (2008). Nearly all have challenged laws that regulate persons,[2] arms,[3] or places.[4]

This case is unique. No other law has categorically prohibited new handgun models. Incremental improvements from one model to another are typical for handguns, as for other consumer products. Today, no

---

[2] Including felons (*United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)); domestic violence misdemeanants (*United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc)); persons subject to domestic violence protection orders (*United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011)); juveniles (*United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009)); young adults (*Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012)); illegal aliens (*United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015)); users of illegal drugs (*United States v. Carter*, 750 F.3d 462 (4th Cir. 2014)); and the formerly mentally ill (*Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (en banc)).

[3] Including ammunition (*Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014)); magazines (*Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*")); semiautomatic rifles (*New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) ("*NYSRPA I*")); machine guns (*Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016)); suppressors (*United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018)); grenades (*U.S. v. McCartney*, 357 F. App'x 73 (9th Cir. 2009) (unpublished)); and pipe bombs (*United States v. Tagg*, 572 F.3d 1320 (11th Cir. 2009)).

[4] In public (*Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012)); in a National Park parking lot (*United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011)); on U.S. Postal Service property (*Bonidy v. U.S. Postal Service*, 790 F.3d 1121 (10th Cir. 2015)); on Army Corps of Engineers land (*GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318 (11th Cir. 2015)); and on private property (*GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012)).

Californian can take advantage of the last six years of advances in ergonomics, safety, accuracy, or durability.

For example, Ruger's Lightweight Compact Pistol (LCP) was introduced in 2007. A superior model, the LCP II, was introduced in 2016 and therefore cannot be sold in California. The new model has a better grip and improved sights—making the gun safer and more accurate for self-defense and other lawful purposes. *See* Ben Findley, *Ruger LCP II—Improvements to a Classic Carry Pistol*, USA CARRY, Nov. 11, 2016.[5]

Modern firearms increasingly incorporate adjustable ergonomics, in order to accommodate physical differences. For example, the Sig Sauer P320 handgun, which first debuted in 2014, allows users to switch between large, medium, and small grips. *See* James Tarr, *SIG Sauer P320 Review*, HANDGUNS, Mar. 7, 2016.[6] Thus, a small woman can use well-fitted grips that help her maintain a strong and firm hold on the pistol.

The amount of force necessary to rack the slide on a semiautomatic pistol has long been a problem for some users, namely, people with "physical impairments, weak hand and finger strength, mostly females, but some males, and older students with frailties (but also others)." Ben Findley, *Smith-Wesson M&P 380 Shield EZ*, USA CARRY, Feb. 27, 2018.[7] The problem is

---

[5] https://www.usacarry.com/review-ruger-lcp-2/.

[6] https://www.handgunsmag.com/editorial/sig-sauer-p320-review/137787.

[7] https://www.usacarry.com/smith-wesson-mp-380-shield-ez-review/. For illustration of how to rack the slide, see *Racking the*

solved by an innovative new pistol from Smith & Wesson, the M&P 380 Shield EZ. *Id.*

The same problem is solved by different inventions in the new Walther CCP M2 (introduced in 2018). Its "SoftCoil" technology reduces recoil, thus allowing the gun to use a lighter recoil spring, so that the user does not have to push so hard to compress the spring. *See* J. Scott Rupp, *Review: Walther CCP M2*, HANDGUNS, Oct. 23, 2018.[8]

Californians are not allowed to purchase these new and safer guns. They may not purchase any semiautomatic handgun model introduced after May 2013. As new guns become better-fitting, more reliable, and safer, Californians are stuck with the lower-quality handguns of the past.

Thus, this case presents the novel issue of whether a constitutional right can be conditioned on meeting an impossible government requirement. *See Pena v. Lindley*, 898 F.3d 969, 1000 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) ("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

---

Slide of Your Gun, THE WELL-ARMED WOMAN, https://thewellarmedwoman.com/training-handling/racking-the-slide-of-your-gun/.

[8] http://www.handgunsmag.com/editorial/review-walther-ccp-m2/326581.

technological feasibility of a requirement imposed by the government.").

Since 2013, California has prohibited any new models of semiautomatic handguns from being sold commercially unless the handgun is "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." Cal. Penal Code § 31910(b)(7)(A).

Yet California produced no evidence that the requirement can be met. It was enough for the majority below that California "predict[ed] as a policy judgment that gun manufacturers are capable" of meeting the requirement. *Pena*, 898 F.3d at 984.

To the majority, legislative speculation was more important than "evidence that gun manufacturers have not produced a functioning, commercially available semiautomatic pistol equipped with the microstamping technology." *Id.* at 983 (quotations omitted). No one has been able to make even a prototype that complies with California's particular standards. "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." *Id.* at 988 (Bybee, J., concurring in part and dissenting in part).

By banning all new firearms that lack impossible features, California has frozen firearms technology in 2013. "The result of CDOJ's restrictive testing protocol is undisputed: since at least 2013, no new handguns have been sold commercially in California." *Id.* at 989 (Bybee, J., concurring in part and dissenting in part).

This Court in *Heller* spoke directly to Second Amendment technology. Rejecting the argument that firearms technology could be frozen in time, this Court explained that all bearable arms are prima facie protected:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, *e.g., Kyllo v. United States*, 533 U.S. 27, 35–36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

Heller, 554 U.S. at 582.[9]

---

[9] This Court determined that communications over the Internet are free speech protected by the First Amendment in *Reno*, 521 U.S. at 849. It would thus be unconstitutional for California

The Second Amendment applies just the same to arms from 2008 as to arms from 1791. Thus, the Amendment also applies equally to firearms from 2014 as from 2012. "It is hard to imagine language speaking more directly to the point" than *Heller* did. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1030 (2016) (Alito, J., concurring).

The closest comparison to California's technological freeze was the Massachusetts approach that this Court rejected in *Caetano*.

In *Caetano*, this Court reversed the Supreme Judicial Court of Massachusetts's decision upholding a ban on electric stun guns "after examining 'whether a stun gun is the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment.'" *Id.* at 1027 (quoting *Com. v. Caetano*, 470 Mass. 774, 777 (2015)). The Massachusetts court upheld the stun gun ban in part because stun guns "were not in common use at the time of the Second Amendment's enactment," and because stun guns are "a thoroughly modern invention." *Id.* at 781.[10]

This Court held that the Massachusetts court's restriction on modern technology was "inconsistent with *Heller*'s clear statement that the Second Amendment

---

to ban all new political speech over the Internet that is transmitted at anything less than an infeasible 300 terabits-per-second.

[10] The same approach was also taken in *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) ("we think it better to ask whether a regulation bans weapons that were common at the time of ratification").

'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'" *Id.* at 1027–28 (quoting *Heller*, 554 U.S. at 582).

Notably, the unconstitutional Massachusetts test allowed for new technology under some circumstances—by using "a contemporary lens" to determine whether stun guns "are readily adaptable to use in the military." *Id.* at 1028. The California microstamping law, conversely, provides no exception. No new semiautomatic handgun is allowed under any condition without the impossible microstamping feature.

The majority below believed it found an analog in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). The Third Circuit in *Marzzarella* upheld 18 U.S.C. § 922(k)'s ban on firearms with a "removed, obliterated, or altered" serial number. The majority below reasoned that "California law does not go so far—it does not ban possession or use of guns manufactured without microstamping features"; it merely prohibits the commercial manufacture and sale of such arms. *Pena*, 898 F.3d at 985. Therefore, the majority determined, the microstamping requirement "implicate[s] the rights of gun owners far less than laws directly punishing the possession of handguns." *Id.* at 986.

The majority overstated the burden of § 922(k). The serial number requirement "was neither designed to nor has the effect of prohibiting the possession of any class of firearms." *Marzzarella*, 614 F.3d at 97. Indeed, "§ 922(k) does not come close to this level of infringement. It leaves a person free to possess any

otherwise lawful firearm he chooses—so long as it bears its original serial number." *Id.* In that sense, § 922(k)'s serial number requirement "is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights." *Id.* No one has ever denied that manufacturers can easily stamp a serial number somewhere on a gun.

In contrast, no one has ever shown that the microstamping of ammunition in the manner that California demands is possible. Thus, the microstamping requirement effectively prohibits all new semiautomatic handguns and "has the effect of prohibiting the possession of [a] class of firearms." *Marzzarella*, 614 F.3d at 97. Consequently, it is more like the District of Columbia's handgun ban struck down in *Heller*: "an example of a law at the far end of the spectrum of infringement on protected Second Amendment rights." *Marzzarella*, 614 F.3d at 97.

II. The Ninth Circuit applied a feeble, watered-down version of intermediate scrutiny.

Striking down the handgun ban in *Heller*, this Court declared that it "would fail constitutional muster" "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. at 628–29. Like the handgun ban in *Heller*, California's de facto ban "extends . . . to the home, where the need for defense of self, family, and property is most acute," and it applies to "the most preferred firearm in

the nation to 'keep' and use for protection of one's home and family." *Id.*[11]

Nonetheless, the majority below applied only intermediate scrutiny. If intermediate scrutiny had been applied properly, the law would fail under even that generous standard. But the majority applied a special, feeble version of intermediate scrutiny that resembles rational basis review.

Under intermediate scrutiny, "[t]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989). The microstamping law satisfies neither requirement.

---

[11] Although the ban does not formally encompass home possession, the ban on commercial sales makes it essentially impossible to acquire a new model handgun to keep in the home (except in rare circumstances, such as inheritance from a relative in another state).

Among all firearms, handguns are "overwhelmingly chosen by American society for" self-defense. *Heller*, 554 U.S. at 628 (citation omitted). Among handguns, semiautomatic handguns are most popular.

In 2017, 3,601,431 semiautomatic handguns were manufactured, compared with 713,577 revolvers, 2,486,941 rifles, and 635,239 shotguns. *Annual Firearms Manufacturing and Export Report: Year 2017 Interim*, ATF, July 27, 2018, https://www.atf.gov/file/130851/download.

A. The State's interests would be achieved just as effectively without the microstamping requirement.

California's microstamping requirement is remarkable not only because of its extraordinary burden, but also because it does nothing to further the governmental interests—in fact, it is counterproductive.

"California's two stated objectives for the microstamping requirement [are] public safety and crime prevention." *Pena*, 898 F.3d at 981–82. Specifically, the majority below found that "limiting the availability of untraceable bullets serves a substantial government interest." *Id.* at 982. Maybe so. But California's microstamping law has not limited the availability of untraceable bullets in any manner. Nor has it done anything to enhance public safety or prevent crime. Because no manufacturer has been able to produce a firearm that meets the criteria, the law has had no effect whatever, aside from burdening the constitutional rights of law-abiding citizens:

> 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 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. at 989 (Bybee, J., concurring in part and dissenting in part).

Since the microstamping feature has not had any effect on the State's interests, the State's interests would be achieved just as effectively without it. Thus, the law fails intermediate scrutiny.

Rather than acknowledge the law's futility, the majority below speculated that manufacturers were capable of complying with the requirement but were refusing to do so. *Id.* at 982–83 ("The reality is not that manufacturers cannot meet the standard but rather that they have chosen not to."); *id.* at 983 ("We thus find it odd, indeed, that the manufacturers . . . refuse to modernize their firearms by installing microstamping features.").

There was no evidence that manufacturers can comply with the California microstamping regime but choose not to. With about a ninth of the U.S. population, California is a very large market for firearms sales. *See NICS Firearm Background Checks: Month/Year by State*, FBI.[12] By not selling new handgun models in California, manufacturers lose out on substantial revenue.

---

[12] https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state.pdf/view.

While the Ninth Circuit speculated that firearms manufacturers prefer to forego enormous revenue rather than cater to California, manufacturer behavior is just the opposite. California has other laws that impose unusual restrictions on semiautomatic rifles. These laws prohibit rifles from having certain useful features, such as adjustable stocks or detachable magazines. In order to sell into the California market, many rifle makers have modified their rifles to comply with California standards. Other rifle makers already made guns that lacked the features that California forbids. So there are hundreds of models of rifles that are touted as "California legal." Appendix II lists these many rifles. *See also California Compliant: LWRCI Patent-Pending California Solution For All Rifles Models*, LWRCI (describing how LWRCI modifies normal rifles in order to prevent the magazine from being detached);[13] *California Legal Compliance Parts*, ATLANTIC FIREARMS (parts and kits to make rifles "California legal" by disabling various standard features of rifles);[14] *Frequently Asked Questions*, DANIEL DEFENSE ("We do manufacture a California Compliant version of each of our carbines that comes complete with a Mag Lock as well as a limited capacity magazine.").[15]

---

[13] https://www.lwrci.com/pdfs/lwrci-cac-sellsheet.pdf.

[14] https://www.atlanticfirearms.com/taxons/california-legal-compliance-parts.

[15] https://danieldefense.com/faq/.

Manufacturers can—and do—comply with the California rifle standards, such as by replacing an adjustable stock with an (inferior) fixed stock. Their willingness to comply with California laws is not an issue. But handgun manufacturers cannot make handguns that comply with the terms of the double microstamping law.

There is no evidence that anyone can satisfy California's microstamping protocol. Indeed, the majority acknowledged as much. *Pena*, 898 F.3d at 985 ("Even if microstamping proves technologically infeasible . . . ").

Consequently, no firearm with the microstamping feature is on the market, as all parties admit. *Id.* at 989 (Bybee, J., concurring in part and dissenting in part) ("The result of CDOJ's restrictive testing protocol is undisputed: since at least 2013, no new handguns have been sold commercially in California").

Perversely, the microstamping requirement substantially nullifies the other safety requirements the Plaintiffs challenge. Since 2007, California has required that any new semiautomatic handgun contain a chamber load indicator ("CLI") and a magazine disconnect mechanism ("MDM"). Cal. Penal Code § 31910(b)(5). But since the microstamping requirement has prevented any new handgun from being sold since 2013, "[t]he only guns commercially sold in California are grandfathered from these provisions." *Pena*, 898 F.3d at 989 (Bybee, J., concurring in part and dissenting in part). "The consequence is obvious. Today, no one in California can purchase handguns that have the

safety features the legislature thought critical for saving lives. . . . This is a totally perverse result." *Id.* (Bybee, J., concurring in part and dissenting in part).[16]

---

[16] The CLI and MDM requirements are problematic—although unlike the microstamping requirement, CLIs and MDMs do exist and can be incorporated into handgun manufacture.

To be precise, older model handguns with CLIs and MDMs are available to some degree in California. First, they were always available in pre-2007 guns, to the limited extent that there was consumer demand for these features. Second, CLIs and MDMs exist on models introduced after the 2007 California mandate but before the May 2013 freeze on all new models. *See*, *e.g.*, *Kahr Arms Releases California-Legal P380*, KAHR ARMS, Jan. 3, 2011, https://www.kahr.com/kahr-arms-releases-california-legal-p380/.

As the Plaintiffs argue, the MDM and CLI mandates are unconstitutional. The magazine disconnect requirement strikes at "the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, by rendering a semiautomatic handgun useless unless a magazine is inserted. Hence, although MDMs have long been available, Americans overwhelmingly prefer guns without them. In a defensive situation, if a magazine is malfunctioning, the defender can remove the magazine, and still be able to fire the one round that remains in the handgun's firing chamber. Similarly, if a magazine is removed or dislodged, in a struggle or inadvertently, the pistol will still fire at least the round in the chamber. California acknowledges that magazine disconnects impair self-defense, since California exempts law enforcement guns from the magazine disconnect requirement. Cal. Penal Code § 32000(b)(4). *See generally* Cynthia Leonardatos, Paul H. Blackman, & David B. Kopel, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L. REV. 157, 167 (2001).

The requirement for chamber load indicators does not impair the defensive function of a handgun. But it too can be contrary to safety. CLIs have generally been disfavored by buyers because they encourage people to ignore the fundamental rule of gun safety: treat every gun as if it is loaded. *Id.* at 217. California's

B. The Ninth Circuit ignored rebuttal evidence.

The majority below explained that under the Ninth Circuit's Second Amendment intermediate scrutiny, "California's evidence need only 'fairly support' its conclusions." *Id.* at 982 (quoting *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014)) (brackets omitted). But this Court's precedent requires more.

In *City of Los Angeles v. Alameda Books*, this Court established that the *first* step of intermediate scrutiny analysis is whether the State's evidence "fairly support[s]" its rationale. 535 U.S. 425, 438 (2002). If the State meets its initial burden, the plaintiffs have an opportunity to "cast direct doubt on this rationale, either by demonstrating that the [government's] evidence does not support its rationale or by furnishing evidence that disputes the [government's] factual findings." *Id.* at 438–39. "If plaintiffs succeed in casting doubt on a [government] rationale in either manner, the burden shifts back to the [government] to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

Had the Ninth Circuit applied *Alameda Books*, the microstamping requirement would have been struck down. After the Plaintiffs cast doubt on the State's

---

own gun safety instruction wisely tells users not to rely on CLIs. Pet. Br. at 7.

evidence and purported facts, the State offered nothing in return.

"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." *Pena*, 898 F.3d at 990 (Bybee, J., concurring in part and dissenting in part).

"The State relies solely on a declaration from microstamping's inventor, Todd Lizotte." *Id.* at 993. Lizotte stated that in 2007, he equipped a Smith & Wesson .40 caliber handgun with a microstamped firing pin and fired 2,500 rounds. He declared that "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." *Id.* (Bybee, J., concurring in part and dissenting in part). There was no evidence—or even contention—however, that these results would satisfy California's microstamping requirement.

Nonetheless, the majority below concluded that "California has gone well beyond this threshold requirement" of showing that its evidence fairly supports its rationale for the law. *Id.* at 982.

After finding that the State had met the "threshold requirement," the majority should have considered whether the Plaintiffs' evidence "cast direct doubt on this rationale, either by demonstrating that the [State's] evidence does not support its rationale or by furnishing evidence that disputes the [State's] factual findings." *Alameda Books*, 535 U.S. at 438–39.

The Plaintiffs cited "several studies regarding microstamping's technological feasibility." *Pena*, 898 F.3d at 992 (Bybee, J., concurring in part and dissenting in part). One of these was a study co-authored by Lizotte that notes several problems with microstamping technology and "acknowledges that the alphanumeric characters microstamped on a casing can become 'deformed, or partially removed due to the firing and cartridge ejection process.'" *Id.* (quoting T. Grieve, et al., *Gear Code Extraction from Microstamped Cartridges*, 45 AFTE J. 64, 64 (2013)). Lizotte's own study further noted that "the ability to identify characters imprinted on a casing may depend on the use of a scanning electron microscope." *Id.* at 993 (Bybee, J., concurring in part and dissenting in part) (citing Grieve, *Gear Code Extraction from Microstamped Cartridges*, at 68).

The admission of the need for an electron microscope reveals a significant flaw in California's protocol: "this equipment is not currently permitted under the [State's] testing protocol and the use of only an optical microscope is unaccounted for in the State's evidence." *Id.* Indeed, "Lizotte's declaration never explains how often imprints are legible using only the equipment allowed for in the microstamping protocol." *Id.*

Additionally, the Plaintiffs introduced declarations from CEOs of two of the nation's leading firearms manufacturers, Michael Fifer of Sturm, Ruger & Co., Inc. and James Debney of Smith & Wesson Corp. "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.'" *Id.* at 992 (Bybee, J., concurring in part and dissenting in part).

Similarly, "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.'" *Id.*

As discussed in Part II.A, firearms manufacturers do comply with special California laws when they *can* comply; they make hundreds of models of "California legal" semiautomatic rifles. Although the court below was puzzled about why handgun manufacturers are not selling in California, the fact that they are not selling is evidence that they cannot sell.

Because the Plaintiffs successfully cast doubt on the State's rationale, the burden should have shifted back to the State to produce additional evidence justifying the microstamping requirement. *Alameda Books*, 535 U.S. at 439. Of course, "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." *Pena*, 898 F.3d at 1001 (Bybee, J., concurring in part and dissenting in part). In other words, if the microstamping

requirement could possibly be complied with, California could have quickly proven so and thereby satisfied its burden under *Alameda Books*. California's failure to do so is a tacit admission that compliance is impossible.

"Given the conflict of evidence on this very point, the majority should not [have] conclude[d] that the microstamping requirement survives intermediate scrutiny." *Pena*, 898 F.3d at 1002 (Bybee, J., concurring in part and dissenting in part).

III. The Ninth Circuit treated the Second Amendment as a second-class right.

The Second Amendment is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment." *McDonald v. City of Chicago*, 561 U.S. 742, 778–79, 780 (2010).

By applying a special, feeble version of heightened scrutiny for the Second Amendment, the Ninth Circuit treats the Second Amendment as a second-class right.

Other circuits do the same, allowing the government to prevail on thin or conclusory evidence and ignoring rebuttal evidence. *See*, *e.g.*, *NYSRPA I*, 804 F.3d at 261 (upholding bans on common arms by looking only at government evidence that "fairly supports" the bans, and ignoring contrary evidence); David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193, 294–95 (2017) (criticizing one-sided view of evidence); *New*

York State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45, 63–64 (2d Cir. 2018) ("*NYSRPA II*"), *cert. granted sub nom. New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, No. 18-280, 2019 WL 271961 (U.S. Jan. 22, 2019) (ban on taking registered handguns outside of New York City upheld on basis of conclusory affidavit of government official, with no data or details).

Justices of this Court have lamented the lower courts' disregard for its Second Amendment precedents. *See Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it."); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (denouncing "noncompliance with our Second Amendment precedents" by "several Courts of Appeals"); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (noting "a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Caetano*, 136 S. Ct. at 1033 (Alito, J., joined by Thomas, J., concurring) (admonishing "[t]he lower court's ill treatment of *Heller*").

Justice Thomas's previous condemnation of the Ninth Circuit's treatment of the Second Amendment as a second-class right is especially relevant here:

> The Ninth Circuit claimed to be applying intermediate scrutiny, but its analysis did not resemble anything approaching that standard. It allowed California to prove a governmental interest with speculation instead of evidence. . . . The Ninth Circuit would not have done this for any other constitutional right, and it could not have done this unless it was applying rational-basis review.

Silvester v. Becerra, 138 S. Ct. 945, 948 (2018) (Thomas, J., dissenting from denial of certiorari).

This case presents an especially flagrant violation of the right. The court below violated the rules of intermediate scrutiny in order to uphold a law that strikes at the core of the Second Amendment. By de facto banning all handgun models created since 2013, the court flouted *Heller*'s rule against technological freezes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 E. 16th Ave.
Denver, CO 80203
(303) 279-6536
david@i2i.org

JOSEPH G.S. GREENLEE
MILLENNIAL POLICY CENTER
3443 S. Galena St., #120
Denver, CO 80231
(970) 485-3303
josephgreenlee@gmail.com

CODY J. WISNIEWSKI
MOUNTAIN STATES LEGAL FOUNDATION
2596 S. Lewis Way
Lakewood, CO 80227
(303) 292-2021
cody@mountainstateslegal.com

February 1, 2019