No 23-55367

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LANA RAE RENNA, et al.,
Plaintiffs-Appellees,

v.

ROB BONTA, in his official capacity as Attorney General of California; and ALISON MENDOZA, in her official capacity as Director of the California Department of Justice Bureau of Firearms,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California
No. 3:20-cv-02190-DMS-DEB
Hon. Dana M. Sabraw

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellees certify as follows:

PWGG, L.P. is a California limited partnership. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

North County Shooting Center, Inc. is a California corporation. It has no parent corporation and no publicly held corporation owns more than ten percent of its stock.

Gunfighter Tactical, LLC is a California limited liability company. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

Firearms Policy Coalition, Inc. is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

San Diego County Gun Owners PAC is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

Citizens Committee for the Right to Keep and Bear Arms is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

Second Amendment Foundation is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

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INTRODUCTION

California enacted the "Unsafe Handgun Act" ("UHA") in an attempt to change the way handguns are manufactured in America. Since 2007, California has banned the sale of all semiautomatic handguns in the State unless the firearm has two component features—a chamber load indicator and magazine disconnect mechanism—that virtually no handgun in America has. California expanded the ban in 2013 to require "microstamping" of cartridges—a feature that is still not available on any gun anywhere. California decided that handguns lacking these features are "unsafe" and cannot be sold to ordinary individuals (but older models in existence as of 2013 are grandfathered in). As a result, Californians cannot purchase several hundreds of models of handguns manufactured in the last 16 years that are sold throughout the Nation and have actual innovations—just not the ones that California seeks to impose on the market. Several classes of favored government employees, including law enforcement, are exempt from the law, however, so they are allowed to buy, use, and even sell on the secondary market all of these "unsafe" new models that the State shields from ordinary Californians.

The UHA's features requirements violate the Second Amendment rights of these ordinary Californians who want to purchase these banned arms in common use throughout the United States. This Court's decision in *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018), which upheld the UHA's features requirements under the old "two-

step" intermediate scrutiny test, has been superseded by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). The district court did not abuse its discretion when it enjoined the UHA's features requirements under *Bruen*. Rather, that decision was plainly correct.

First, the district court correctly determined that the Second Amendment's plain text covers the Plaintiffs' proposed conduct here—purchasing handguns that California now bans for self-defense and other lawful purposes. *Bruen* affirmed that, when (as here) conduct is covered by the Second Amendment's text, "the Constitution presumptively protects that conduct." 142 S.Ct. 2129–30. The State utterly fails to engage with the simple textual analysis *Bruen* requires, and instead offers a variety of arguments having nothing to do with the actual test—including the remarkable claim that the UHA isn't really to blame for the lack of choice in handguns in California, but rather it's the manufacturers' fault for not complying with the law.

Second, the district court did not abuse its discretion when it rejected the State's claim that the UHA's requirements are merely "conditions and qualifications on the commercial sale of arms," and therefore "presumptively lawful" under *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008), such that the State doesn't have to justify its ban under *Bruen*'s history test. The district court correctly observed that a flat ban on what can be sold in a state is not a "condition [or]

qualification" on sales. And in any event, *Bruen* affirmed that *Heller*'s reference to so-called "presumptively lawful" regulatory measures did not exempt any such measure from *Bruen*'s text and history test.

Third, the district court did not abuse its discretion when it concluded that California failed to carry its burden under *Bruen* of "justify[ing the UHA's requirements] by demonstrating that [they are] consistent with the Nation's historical tradition of firearm regulation." 142 S.Ct. at 2130. To the contrary, the creation of "rosters" of approved guns that may be sold is a radically modern regulatory invention, and there is no analogous history whatsoever that justifies California's ban on guns in common use. Indeed, *Heller* already established that the only historically-recognized tradition of banning bearable arms is limited to the (not widespread) tradition of banning "dangerous and unusual weapons," so handguns in common use—like the off-Roster handguns at issue here—cannot be banned. *Heller*, 554 U.S. at 627; *Bruen*, 142 S.Ct. at 2143.

Finally, the district court correctly held that Plaintiffs are irreparably harmed by the Roster's violation of their Second Amendment rights. As this Court has repeatedly emphasized, "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted). And when a state violates the Constitution, "both the public interest and the balance of the equities favor a

preliminary injunction." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). The district court properly rejected the State's assertion that the injunction creates "public safety risks" since the grandfathered handguns on the Roster also lack the features required by the UHA. There is no basis for this Court to revisit the district court's consideration of the balance of equities and public interest on appeal.

STATEMENT OF JURISDICTION

Appellees agree with Appellants' jurisdictional statement. Dkt. 13, Appellants' Opening Br. ("AOB") at 4.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates the Second and Fourteenth Amendments to the United States Constitution. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Section 1 of the Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

All applicable statutes are reproduced in Appellants' addendum.

STATEMENT OF THE CASE

This appeal presents a single claim whose resolution is straightforward after the Supreme Court's decision in *Bruen*. Plaintiffs challenge California's novel ban on hundreds of models of handguns commonly used for lawful purposes throughout the United States. California's "Unsafe Handgun Act" requires the California Department of Justice to maintain a "Roster" of handguns that may lawfully be sold by licensed firearms dealers. Cal. Penal Code §§ 31900–32110.[1] Handguns deemed "unsafe" under the UHA's various technical and other requirements are excluded from the Roster and therefore banned for retail sale, even though they are commonly and lawfully used throughout the rest of the Nation.

Because California's handgun ban violates the Second Amendment, the district court issued a preliminary injunction enjoining the State from enforcing the three core "feature" requirements that operate together to effect the handgun ban, ER-002–032, joining another district court that had recently reached the same conclusion. *Boland v. Bonta*, No. 8:22-cv-01421-CJC-ADS, --- F.Supp.3d ----, 2023 WL 2588565 (C.D. Cal. Mar. 20, 2023), appeal docketed No. 23-55276 (9th Cir. March 27, 2023).

[1] All further undesignated statutory citations are to the California Penal Code.

A. California's "Unsafe Handgun Act" Creates A Limited "Roster" Of Handguns That May Lawfully Be Purchased In California.

The UHA was enacted in 1997 and mandates that the California Department of Justice ("DOJ") maintain "a roster listing all of the handguns that have been tested by a certified testing laboratory, have been determined not to be unsafe handguns, and may be sold" in California. § 32015(a). As this Court has put it, "[e]ffectively, the Act presumes all handguns are unsafe unless the [DOJ] determines them 'not to be unsafe.'" *Pena*, 898 F.3d at 973–74. To that end, the UHA prohibits the retail sale of any "unsafe" handgun. § 32000. The UHA defines an "unsafe handgun" as "any pistol, revolver, or other firearm capable of being concealed upon the person" and that does not have certain statutorily enumerated safety devices, meet firing requirements, or satisfy drop safety requirements. § 31910.

Only two other states and the District of Columbia have similar restrictive purchasing regimes. Maryland enacted the nation's first handgun roster in 1988; California followed suit with the UHA nine years later; Massachusetts enacted a handgun roster in 1998; and D.C. established a roster based on California's in 2009. Md. Code Ann., Pub. Safety § 5-405; Mass. Gen. Laws Ann. ch. 140, § 123 & 501 Mass. Code Regs. 7.02–03; D.C. Mun. Regs. tit. 24, § 2323.

The UHA's most significant burden on Californians' right to bear arms is its mandate that new models of handguns possess particular features, ostensibly for safety or law enforcement purposes, in order to be added to the Roster. Starting in

2007, the UHA required that semiautomatic pistols generally have both a chamber load indicator ("CLI") and a magazine disconnect mechanism ("MDM"), which the State claims reduce the likelihood of accidental discharge.[2] § 31910(b)(4), (5). A CLI is a "device that plainly indicates that a cartridge is in the firing chamber," § 16380, and an MDM is "a mechanism that prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted in the semiautomatic pistol," § 16900. Starting in 2013, the UHA required pistols to include a "microstamping" feature that imprints the make, model, and serial number of the firearm onto the shell casing when a round is fired. § 31910(b)(6).

No commercially available semiautomatic handguns manufactured in the United States have the two features and microstamping technology required by the UHA. Indeed, "no firearm manufacturer in the world makes a firearm with [microstamping] capability." *Boland*, 2023 WL 2588565, at *3. As a result, literally no new models of guns have been added to the Roster since 2013. ER-280–281 (Phillips Decl., ¶ 9); *see also Boland*, 2023 WL 2588565, at *1. Since *any* change whatsoever to an approved handgun subjects the changed design to new testing to

[2] The UHA imposes different requirements on rimfire and centerfire semiautomatic pistols. Rimfire semiautomatic pistols must have an MDM but are not required to have a CLI. Centerfire semiautomatic pistols must have both features. §§ 31910(b)(4), (5); 32010(d)(1)–(3).

appear on the Roster,[3] the few additions each year have consisted of slight (mostly cosmetic) changes to models of handguns that have already been approved. ER-280–281 (Phillips Decl., ¶ 9). And while the UHA has generally exempted handguns "already listed on the roster" from the new technological requirements, *see* § 31910(b)(4), (b)(5), (6)(A), a 2020 law requires that DOJ remove three "grandfathered" firearms from the Roster for each new handgun that the agency approves, § 31910(b)(7).

Each layer of regulation under the UHA has thus hastened the dramatic shrinkage of handguns available for purchase in California. As of 2013, there were nearly 1,300 makes, models, and permutations of approved handguns on the Roster, but the list has steadily declined over the past decade. ER-281 (Phillips Decl., ¶ 10). The total number of approved handguns now stands at just over 800. *Id.* But even this total is misleading: Approximately "one-third of the Roster's total listings are comprised of makes and models that do not offer consumers substantive and material choices in the physical attributes, function, or performance of a handgun relative to another listing (*i.e.*, a base model)," because, as noted above, many of the approved handguns are in reality the same handgun make and model as another approved model, but with merely cosmetic differences. *See*, *e.g.*, *California's Handgun Roster: How big is it, really?*, online at https://www.firearmspolicy.org/california-

[3] *See* §§ 32015, 32030; 11 Cal. Code Regs. §§ 4059, 4070.

handgun-roster (showing the results of a detailed analysis of the Roster as of January 30, 2019).

The district court in *Boland* summed up the bizarre state of affairs under the UHA's regime: "*none* of the 832 Roster listings meets the current definition of a handgun that is not 'unsafe.' *Not one* of the handguns currently being sold in California has a CLI, MDM, and microstamping ability. *Every single* handgun on the Roster is a grandfathered handgun—one the California legislature now deems 'unsafe.'" 2023 WL 2588565, at *3 (emphasis in original).

B. The Roster Operates As A Ban On The Acquisition Of Hundreds Of Handgun Models In Common Use In The United States.

The UHA bans the sale of hundreds of models of constitutionally protected handguns in common use throughout the United States. For example, many of the nation's best-selling firearms are either excluded from the Roster or the Roster-approved models are outdated. California has not approved a single Generation 4 (first brought to market in 2010) or Generation 5 (brought to market in 2017) Glock handgun. As a result, the Roster-approved model of the Glock 19 (Generation 3) dates to the late 1990s. *See* ER-281 (Phillips Decl., ¶ 12). The Glock G43, SIG Sauer P320, and Springfield Armory Hellcat—three of the best-selling firearms designed for concealed carry—do not appear on the Roster. Each of these handguns is available for sale and in common use throughout the rest of the Nation. ER-281–282 (Phillips Decl., ¶¶ 12–13).

Handgun manufacturers have been making improvements in design, safety, reliability, and ergonomics with new models over the past 10 years. Yet while those new models are in common use throughout the country, California consumers are not able to benefit from them because these guns are banned for sale to common, law-abiding Californians under the UHA. ER-281–282 (Phillips Decl., ¶¶ 11–15).

In addition to California's failure to add new handguns to the Roster, several hundred makes and models of firearms have fallen off the Roster over the past several years. ER 280–81 (Phillips Decl., ¶¶ 9–10). The net result is that Californians' ability to purchase the firearm of their choice continues to contract, and the statutory mandate that DOJ remove three models from the Roster for every new approval guarantees the problem will only get worse. § 31910(b)(7). While gun manufacturers innovate and release newer firearm models with improved features that are freely purchased throughout the country, Californians are left to choose from a shrinking list of aging handgun models that may not be suitable for their self-defense needs. ER-281–282 (Phillips Decl., ¶¶ 11–15).

While it is not necessary to Plaintiffs' claim in light of the constitutional test set out in *Bruen*, it is worth emphasizing that citizens generally need access to a wide array of firearms for self-defense. People come in all shapes and sizes and have innumerable individualized limitations, strengths, and weaknesses; they therefore have different needs when it comes to choosing the appropriate firearm for self-

defense. Plaintiff Renna is one example: she has a particular need for a firearm specifically designed for people with limited hand strength, but California's handgun Roster removes that option for her. ER-285 (Renna Decl., ¶¶ 4–7). The Roster likewise excludes newer models of semiautomatic handguns that have ambidextrous configurations, which make them more suitable for left-handed customers. ER-282 (Phillips Decl., ¶ 15); ER-289 (M. Schwartz Decl., ¶ 8) (explaining that his ability to acquire a Glock 19 Gen5 with an ambidextrous slide release and adjustable backstraps is "crucial to [his] gun safety training"). And the Roster's restrictions pose particular constraints for females, who are the fastest-growing demographic of new gun purchasers but are unable to purchase new models designed primarily for females. ER-282 (Phillips Decl., ¶ 15); *see also* D.Ct.Dkt. 13-15 (D. Jaymes Decl., ¶¶ 7–10, discussing her desire to purchase firearms for concealed carry and home defense that are better suited for women); D.Ct.Dkt. 13-21 (L. Schwartz Decl., ¶¶ 6–8, discussing her desire to purchase firearms that are safer and more accurate for her to shoot because of her hand size).

C. The District Court Enjoins The Roster's Feature Requirements And Three-For-One Removal Provision.

Plaintiffs' Third Amended Complaint asserts a single claim that the UHA, through the Roster's ban on handguns in common use, violates the Second Amendment. Plaintiffs are individuals, firearms dealers, and firearms-related

advocacy and public policy organizations that have been harmed by Defendants' enforcement of the UHA. *See* ER-007–009.

Each of the individual plaintiffs is a law-abiding Californian who has a constitutionally protected right to purchase and possess firearms under state and federal law, and who desires to purchase off-Roster pistols that are in common use for self-defense and other lawful purposes. ER-317–325 (Third Am. Compl., ¶¶ 17–38). Plaintiffs PWGG, L.P.; North County Shooting Center, Inc.; and Gunfighter Tactical, LLC are licensed firearms retailers in San Diego County. Each of these retailer Plaintiffs has customers who are interested in purchasing off-Roster handguns; but for the UHA, these firearms dealers would sell off-Roster handguns to eligible customers. ER-325–327 (Third Am. Compl., ¶¶ 39–50); ER-279, ER-283 (Phillips Decl., ¶¶ 2, 19–20). And the four Plaintiff firearms-advocacy organizations have scores of members who wish to purchase (or, in the case of retailers, sell) off-Roster firearms, including the individual Plaintiffs. ER-327–329; ER-273–274 (Combs Decl., ¶¶ 11–13); ER-276–277 (Gottlieb Decl., ¶¶ 3–4); ER-288 (Schwartz Decl., ¶ 4).

Plaintiffs moved for a preliminary injunction or alternatively summary judgment seeking to invalidate the UHA and restore their ability to purchase modern handguns. The district court issued a preliminary injunction enjoining the Act's three core feature requirements and its three-for-one removal provision. ER-002–032.

The court first held that Plaintiffs were likely to succeed on their claim that the feature requirements violate their Second Amendment rights. ER-013–026. The court found that Plaintiffs' proposed course of conduct—"to commercially purchase off-roster semiautomatic handguns that are in common use for self-defense and other lawful purposes"—was covered by the Second Amendment's "plain text," and was therefore "presumptively protect[ed]" by the Constitution. ER-014–021.

The court rejected several atextual arguments advanced by California. The court was not persuaded by the State's claim the Roster did not implicate the Second Amendment's text because Plaintiffs could purchase other semiautomatic handguns that were on the roster: "[T]he *availability* of handguns on the roster for retail purchase does not address in any way whether Plaintiffs' desire to purchase off-roster semiautomatic handguns is *covered* by the Second Amendment." ER-015. The court was even less impressed with California's argument that Plaintiffs had failed to show that the off-Roster handguns were "in common use"—as the court put it, "[t]his argument is a stretch under any reasonable assessment." ER-016; *see* ER-016–018 (reviewing evidence submitted by Plaintiffs to establish common use, which "corroborate[d] what is evident—that the roster bans commercial sale of newer models of semiautomatic handguns that are in common use").

Finally, the district court dismantled the State's "one sentence conclusion . . . that the provisions of the UHA are presumptively lawful 'conditions and

qualifications on the commercial sale of arms.'" ER-018–021. The court explained that "the CLI, MDM, and microstamping provisions of the UHA operate as a 'functional prohibition,'" ER-020, and "are not regulations that merely impose conditions and qualifications on the commercial sales of arms but operate collectively as an outright prohibition on commercial sales of a wide segment of modern arms in common use for self-defense and other lawful purposes." ER-020–021.

Turning to *Bruen*'s historical tradition inquiry, the district court held that California failed to meet its burden of demonstrating that the UHA "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126; *see* ER-021–026. In doing so, the court determined that the two types of historical analogues the State offered were not "relevantly similar" under *Bruen*'s core analogical criteria: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." 142 S.Ct. at 2132–33.

California's leading example was an 1805 Massachusetts law that subjected all muskets and pistols to an inspection and discharge test overseen by a state-appointed "prover" to ensure that firearms operated safely before they could be sold. ER-022–023. The court reasoned that while the "why" of this proving law was similar to the justification for the feature requirements, the "how" was "entirely different": "Requiring the *testing* of firearms to ensure they fired safely without

malfunctioning is significantly different from requiring manufacturers to *add* mechanical safety features to arms in common use that are indisputably safe and operate as designed for self-defense." ER-023. And the court stressed that the Roster imposes a far more stringent burden on self-defense than the proving law because the UHA "prohibit[s] retail sales . . . of a significant segment of the most common self-defense firearm sold in America today." ER-024.

The district court next rejected California's attempt to analogize the UHA to a handful of 19th-century fire-safety laws regulating the storage of gunpowder and firearms. ER-024–026. The court explained that these laws failed both of *Bruen*'s metrics: "the goal of these statutes is fire-safety (the why), and that goal is addressed by controlling gun powder and loaded gun storage (the how)." ER-025. The UHA's feature provisions, by contrast, "operate to ban commercial acquisition of a significant segment of popular handguns designed for self-defense." ER-026. Thus, the "fire-safety laws are not 'relevantly similar' to the UHA roster provisions, and they impose a far less 'comparable burden' on Plaintiffs' Second Amendment rights to armed self-defense than does the UHA." ER-026.

The district court then addressed the UHA's three-for-one removal provision in defining the scope of the injunction. Since the removal requirement operates in conjunction with the CLI, MDM, and microstamping provisions, the court determined that it must be enjoined as well. ER-026–028.

The district court further found that the remaining preliminary injunction factors each favored Plaintiffs. Specifically, the court observed that "[i]t is well-established that loss of 'the enjoyment of Second Amendment rights constitutes irreparable injury.'" ER-029 (quoting *Duncan v. Becerra*, 265 F.Supp.3d 1106, 1135 (S.D. Cal. 2017)). And because the UHA infringed Plaintiffs' constitutional rights, the balance of equities and public interest sharply favored an injunction. ER-029–030. In reaching this conclusion, the court rejected California's argument that an injunction would "create[] 'public safety risks'"—this claim was not persuasive since the State already allowed the purchase of over 450 grandfathered firearms that lacked CLI, MDM, or microstamping features. ER-029–030.

The district court stayed enforcement of the injunction pending appeal. ER-030–031.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "The first factor—likelihood of success on the merits—'is the most

important' factor." *California by & through Becerra v. Azar*, 950 F.3d 1067, 1083 (9th Cir. 2020) (citation omitted).

This Court's review of an order granting a preliminary injunction is "limited and deferential," and asks only whether the district court abused its discretion. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816–17 (9th Cir. 2013). "Abuse-of-discretion review is highly deferential to the district court." *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1141 (9th Cir. 2018) (citation omitted). The scope of this Court's review is "narrow"—its only task is "to determine . . . whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015).

"As long as the district court got the law right, it will not be reversed simply because [this Court] would have arrived at a different result if [it] had applied the law to the facts of the case." *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002) (quoting *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995)). Put another way, this Court "will not second guess whether the court correctly *applied* the law to the facts of the case, which may be largely undeveloped at the early stages of litigation." *Demery v. Arpaio*, 378 F.3d 1020, 1027 (9th Cir. 2004) (citation omitted). So "[i]f the district court 'identified and applied the correct legal rule to the relief requested,'" this Court "will reverse only if the court's decision

'resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009)).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it preliminarily enjoined the UHA's three core "feature" requirements that effectively ban the retail sale of modern handguns that are in common use throughout the Nation. This decision was compelled by the Supreme Court's decision in *Bruen* and well within the court's discretion. Plaintiffs seek to purchase off-Roster handguns for self-defense and other lawful purposes. This conduct is surely covered by the "plain text" of the Second Amendment and is therefore "presumptively protect[ed]" by the Constitution. *Bruen*, 142 S.Ct. at 2126. California's various arguments simply ignore *Bruen*'s straightforward approach at this stage. *See* ER-014–021.

The district court correctly ruled that the State cannot sidestep *Bruen* altogether by claiming the UHA's requirements are "presumptively lawful" regulations "imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–27. The UHA is a "functional prohibition" on the retail sale of arms, rather than a "condition" or "qualification" on commercial sales, as the court explained. ER-019–021. And *Bruen* illustrates that where, as here, the

Second Amendment's text covers a plaintiff's course of conduct, the government must demonstrate that its laws are consistent with the historical tradition of firearm regulation.

California has not met its burden under *Bruen*'s historical tradition inquiry. Indeed, the Supreme Court already answered the historical question here in *Heller* and *Bruen*: Handguns in common use cannot be banned, so there is no historical tradition that could save the UHA.

The very few laws identified by California only confirm this conclusion. The State identified historical laws that permitted the government to inspect arms and ammunition to ensure that they functioned safely and as-intended. These quality control laws were rare and inflicted only a modest burden on the right to self-defense and are not comparable to the UHA. California's attempt to analogize laws regulating the storage of gunpowder and firearms fares no better. These fire-safety laws had a distinct justification and imposed a far lesser burden on armed self-defense than the UHA. The district court correctly concluded that these laws were not "relevantly similar" to the UHA's CLI and MDM provisions. ER-021–026.

There is no historical precedent for California's attempt to impose microstamping on firearm manufacturers. While the State tries to analogize this novel technology to traditional serial numbers, "no firearm manufacturer in the

world makes a firearm with [microstamping] capability." *Boland*, 2023 WL 2588565, at *3. The State even admits as much. AOB at 45.

Nor can California justify the bizarre provision in the UHA that requires DOJ to remove three firearms from the Roster for every new handgun that is approved. The State's meager effort to justify this provision by invoking general government authority to "control" the firearms trade quickly gives way to a plea for a return to the interest balancing that *Bruen* leaves no doubt is off limits.

In short, the district court did not abuse its discretion in finding that Plaintiffs established a likelihood of prevailing on their Second Amendment claim.

The district court acted within its discretion in concluding that each of the equitable preliminary injunction factors tilts in Plaintiffs' favor. Plaintiffs are irreparably harmed by the UHA's violation of their Second Amendment rights. This harm is particularly acute because the UHA compromises Plaintiffs' right to armed self-defense with the handgun of their choice.

The balance of equities and public interest likewise favor Plaintiffs. The public interest is always in favor of preserving constitutional, rights and California has no interest in the continued enforcement of an unconstitutional law. The district court rightly rejected the State's argument that the injunction creates "public safety risks," since the State already permits the sale of grandfathered handguns without the features required by the UHA. ER-029–030.

Finally, California's efforts to reweigh evidence in the record and argue with the district court's conclusions provide no grounds for reversal. It is up to the district court to consider the evidence and weigh the equities.

This Court should affirm.

ARGUMENT

I. The District Court Correctly Ruled That Plaintiffs Are Likely To Succeed On Their Claim That The UHA Violates The Second Amendment.

Under *Bruen*, Plaintiffs are likely to prevail because the plain text of the Second Amendment protects the acquisition and possession of bearable arms, including the off-Roster handguns at issue here, and because California cannot carry its burden to establish that the UHA is consistent with the Nation's historical tradition of firearm regulation.

A. The District Court Correctly Concluded That Plaintiffs' Proposed Conduct Is Covered By The Text Of The Second Amendment.

A straightforward analysis under *Bruen* demonstrates that Plaintiffs' proposed course of conduct is covered by the Second Amendment, as the district court held.

1. Determining Whether Plaintiffs' Proposed Conduct Is Covered By The Second Amendment Is A Straightforward Exercise.

The one and only question at the outset of *Bruen*'s test is whether "the Second Amendment's plain text covers [Plaintiffs' proposed] conduct." 142 S.Ct. at 2126. This is a simple test that operates at a high level of generality. In *Bruen*, for instance,

the "proposed conduct" was "carrying handguns publicly for self-defense." *Id.* at 2134. The district court here correctly formulated the "course of conduct at issue" in this case: "Plaintiffs' desire to commercially purchase off-roster semiautomatic handguns that are in common use for self-defense and other lawful purposes." ER-014.

And the district court correctly determined that this conduct is "covered" by the Second Amendment. ER-021. The State did not dispute—and could not have disputed below—that the Second Amendment "right to keep arms, necessarily involves the right to purchase them." ER-014 (quoting *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017)). The plain text of the Second Amendment covers "*all* instruments that constitute bearable arms," *Heller*, 554 U.S. at 582 (emphasis added); any limitations on that scope are a matter of history, not plain text. *See also Bruen*, 142 S. Ct. at 2132. In other words, the plain text of the "Amendment does not parse between types, makes and models of arms. *See Heller*, 554 U.S. at 629." ER-014. And the handguns at issue in this case indisputably are bearable arms. The district court concluded, just as *Bruen* instructs, that Plaintiffs' proposed conduct is therefore "presumptively protected." ER-021; *Bruen*, 142. S.Ct. at 2130.

Accordingly, under *Bruen*, the only way a handgun can be restricted from being kept or borne for self-defense is if California can meet its burden of showing its regulation is historically justified. It cannot do so here because *Bruen* and *Heller*

have already established that any historically recognized tradition banning bearable arms is limited to a tradition of banning "dangerous and unusual weapons." *Bruen*, 142 S.Ct. at 2143. By definition, arms in common use—like handguns—cannot be banned, *see id.*, yet California has done exactly that by limiting access to only the subset of handguns that it approves.

The State completely fails to engage with *Bruen* on the terms it requires.[4]

2. The State Makes A Series Of Arguments That Have Nothing To Do With *Bruen*'s Test.

California strains to avoid *Bruen*'s instruction about how Second Amendment claims must now be resolved by making several non-textual arguments:

These safety regulations don't violate the Second Amendment. The State begins by jumping ahead to its desired *conclusion* by repeating various iterations of the argument that "*Bruen* does not prohibit States from imposing reasonable firearm safety regulations because nothing in 'the Second Amendment's plain text'

[4] The State comes closest to acknowledging the real test when it argues that, "[i]n conducting [the] textual analysis, 'the regulated conduct must be defined specifically enough that it can meaningfully compare to the Second Amendment's plain text.'" AOB at 21 (citing *United States v. Reyna*, 2022 WL 17714376, at *4 (N.D. Ind. Dec. 15, 2022)). We need not argue about how specific the articulation must be, or whether *Reyna* was properly decided; it suffices to note that the articulation of the proposed conduct in *Reyna* ("possession of a firearm with an obliterated serial number") was no more specific than the articulation of the proposed conduct here. And in any event, at the plain text level the only question is whether the item in question is an "arm"; whether that arm can nevertheless be restricted is a matter for the historical inquiry.

guarantees the commercial availability of firearms without features that enhance the safety of what is ultimately a consumer product." AOB at 22. The UHA's imposition of "mere[] safety features," *id*., it is claimed, cannot violate the Second Amendment. *Id*. at 23 ("[i]mposing safety requirements . . . does not restrict conduct protected by the Second Amendment"); *see also id*. at 24 ("[n]or have plaintiffs shown that the Roster removal provision violates the plain text of the Second Amendment").

It is entirely backwards under *Bruen* to claim that the firearms regulations at issue here don't violate the Second Amendment, so the Second Amendment's text isn't implicated. The question at this stage of the analysis is *only* whether the proposed conduct is covered by the Second Amendment's text, and it plainly is. The State's policy justifications have nothing to do with whether Plaintiffs' proposed conduct is covered by the Second Amendment's text. Indeed, after *Bruen*, a government's policy justifications for firearm restrictions have no bearing at any stage of the analysis. 142 S.Ct. at 2126 ("To justify its regulation, the government may not simply posit that the regulation promotes an important interest."), 2127–31 (explaining that means-end scrutiny is improper under *Heller*). Rather, so long as a plaintiff's proposed conduct is covered by the Second Amendment, as it is here, the question whether the regulation does or does not *violate* the Second Amendment can "only" be determined after the government attempts to carry its burden of

"justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*. at 2130.

Plaintiffs already have enough guns to choose from. The State next claims that the UHA's "requirements do not impede any person's ability to purchase or possess a handgun" because Californians can still purchase "nearly 500 semiautomatic pistols [and] about 315 revolvers." AOB at 23; *see also id*. at 26 ("the challenged laws do not infringe on the rights to 'keep and bear Arms'" because Plaintiffs can still choose from "approximately 800 models" of handguns). But this is not a textual argument either. The district court succinctly captured the point: "[T]he availability of handguns on the roster for retail purchase does not address in any way whether Plaintiffs' desire to purchase off-roster semiautomatic handguns is *covered* by the Second Amendment. Instead, the argument focuses on the *burden* imposed on Plaintiffs' rights, which assumes Plaintiffs' conduct is protected (covered) by the Amendment." ER-015. And *Heller* has already *rejected* the similar argument that the government can justify a ban of some arms in common use by pointing to the availability of other arms: "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." 554 U.S. at 629. "[R]estating the Second Amendment right in terms of what IS LEFT after the regulation rather than what EXISTED historically . . . is exactly backward from *Heller*'s reasoning." *Nat'l Rifle*

Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc).

Nor is it a textual argument for California to regurgitate *Heller*'s statement that "the right secured by the Second Amendment is not unlimited," and that it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. 626; *see* AOB at 26–27. This statement does not concern the coverage of the Amendment's *text*; rather, it is an acknowledgment that some *historical* limitations on the right have been recognized. *Heller* goes on to explain that one of those "important limitation[s] on the right to keep and carry arms" is that "the sorts of weapons protected were those 'in common use at the time.'" 554 U.S. at 627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)).

At the textual step, *any* bearable arm falls within the Amendment's ambit. *See Heller*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to *all instruments* that constitute bearable arms.") (emphasis added). Here, California is banning handguns, the "quintessential self-defense weapon," which both *Heller* and *Bruen* explained are in common use—so history cannot provide support for such a ban. *Heller*, 554 U.S. at 629; *Bruen*, 142 S.Ct. at 2143.[5]

[5] By expressing this "limitation" on the reach of the Second Amendment's scope, *Heller* affirms that the Second Amendment's scope *does* extend to protect handguns in common use, because there is no historical tradition limiting citizens' access to them.

It's the manufacturers' fault for not complying. The State repeatedly makes the nonsensical argument that the UHA requirements at issue here aren't to blame for the roster's limitation on the availability of handguns. AOB at 23–30. Rather, it's the manufacturers "choice not to comply" with the UHA that is to blame, and applying *Bruen* faithfully would "allow[] firearm manufactures to dictate what safety features they will tolerate." *Id*. at 28, 29; *see also id*. at 23 ("manufacturers have demonstrated that they can make semiautomatic pistols satisfying the [CLI] and [MDM] requirements," so therefore "[i]mposing safety requirements that manufacturers acknowledge they can meet does not restrict conduct protected by the Second Amendment's textual right to 'keep' and 'bear' protected 'arms'"). Therefore, the State claims, the district court erred by concluding that the UHA's requirements operate as a "functional prohibition" on modern handguns that do not qualify for the Roster. *Id*. at 27 (citing ER-019–020).

Setting aside that this has absolutely nothing to do with the question whether Plaintiffs' proposed conduct is covered by the Second Amendment's text, this argument is incoherent. Plaintiffs brought this case because the UHA's various features restrictions render ineligible for sale many hundreds of models of handguns that are commonly used throughout the United States. The *entire point* of the UHA is to ban these guns because California deems them "unsafe" since they don't have the CLI or MDM features or microstamping capability.

The microstamping requirement is just like a serial number requirement. Finally, the State protests that the UHA's microstamping requirement "is an extension of identification methods long used in imprinting serial numbers," and courts have upheld serial number requirements as constitutional. AOB at 24, 28–29.[6] Plaintiffs highlight this argument not just because it also ignores the actual question at this stage. Rather, it's worth emphasizing that the State clings to the test *Bruen* rejected by relying here on *Pena*'s conclusion that the microstamping requirement survived intermediate scrutiny. AOB at 24 (citing *Pena*, 898 F.3d at 978 and 985). After *Bruen*, this Court may no longer decide Second Amendment cases based on "the deference [it] provide[s] to California's lawmakers." *Pena*, 898 F.3d at 983; *Bruen*, 142 S.Ct. at 2131 ("while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here"). All that matters at this juncture is that the Plaintiffs' proposed conduct is covered by the Second Amendment's text.

[6] The record reveals that any suggestion that serial numbers and microstamping requirements are comparable is manifestly wrong, as no commercially available semiautomatic handguns contain microstamping technology. *See* ER-020; *Boland*, 2023 WL 2588565, at *3.

B. The District Court Correctly Decided That The State Cannot Evade Its Burden On The Theory That The UHA's Requirements Are "Presumptively Lawful" As "Conditions Or Qualifications On The Commercial Sale" of Arms.

The State also claims that the UHA's ban on handguns lacking the required features is "presumptively lawful" because they are "laws imposing conditions and qualifications on the commercial sale of arms." AOB at 31 (citing *Bruen*, 142 S.Ct. at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626–27)). The district court properly rejected this argument with a detailed analysis. ER-018–021. This Court has called *Heller*'s discussion about such "presumptively lawful" regulations "opaque." *Teixeira*, 873 F.3d at 683. And even in *Teixeira*'s now-discredited two-step analysis of county zoning requirements, the en banc Court refused to "rely[] on [that language in *Heller*] alone to dispose of" the case, *id*. at 683, like the State requests here.

Heller "did not invite courts onto an analytical off-ramp to avoid constitutional analysis" or insulate firearms regulations from constitutional scrutiny. *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686–87 (6th Cir. 2016). Instead, following *Bruen*, *Heller*'s list of "presumptively lawful" regulations should be understood as a set of regulations that the Court assumed would prove constitutional to some extent, *after the proper historical analysis was completed*. In other words, nothing about *Heller*'s use of the word "presumptively" indicates courts can simply skip the historical analysis *Bruen* prescribes or apply a burden-shifting

"presumption" in the government's favor. To the contrary, *Bruen* twice emphasized the legal presumption that actually applies in its test: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and "only" after conducting the necessary historical analysis, where the government bears the burden, "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" 142 S.Ct. at 2126, 2130 (citation omitted).

The Court's analysis in *Bruen* further illustrates that laws fitting *Heller*'s list of "presumptively lawful regulatory measures" are not exempt from the text-and-history test. Namely, *Heller*'s list includes "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," 554 U.S. at 626, but *Bruen* demonstrates that the government's designation of "sensitive places" does not create a legal presumption in its favor. Rather, the government must still demonstrate, just as with any other firearm regulation, that sensitive place restrictions are consistent with the Nation's history of firearm regulations. *See Bruen*, 142 S.Ct. at 2133–34. Likewise, in *Range v. Garland*, --- F.4th ----, No. 21-2835, 2023 WL 3833404 (3rd Cir. June 6, 2023), the *en banc* Third Circuit required the government to justify its felon-in-possession ban under *Bruen*'s history test—which the government could not do—even though *Heller* listed such a restriction

among its "presumptively lawful" regulations. *Id*. at *5–7; *see Heller*, 554 U.S. at 626–27 & n.26.

In any event, the UHA's features requirements manifestly are **not** "qualifications or conditions on the commercial sale of arms," so the import of this passage from *Heller* is entirely academic. The district court correctly relied on the reasoning in *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407 (4th Cir. 2021), vacated as moot on other grounds, 14 F.4th 322 (4th Cir. 2021), which dealt with federal statutes that prohibit already-licensed firearms dealers from selling handguns and handgun ammunition to anyone under the age of 21. ER-019–020. The Fourth Circuit rejected the government's reliance on *Heller*'s "presumptively lawful" passage and observed that "[a] condition or qualification on the sale of arms is a hoop someone must jump through to *sell* a gun, such as obtaining a license, establishing a lawful premise, or maintaining transfer records." 5 F.4th at 416 (original emphasis). *Hirschfeld* further emphasized that "a law's substance, not its form, determines whether it qualifies as a condition on commercial sales." *Id*. at 416 (citing *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016)).

And the district court correctly concluded that the substance of the UHA's features requirements is a "functional prohibition" on the sale of arms, just as in *Hirschfeld*. ER-020. Here, just like the dealer in *Hirschfeld*, dealers in California have jumped through the "hoops" to get licensed and "qualified" to sell firearms. 5

F.4th at 416. The UHA bans these qualified dealers from selling the hundreds of handguns that don't have the UHA's required features, no matter how many hoops the dealers might jump through. Just as the statutes in *Hirschfeld* told qualified dealers *to whom* they could sell, the UHA tells qualified dealer *what* they can and cannot sell. ER-019–020. Flat prohibitions like this have nothing to do with "conditions or qualifications" on commercial sales.

The district court summed it up exactly right: "If the commercial sales limitation identified in *Heller* were interpreted as broadly as the State suggests, the exception would swallow the Second Amendment. States could impose virtually any condition or qualification on the sale of any arm covered by the Second Amendment, no matter how prohibitory." ER-020; *see also United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3rd Cir. 2010) ("If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*."). [7] The State cannot avoid its burden of justifying the UHA's handgun ban.

[7] Moreover, "treat[ing] *Heller*'s listing of 'presumptively lawful regulatory measures,' for all practical purposes, as a kind of 'safe harbor,'" as some courts have done, "'approximates rational-basis review, which has been rejected by *Heller*.'" *Tyler*, 837 F.3d at 686 n.6 (quoting *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010)). Indeed, *Bruen* has now rejected any scrutiny inquiry at all in favor of historical analysis.

C. The District Court Correctly Found That The UHA Is Inconsistent With The Nation's Historical Tradition Of Firearm Regulation.

As noted above, *Heller* and *Bruen* already answered the historical question here: Handguns in common use cannot be banned. *Bruen*, 142 S.Ct. at 2128 (quoting *Heller*, 554 U.S. at 627), 2134; *Heller*, 554 U.S. at 624. Even if the Court were to look beyond that and consider the State's supposed historical analogues, California has failed to meet its burden of demonstrating that the Roster's ban "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126. For a historical law to serve as a "proper analogue" to a modern firearm regulation, the two laws must be "relevantly similar" based on "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132–33. "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry." *Id.* at 2133 (citations omitted). To carry its burden, "the government [must] identify a well-established and representative" tradition of analogous regulation, and "courts should not 'uphold every modern law that remotely resembles a historical analogue,'

because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.'" *Id.* at 2133 (citation omitted).[8]

The very few laws identified by the State fall far short of demonstrating a historical tradition of limiting arms in common use, let alone a tradition sufficient to justify the UHA. To evade the inevitable conclusion that the Roster's novel feature requirements are unconstitutional because they lack a historical pedigree, California pleas for the Court to take a "nuanced approach" to its analysis. AOB at 35 (quoting *Bruen*, 142 S.Ct. at 2132). By this, the State apparently means the historical question should be framed in very broad terms: It argues that there is a "long history" of regulation "to protect the public from defective or poorly manufactured firearms," AOB at 35, and the UHA's feature requirements "are part of that well-established tradition." AOB at 36. Yet *Bruen* cautioned against defining the analogical inquiry at such a high level: "[B]ecause '[e]verything is similar in infinite ways to everything else,' one needs 'some metric enabling the analogizer to assess which similarities are important and which are not.'" 142 S.Ct. at 2132 (citations omitted). And when this Court follows *Bruen*'s blueprint, the analysis, however nuanced, confirms that the UHA is not consistent with the Second Amendment's historical understanding.

[8] California conspicuously does *not* argue that the UHA is consistent with the historical laws banning "dangerous and unusual" weapons, nor could it in light of *Heller*. 554 U.S. at 627; *see also Bruen*, 142 S.Ct. at 2143.

1. Firearm Proving Laws And Colonial Fire-Safety Regulations Are Not Proper Analogues To The CLI Or MDM Requirements.

California identifies two small collections of early American laws that it claims establish a historical precedent for the UHA's CLI and MDM requirements.

One Proving Law In Massachusetts (And Another In Maine)

The State's leading example is an 1805 Massachusetts law requiring that all firearms manufactured in the state be inspected and certified by a state-appointed "prover" of firearms. AOB at 37; *see* ER-258–259 (Cornell Decl., Ex 3). This law required all muskets and pistols to pass a discharge test proving that they are operable, and the prover would then stamp their initials and the year of inspection on the firearm. *Id.* This law fails *Bruen*'s "how" and the "why" metrics and is therefore not "relevantly similar" to the CLI and MDM requirements.

The proving law imposed a far lesser burden on Second Amendment rights than the UHA: Massachusetts did not prescribe any particular features or specifications for firearms to be sold in the state. Rather, manufacturers needed only prove that the firearm operated as intended (*i.e.*, to pass a basic objective firing test). Thus, quite unlike the UHA, the "prover" law did not exclude commonly used arms for lacking "safety" characteristics; Massachusetts did not use the law to force gun manufacturers to *add* unusual "safety" features. Here, off-roster handguns could pass 100 firing tests to confirm they work, but they would still be banned. This key

distinction reveals the fault in California's overbroad claim that the laws are comparably justified because they both seek "to reduce the dangers arising from firearms and ammunition that did not function or were not used in line with their intended purpose." AOB at 39. California's law goes far beyond just making sure that handguns properly function and instead bans hundreds of handguns that function just fine (and, given the steady advance of technology, that almost certainly function better than the grandfathered firearms that are on the Roster).

The problems with California's effort to analogize the Massachusetts proving law don't end there. The law applied only to in-state manufacturers—based on the text of the law, Bay Staters remained free to purchase any firearms manufactured out of state, which were not subject to the testing law. Nor did it even apply to the state's largest manufacturer, the federal Springfield Armory. ER-207–208 (Cornell Decl., ¶¶ 32–33). As such, this prover law operates nothing like the UHA's complete ban of today's most popular handgun models from manufacturers like Glock and SIG Sauer. And the State is surely wrong to claim that the prover law "required an inspection and stamp for *every* firearm . . . that was to be sold" in Massachusetts. AOB at 39 (emphasis in original). The district court correctly found that the UHA and proving laws do not impose "comparable burden[s]" on Second Amendment rights because the UHA's feature requirements "prohibit retail sales in the state of a

significant segment of the most common self-defense firearm sold in America today." ER-024.

California's effort to analogize the proving law also fails because Maine is the only state other than Massachusetts to have enacted similar legislation. AOB at 38. Both *Heller*, 554 U.S. at 632, and *Bruen*, 142 S.Ct. at 2153, teach that more is required to establish a tradition. Because these rare prover laws stand alone, they are not a "well-established and representative historical analogue"—relying on them to uphold California's UHA here would "risk[] endorsing [an] outlier[]." *Bruen*, 142 S.Ct. at 2133.

Fire-Safety Laws Controlling Storage And Inspection Of Arms And Gunpowder

In keeping with its over-generalized approach, California lumps the two proving laws in with a handful of very different 19th-century fire-safety regulations. AOB at 37–40. Most prominent among them is a Massachusetts law that prohibited storing loaded weapons in Boston homes, which *Heller* already rejected as an appropriate historical analogue because it was directed at *fire* safety, not gun control. Because the law's purpose "was to eliminate the danger to firefighters posed by the 'depositing of loaded Arms' in buildings," it "gives reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder." 554 U.S. at 631; *see* 2 Acts And Laws Of The Commonwealth Of Massachusetts 120 (1890) (noting that

"the depositing of loaded Arms in the Houses [of Boston] is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out").[9] California's reliance on the Massachusetts powder law fares no better here.

The State also cites a smattering of early American gunpowder inspection and storage laws from a few states. AOB at 38–39. *Bruen* demands more to constitute a "well-established and representative" historical tradition of regulation of any kind. 142 S.Ct. at 2133. But even if the State could catalogue similar gunpowder storage laws in *every* state at the Founding, such laws are not "relevantly similar" to the UHA's ban on the retail sale of handguns in common use across the country.

These laws fail both the "how" and "why" metrics that are "central" to *Bruen*'s analogical analysis. The gunpowder regulations and UHA do not impose "comparable" burdens on Second Amendment rights. The State acknowledges that the gunpowder inspection laws were limited to ensuring that ammunition "met certain quality standards." AOB at 38. Thus, similar to the proving laws, these regulations were meant to ensure gunpowder worked properly. These laws fail *Bruen*'s test for the same reason the proving laws do: Imposing basic quality controls

[9] This Court previously rejected San Francisco's attempt to analogize the Massachusetts fire-protection law to support its handgun ordinance. *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (finding that Boston's firearm-and-gunpowder storage law was historically irrelevant based on *Heller*).

on ammunition is a far lesser burden on Second Amendment rights than banning an entire class of handguns that work as intended.

For their part, gunpowder storage laws restricted the amount of gunpowder that could be kept or regulated the manner of storage. AOB at 38–39. These regulations are not comparably justified to the UHA. As California notes, the inspection and storage regulations were based principally on the danger of combustion in residential dwellings in the event of a fire. *See* AOB at 38 (explaining that the historical regulations aimed "to reduce harm to the public and decrease the risks of fire, accidental discharge, and explosion arising from the corrosive nature of gunpowder"). The UHA, on the other hand, is motivated by the State's generalized assertion that particular—and manifestly uncommon—features are necessary to prevent handguns from being "unsafe." And far from just regulating just the manner of storing ammunition, the UHA imposes a far greater burden on the right of armed self-defense by prohibiting the sale of a class of arms altogether.

The State responds that the storage laws share a common justification with the CLI and MDM requirements because they are both generally aimed at preventing accidents, *i.e.*, accidental ignition of gunpowder and accidental firing of a pistol. AOB 40–41. The relevant metric here, however, is not "laws that prevent accidents." The problem with this line of reasoning is evident when you consider the *type* of accident the laws are directed toward. The storage laws were concerned with the risk

of fire from poorly stored or improperly manufactured gunpowder; they were not directed at risks from a firearm's operation.[10] California, on the other hand, justifies the CLI and MDM requirements based on its concern with malfunction or accidental discharge. These justifications are different in kind.

The State strains its analogical efforts far beyond reason by arguing that these historical laws "imposed a greater burden" on armed self-defense than the UHA. AOB at 39. First it says that while the inspection laws required that "*every* firearm and *every* cask of ammunition" be tested, the UHA only requires testing of a three-gun sample of each make and model of firearm. This, of course, ignores the fact that the UHA dictates what pistols can be submitted for testing in the first place—and establishes that hundreds of handguns in common use throughout the Nation *cannot even be tested* for inclusion on the Roster.

The State doubles down on this absurdity by claiming the gunpowder storage laws were more burdensome than the UHA in that they authorized the government to "search any building for gunpowder, burdening customers and manufacturers alike," while the UHA's restrictions "do not impose any burdens on consumers."

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[10] California claims that in *Boland* it tracked down "relevant historical laws related to firearm storage." AOB at 40 n.11 (citing *Boland* AOB at 36–38 and *Boland* ER-238–243). But the only firearm-storage restriction identified in the briefing and portions of the record referenced by the State is the same 1783 Massachusetts law prohibiting the storage of a loaded weapon in the home that has been rejected as a fire-safety law by *Heller*, this Court, and the district court below.

AOB at 40. Of course they do. The entire premise of the Roster is to control the retail marketplace for handguns by restricting what is available for consumers. Under the UHA, Californians can purchase any handgun they want so long as it has a CLI, MDM, and microstamping—three features that no handgun manufactured in the world possesses.

The CLI and MDM requirements are not consistent with the Nation's historical tradition of firearm regulation.

2. The Microstamping Requirement Has No Historical Analogue.

The State briefly argues that the microstamping requirement is justified by a historical tradition "supporting federal requirements for serial numbers." AOB at 43–45. This argument is based entirely on a district court opinion rejecting a criminal defendant's Second Amendment challenge to 18 U.S.C. § 922(k), which prohibits the possession of firearms with obliterated serial numbers. *United States v. Holton*, 2022 WL 16701935, at *3–5 (N.D. Tex. Nov. 3, 2022). This argument falls short for several reasons:

First, California advances this argument for the first time on appeal. The State did not present this theory to the district court and there is no evidence in the record to support it. "Generally, [this Court does] not consider arguments raised for the first time on appeal." *Momox-Caselis v. Donohue*, 987 F.3d 835, 841 (9th Cir. 2021).

Second, the State does not bother to identify any specific historical regulations that it claims are relevantly similar to the microstamping requirement. Instead, it summarizes and quotes general propositions from *Holton*. This is insufficient to meet the government's burden of proof to "identify a well-established and representative historical analogue." *Bruen*, 142 S.Ct. at 2133. A modern serial number law is not enough.

Third, even if the district court in *Holton* were correct that the federal serial number law had an appropriate historical analogue, that would not mean that California's novel microstamping requirement survives constitutional scrutiny. The *Holton* court explained that the presence of serial numbers (and the requirement not to obliterate them) "imposes an arguably negligible burden" on Second Amendment rights. 2022 WL 16701935, at *5. This is not remotely similar to the severe burden imposed by the microstamping requirement, as "no firearm manufacturer in the world makes a firearm with this capability." *Boland*, 2023 WL 2588565, at *3. As the State itself acknowledges, "[t]o be sure, no new semiautomatic pistols have been made available for retail sale since the microstamping requirement took effect." AOB at 45. Put simply, the federal serial number statute and California's microstamping requirements do not impose comparable burdens on the right to armed self-defense. There is no historical precedent for requiring firearms to possess technology that is not commercially available.

3. The Roster Removal Provision Is Not Supported By A Historical Tradition Of Firearm Regulation.

California attempts to justify the UHA's three-for-one removal provision by analogizing it to the government's general authority to "regulat[e] the commercial sale of firearms." AOB at 46, 47. The State points to no specific historical analogues but instead rehashes the various regulations that it sought to analogize to the feature requirements which, California claims, evidences a history of "government control" over the firearms trade. AOB at 47.

While it is obvious that this does not suffice under *Bruen*'s historical tradition inquiry, California's generalizing ignores that the "removal provision" is simply an arbitrary ban of guns now being sold and used: For every gun added to the Roster, three must be removed. § 31910(b)(7). Even if new handguns could be added to the Roster, the UHA then requires that the Roster shrink, thereby even further limiting the number of firearms law-abiding Californians have access to. As demonstrated above, *Heller* and *Bruen* have already explained that there is no historical tradition of analogous regulations.

What the State really seeks is a return to the pre-*Bruen* regime: It claims that the roster-removal provision is justified by the government's interest in public safety, and that "any burden imposed by the Roster removal provision is minimal" because "it merely incentivizes manufacturers to add . . . features" while "allow[ing] ready access to numerous alternative handguns." AOB at 48. This is an attempt to

swap *Bruen*'s standard for the interest-balancing test it rejected. The Supreme Court left no room for doubt that this is inappropriate: courts may not "engage in independent means-end scrutiny under the guise of an analogical inquiry." 142 S.Ct. at 2133 n.7. There is no historical precedent for the removal requirement.

* * *

In sum, the UHA's feature requirements and removal provision flunk *Bruen*'s historical test. California failed to meet its burden.

II. Each Of The Equitable Preliminary Injunction Factors Tilts In Plaintiffs' Favor.

California leads with two intertwined arguments concerning the district court's conclusion that each of the equitable factors favored preliminary injunctive relief. Each of these arguments is designed to obscure the deferential standard of review that governs this appeal. Neither has merit in any event.

The State first claims that the district court's analysis turned entirely on Plaintiffs' establishing a likelihood of success on the merits such that the district court "collaps[ed]" and "eliminated" the remaining equitable factors. AOB at 49–51.[11] Not so. To be sure, "[l]ikelihood of success on the merits is a threshold inquiry

[11] California spends nearly three pages of its opening brief conjuring up an argument that the district court disregarded the equitable factors set forth in *Winter* and considered only Plaintiffs' likelihood of success on their Second Amendment claim, as if the court did not even bother with the equitable analysis. But that is not the case. In response, it suffices to note that Plaintiffs do not contend that *all* they needed to show was likelihood of success on the merits. Rather, the district court

and is the most important factor" in considering whether to issue a preliminary injunction. *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). But the district court did not, as the State argues, "simply assume" that the equitable factors "collapse[d] into the merits" of Plaintiffs' claim. AOB at 51; *see Doe v. Harris*, 772 F.3d 563, 582–83 (9th Cir. 2014). Rather, the district court determined that Plaintiffs' constitutional injury caused irreparable harm, ER-029, and then considered and rejected California's claim that an injunction would create "public safety risks" when balancing the equities and considering the public interest, ER029–030. As explained below, each of these conclusions was consistent with this Court's longstanding precedents and well within the district court's discretion.

California next argues that the district court's ruling is "especially problematic" because of the "mandatory nature" of the injunction. AOB at 51–52. A mandatory injunction is one that orders a party to "take action," while a prohibitory injunction is one that "restrains" a party from further action. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). But the district court's injunction does not require the State to do anything: It enjoins the State from enforcing the CLI, MDM, microstamping, and three-for-one removal provisions of the UHA. ER-032. And an injunction that prohibits the government from taking further unconstitutional action

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correctly held that each of the necessary elements for obtaining a preliminary injunction was satisfied.

is "a classic form of prohibitory injunction" that "prevents future constitutional violations." *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017) (collecting cases).[12] So while California protests that the injunction "would alter the status quo," AOB at 51, "[m]aintaining the status quo is not a talisman." *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). And "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury." *Id.* (quoting *Canal Auth. of Florida v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)). Accordingly, the heightened standard that applies to mandatory injunctions is not appropriate here.

A. The District Court Correctly Held That Plaintiffs Are Irreparably Harmed By The UHA.

Plaintiffs are irreparably harmed by the UHA's violation of their Second Amendment rights. As this Court has repeatedly emphasized, "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres*, 695 F.3d at 1002 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Because "constitutional violations cannot be adequately remedied through damages [such violations] therefore generally constitute irreparable harm." *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (citation

[12] In any event, a mandatory injunction it would be warranted in this case because "the facts and law clearly favor" Plaintiffs. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994)).

omitted). This principle applies with equal force to Second Amendment violations. *E.g.*, *Ezell v. Chicago*, 651 F.3d 684, 699–700 (7th Cir. 2011) (Second Amendment deprivation is "irreparable" because there is "no adequate remedy at law"); *Duncan v. Becerra*, 265 F.Supp.3d at 1135 ("Loss of . . . the enjoyment of Second Amendment rights constitutes irreparable injury."); *Koons v. Reynolds*, --- F.Supp.3d ---- (2023), 2023 WL 128882, *22 (D. N.J. Jan. 9, 2023) (collecting cases holding that Second Amendment deprivations constitute irreparable harm). Holding otherwise would render the Second Amendment "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 142 S.Ct. 2156 (quoting *McDonald v. Chicago*, 561 U.S. 742, 780 (2010)).

In response, California argues that Plaintiffs did not "provide evidence of any immediate, practical harm." AOB at 53. Inherent in this argument is the State's belief that Plaintiffs' inability to purchase off-Roster handguns does not amount to any injury at all, but that is obviously wrong. In any event, the Second Amendment protects not only tangible, but "intangible and unquantifiable interests." *Ezell*, 651 F.3d at 699. "The right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary." *Grace v. District of Columbia*, 187 F.Supp.3d 124, 150 (D.D.C. 2016). Put simply, "[u]nlike the exercise of other constitutional rights, the inability to exercise one's Second Amendment right when

needed could be a matter of life or death." *Koons v. Platkin*, --- F.Supp.3d ----, 2023 WL 3478604, at *105 (D.N.J. May 16, 2023).[13]

While the loss of "peace of mind" stemming from a Second Amendment deprivation is irreparable in itself, that harm is more acute where, as here, Plaintiffs' ability to exercise their constitutional rights "may save lives." *Duncan*, 265 F.Supp.3d at 1135 (holding that irreparable harm resulted from restriction on plaintiffs' inability to possess magazines holding more than ten rounds). Plaintiffs have explained why off-Roster pistols were better suited for their particular self-defense needs and detailed the practical limitations the Roster imposes. ER-317–325 (Third Am. Compl., ¶¶ 17–38); ER-282–283 (Phillips Decl., ¶¶ 14–16, 20); ER-285 (Renna Decl., ¶¶ 4–7); ER-289 (M. Schwartz Decl., ¶¶ 6–9).[14] And the UHA's harm

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[13] Other courts have emphasized similar points when describing Second Amendment injuries. *E.g.*, *Rhode v. Becerra*, 445 F.Supp.3d 902, 953–54 (S.D. Cal. 2020) ("The right to keep and bear arms is the insurance policy behind the right to life. If a state regulation prevents a citizen from protecting his life, his other constitutional rights will be superfluous."); *Spencer v. Nigrelli*, --- F.Supp.3d ----, 2022 WL 17985966, at *13 (W.D.N.Y. Dec. 29, 2022) (finding that plaintiffs suffered irreparable harm by being forced to give up their right to armed self-defense outside the home because they "cannot regain . . . peace of mind or readiness [for self-defense] after the fact").

[14] To support their motion, Plaintiffs also relied on previous declarations submitted by the individual Plaintiffs that detailed the particular off-Roster firearms they wished to purchase. *See, e.g.*, D.Ct.Dkt. 13-15 (D. Jaymes Decl., ¶¶ 7–10, discussing her desire to purchase firearms for concealed-carry and home defense that are better suited for women); D.Ct.Dkt. 13-21 (L. Schwartz Decl., ¶¶ 6–8, discussing her desire to purchase firearms that are safer and more accurate for her to shoot because of her hand size).

is not limited to the individual Plaintiffs, it extends to the customers of the retailer Plaintiffs and the members of the Plaintiff organizations, who are all subject to the Roster's restrictions.[15]

Finally, California suggests that Plaintiffs did not establish irreparable harm because they did not "disclose what firearms they already own" and prove that those firearms are not adequate for self-defense.[16] AOB at 56. But the enshrinement of the Second Amendment means that individual citizens—and not the government—get to choose which firearms best suit their particular self-defense needs. As the Court made clear in *Heller*, "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms . . . is allowed." 554 U.S. at 629; *see also Frein v. Penn. State Police*, 47 F.4th 247, 256 (3d Cir. 2022) (rejecting the government's argument that "seizures do not burden Second

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[15] California does not dispute that the retailer and organizational plaintiffs have standing to assert a Second Amendment claim on behalf of their customers and members, respectively.

[16] California quotes *Or. Firearms Fed'n, Inc. v. Brown*, No. 2:22-cv-01815, 2022 WL 17454829 (D. Or. Dec. 6, 2022), which is distinguishable in multiple respects from this case. There, the district court denied a TRO in a challenge to law prohibiting the use of magazines that hold more than ten rounds of ammunition inside the home: The court found plaintiffs had failed to establish a likelihood of success in the first instance, *id.* at *12–17; and the plaintiffs failed to establish an "immediate risk of irreparable harm" to justify a TRO given the law's "grandfather clause" that allowed for continued possession of magazines and another provision permitting their use on plaintiffs' property, *id.* at *18–19. Here, by contrast, Plaintiffs established that they are likely to succeed on the merits and demonstrated that the UHA imposes a severe burden on their right to armed self-defense.

Amendment rights as long as citizens can 'retain[ ] or acquir[e] other firearms"'); *id.* ("We would never say the police may seize and keep printing presses so long as newspapers may replace them, or that they may seize and keep synagogues so long as worshippers may pray elsewhere.").

In short, Plaintiffs have demonstrated more than just an "abstract" injury based on the deprivation of their ability to purchase off-Roster handguns.

B. The District Court Correctly Held That The Balance Of Equities And Public Interest Favored A Preliminary Injunction.

Turning to the balance of equities and public interest. California leads by claiming that the district court erred in relying on Plaintiffs' "purported constitutional injury" when considering the remaining equitable factors. AOB at 56. This argument ignores this Court's consistent recognition that when a state violates the Constitution, "both the public interest and the balance of the equities favor a preliminary injunction." *Arizona Dream Act Coalition*, 757 F.3d at 1069. This is because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (citation omitted); *accord Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."). Accordingly, this Court has explained that "it is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there

are no adequate remedies available." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009), reiterated in *United States v. California*, 921 F.3d 865, 893–94 (9th Cir. 2019). On the other hand, California "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *see also Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (the government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations").

California does not contest these principles on appeal, but instead argues that the "'public interest' is harmed where . . . a lower court invalidates a duly enacted statute." AOB at 56. To support this point, the State claims that it "suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." because of the injunction. AOB at 56–57 (quoting *Coal. For Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)).

This Court long ago distanced itself from *Wilson*'s language, noted that it was dicta, and cautioned that it should not be used to override the *Winter* analysis when the validity of a statute is at issue: Even though "a state may suffer an abstract form of harm whenever one of its acts is enjoined," this "is not dispositive of the balance of harms analysis. If it were, then the rule requiring 'balance' of 'competing claims of injury,' would be eviscerated. Federal courts instead have the power to enjoin state actions, in part, because those actions sometimes offend federal law provisions,

which, like state statutes, are themselves 'enactments of its people or their representatives.'" *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (citations omitted), vacated and remanded on other grounds, 565 U.S. 606 (2012); *see also Latta v. Otter*, 771 F.3d 496, 500 & n.1 (9th Cir. 2014) (noting that "[i]ndividual justices, in orders issued from chambers, have expressed the view that a state suffers irreparable injury when one of its laws is enjoined," but "[n]o opinion for the Court adopts this view" (citations omitted)). In other words, the naked statement that California is injured *ipso facto* because its statute is enjoined cannot warrant disturbing the district court's ruling.

California's argument also ignores that the district court considered the arguments and evidence it put forward, and then concluded that the balance of equities and public interest supported a preliminary injunction. ER-029–030. As part of its analysis, the district court rejected the State's argument—reiterated on appeal—that an injunction would "create[] 'public safety risks,'" noting that "grandfathered handguns without CLI, MDM, or microstamping features are already available to Californians" and "[o]f the 499 grandfathered semiautomatic pistols, only 32 have CLI and MDM features." *Id.* The *Boland* district court reached the same conclusion. 2023 WL 2588565, at *9–10.

The rest of California's argument boils down to restating the evidence in the record here (and citing the record in *Boland*) to quibble with the district court's

conclusion that the equitable factors favored Plaintiffs. AOB at 57–61. This misses the mark for a few reasons. For one thing, arguing that the injunction permits "unsafe" handguns to be sold in California assumes the constitutional validity of the Roster in the first place. It also ignores that the State has not only grandfathered an entire Roster full of handguns that lack these features, it has carved out exemptions for numerous categories of government officials and personnel, allowing *them* to freely acquire off-Roster handguns and thus undermining the fundamental premise that these arms are "unsafe." *See Boland*, 2023 WL 2588565, at *3, *10.

Beyond that, California's desire to relitigate the evidence provides no grounds for reversal. "The assignment of weight to particular harms is a matter for district courts to decide." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010). When reviewing a preliminary injunction, this Court does not "'re-weigh the evidence and overturn the district court's evidentiary determinations,'" which would, "'in effect, . . . substitute [its] discretion for that of the district court.'" *Duncan v. Becerra*, 742 F. App'x 218, 222 (9th Cir. 2018) (quoting *Fyock*, 779 F.3d at 1000).

California identifies no legal error in the court's analysis, it just disagrees with the result. The district court's factual findings were not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Herb Reed Enters., LLC*, 736 F.3d at 1247. That is the end of the matter.

There is no basis to revisit the district court's consideration of the balance of equities and public interest on appeal.

CONCLUSION

This Court should affirm the district court's order granting a preliminary injunction.

Respectfully submitted,

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1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because this brief contains 12,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: June 9, 2023

s/Bradley A. Benbrook_
Bradley A. Benbrook

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I hereby certify that on June 9, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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