

1 Raymond M. DiGuseppe
The DiGuseppe Law Firm, P.C.
2 4320 Southport-Supply Road, Suite 300
Southport, NC 28461
3 P: 910-713-8804
E: law.rmd@gmail.com

Michael P. Sousa
Law Offices of Michael P. Sousa, APC
3232 Governor Dr., Suite A
San Diego, CA 92122
P: 858-453-6122
E: msousa@msousalaw.com

4 Bradley A. Benbrook
Stephen M. Duvernay
5 Benbrook Law Group, PC
701 University Avenue, Suite 106
6 Sacramento, CA 95825
P: 916-447-4900
7 E: brad@benbrooklawgroup.com

William A. Sack
Firearms Policy Coalition
426 Campbell Avenue
Havertown, PA 19083
P: 916-596-3492
E: Wsack@fpclaw.org

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10 Attorneys for Plaintiffs

11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 Lana Rae Renna; Danielle Jaymes; Laura
14 Schwartz; Michael Schwartz; Robert
15 Macomber; Clint Freeman; John Klier;
16 Justin Smith; John Phillips; Cheryl
17 Prince; Darin Prince; Ryan Peterson;
18 PWGG, L.P.; North County Shooting
Center, Inc.; Gunfighter Tactical, LLC;
19 Firearms Policy Coalition, Inc.; San
Diego County Gun Owners PAC;
Citizens Committee for the Right to
Keep and Bear Arms; and Second
Amendment Foundation,

20 Plaintiffs,

21 v.

22 Robert Bonta, Attorney General of
California; and Allison Mendoza,¹
23 Director of the California Department of
Justice Bureau of Firearms,
24

25 Defendants.
26

Case No.: 20-cv-2190-DMS-DEB

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT**

Date: February 10, 2023
Time: 1:30 p.m.
Courtroom 13A (13th Floor)
Hon. Dana M. Sabraw

27
28 ¹ Allison Mendoza is substituted for former Bureau of Firearms Director Luis Lopez and former Acting Director Blake Graham. Fed. R. Civ. P. 25(d).

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I. INTRODUCTION

1
2 This case now involves just a single claim whose resolution is straightforward
3 after the Supreme Court’s decision in *New York State Rifle & Pistol Ass’n, Inc. v.*
4 *Bruen*, 142 S.Ct. 2111 (2022). Plaintiffs challenge California’s novel ban on hundreds
5 of models of handguns commonly used for lawful purposes throughout the United
6 States. California’s “Unsafe Handgun Act” (the “UHA”) requires the Defendants to
7 maintain a “Roster” of handguns that may lawfully be sold by licensed firearms
8 dealers. Cal. Penal Code §§ 31900–32110.² Handguns deemed “unsafe” under the
9 UHA’s various technical and other requirements are excluded from the Roster and
10 therefore banned for sale, even though they are commonly used—entirely lawfully—
11 throughout the rest of the nation. This ban violates the Second Amendment.

12 Under *Bruen*, Plaintiffs’ claim boils down to two simple yet fundamental
13 points. *First*, the “conduct” that Plaintiffs wish to engage in—purchasing handguns
14 currently banned for sale in California to keep and bear for their self-defense—is
15 covered by the Second Amendment’s plain text, so it is “presumptively protect[ed]”
16 by the Constitution. *Bruen*, 142 S.Ct. at 2126.

17 *Second*, the Defendants bear the burden of justifying the Roster’s ban by
18 “demonstrat[ing] that the regulation is consistent with this Nation’s historical tradition
19 of firearm regulation.” *Id.* This showing cannot be made, however, as there is no
20 historical tradition whatsoever of allowing some commonly used handguns to be sold
21 while banning other models of handguns in common use on the theory that those
22 banned are “unsafe.” The UHA was enacted in 1997, and the only two comparable
23 laws in the nation’s history were enacted in 1988 (Maryland) and 1998
24 (Massachusetts). *Bruen* likewise foreclosed any opportunity to analogize the UHA to
25 any Founding-era prohibitions on the carrying of “dangerous and unusual” weapons.
26 The Supreme Court stated repeatedly that modern regulators cannot ban firearms “in
27

28 ² All further undesignated statutory references are to the California Penal Code.

1 common use” today by analogizing to colonial restrictions on carrying dangerous and
 2 unusual weapons. *See id.* at 2128, 2143. Because Defendants cannot satisfy their
 3 burden, the Roster’s ban on handguns in common use throughout the nation violates
 4 the Second Amendment and can no longer be enforced.

5 This motion is brought alternatively as a motion for preliminary injunction
 6 (with a request to advance the trial on the merits to the time of the motion hearing
 7 under Fed. R. Civ. P. 65(a)(2)) or as a motion for summary judgment. Either form of
 8 motion is appropriate, as the questions here turn on legal issues that *Bruen* itself
 9 dictates must be resolved in Plaintiffs’ favor.

10 II. BACKGROUND

11 A. California’s “Unsafe Handgun Act” Creates A Limited “Roster” Of 12 Handguns That May Lawfully Be Purchased In California.

13 The UHA was enacted in 1997 and mandates that DOJ maintain “a roster listing
 14 all of the handguns that have been tested by a certified testing laboratory, have been
 15 determined not to be unsafe handguns, and may be sold” in California. § 32015(a). As
 16 the Ninth Circuit has put it, “[e]ffectively, the Act presumes all handguns are unsafe
 17 unless the [DOJ] determines them ‘not to be unsafe.’” *Pena v. Lindley*, 898 F.3d 969,
 18 973–74 (9th Cir. 2018) (emphasis added). To that end, the UHA prohibits the retail
 19 sale of any “unsafe” handgun. § 32000. The UHA defines an “unsafe handgun” as
 20 “any pistol, revolver, or other firearm capable of being concealed upon the person”
 21 and that does not have certain statutorily enumerated safety devices, meet firing
 22 requirements, or satisfy drop safety requirements. § 31910.

23 Only two other states and the District of Columbia have similar restrictive
 24 purchasing regimes. Maryland enacted the nation’s first handgun roster in 1988;
 25 California followed suit with the UHA nine years later; Massachusetts enacted a
 26 handgun roster in 1998; and D.C. established a roster based on California’s in 2009.³

27 ³ Md. Code Ann., Pub. Safety § 5-405; Mass. Gen. Laws Ann. ch. 140, § 123 &
 28 501 Mass. Code Regs. 7.02–03; D.C. Mun. Regs. tit. 24, § 2323.

1 The UHA’s most significant burden on Californians’ right to bear arms is its
2 mandate that new models of handguns possess particular features, ostensibly for safety
3 or law enforcement purposes, in order to be added to the Roster so they may be sold
4 in California. Starting in 2007, the UHA required that semiautomatic pistols generally
5 have both a chamber load indicator (“CLI”) and a magazine disconnect mechanism
6 (“MDM”), which the State claims will reduce the likelihood of accidental discharge.
7 § 31910(b)(4), (5); *see* § 16380 (defining chamber load indicator); § 16900 (defining
8 magazine disconnect mechanism).⁴ Starting in 2013, the UHA required pistols to
9 include a “microstamping” feature that imprints the make, model, and serial number
10 of the firearm onto the shell casing when a round is fired. § 31910(b)(6).

11 The microstamping feature in particular reveals how far removed this
12 regulatory scheme is from the mainstream: No commercially available semiautomatic
13 handguns manufactured in the United States have the microstamping technology and
14 the two additional features required under the UHA. As a result, literally no new
15 models of guns have been added to the Roster since 2013. Phillips Decl., ¶ 9. Since
16 *any* change whatsoever to an approved handgun subjects the changed design to new
17 testing to appear on the Roster, *see* §§ 32015, 32030, 11 CCR §§ 4059, 4070, the few
18 additions each year have consisted of slight (mostly cosmetic) changes to models of
19 handguns that have already been approved. Phillips Decl., ¶ 9.

20 And while the UHA has generally exempted handguns that were “already listed
21 on the roster” from the new technological requirements, *see* § 31910(b)(4), (b)(5),
22 (6)(A), a 2020 law requires that the Department of Justice remove three
23 “grandfathered” firearms from the Roster for each new handgun that the agency
24 approves. § 31910(b)(7). Manufacturers must also pay an initial \$200 testing fee for a
25 handgun model to be considered for inclusion on the Roster; approval expires every

26
27 ⁴ The UHA imposes different requirements on rimfire and centerfire
28 semiautomatic pistols. Rimfire semiautomatic pistols must have an MDM, but are not
required to have a CLI. Centerfire semiautomatic pistols must have both features. §
32010(d)(1)–(3).

1 year and manufacturers must pay an additional \$200 annual “maintenance” fee for the
 2 continued privilege of having each firearm model remain on the list. § 32015(b)(1)–
 3 (3); 11 CCR §§ 4070(a)–(b); 4072(b).

4 Each layer of regulation under the UHA has thus hastened the dramatic
 5 shrinkage of handguns available for purchase in California. As of 2013, there were
 6 nearly 1,300 makes, models, and permutations of approved handguns on the Roster,
 7 but the list has steadily declined over the past decade. Phillips Decl., ¶ 10. The total
 8 number of approved handguns now stands at just over 800. *Id.* But even this total is
 9 misleading: Approximately “one-third of the Roster’s total listings are comprised of
 10 makes and models that do not offer consumers substantive and material choices in the
 11 physical attributes, function, or performance of a handgun relative to another listing
 12 (*i.e.*, a base model),” because, as noted above, many of the approved handguns are in
 13 reality the same handgun make and model as another approved model, but with merely
 14 cosmetic differences. *See, e.g., California’s Handgun Roster: How big is it, really?*,
 15 online at <https://www.firearmspolicy.org/california-handgun-roster> (showing the
 16 results of a detailed analysis of the Roster as of January 30, 2019).

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

19 The UHA bans the sale of at least hundreds of models of constitutionally
 20 protected handguns in common use throughout the United States. For example, many
 21 of the nation’s best-selling firearms are either excluded from the Roster or the Roster-
 22 approved models are outdated. California has not approved a single Generation 4 (first
 23 brought to market in 2010) or Generation 5 Glock handgun. As a result, the Roster-
 24 approved model of the Glock 19 (Generation 3) dates to late 1990s. *See* Phillips Decl.,
 25 ¶ 12. The Glock G43, SIG Sauer 320, and Springfield Armory Hellcat—three of the
 26 best-selling firearms designed for concealed carry—do not appear on the Roster. *See*
 27 Roster listings, last visited November 22, 2022:
 28 <https://oag.ca.gov/firearms/certified-handguns/search?make=150972> (Glock),

1 <https://oag.ca.gov/firearms/certified-handguns/search?make=150970> (Sig Sauer),
2 <https://oag.ca.gov/firearms/certified-handguns/search?make=150975> (Springfield
3 Armory). Each of these handguns is available for sale and in common use throughout
4 the rest of the nation. Phillips Decl., ¶¶ 12–13.

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

10 In addition to California’s failure to add new handguns to the Roster, several
11 hundred makes and models of firearms have fallen off the Roster over the past several
12 years. Phillips Decl., ¶¶ 9–10. The net result is that Californians’ ability to purchase
13 the firearm of their choice continues to contract; and Assembly Bill 2847’s mandate
14 that DOJ remove three models from the Roster for every new approval guarantees the
15 problem will only get worse. While gun manufacturers innovate and release newer
16 firearm models with improved features that are freely purchased throughout the
17 country, Californians are left to choose from a shrinking list of aging handgun models
18 that may not be suitable for their self-defense needs. *Id.*, ¶ 11; *see* Renna Decl., ¶¶ 4–
19 5, and M. Schwartz Decl., ¶ 8.

20 Although it is neither relevant nor necessary to Plaintiffs’ claim in light of the
21 constitutional test set out in *Bruen*, it is worth emphasizing that citizens generally need
22 access to a wide array of firearms for self-defense. People come in all shapes and sizes
23 and have innumerable individualized limitations, strengths, and weaknesses; they
24 therefore have different needs when it comes to choosing the appropriate firearm for
25 self-defense. Plaintiff Renna is one example: she has a particular need for a firearm
26 specifically designed for people with limited hand strength, but California’s handgun
27 Roster removes that option for her. Renna Decl., ¶¶ 5–8. The Roster likewise excludes
28 newer models of semiautomatic handguns that have ambidextrous configurations,

1 which make them more suitable for left-handed customers. Phillips Decl., ¶ 15; ECF
 2 No. 13-22, M. Schwartz Decl., ¶ 8, in support of Plaintiffs’ opposition to Defendants’
 3 Motion to Dismiss (“ISO MTD. Opp.”); M. Schwartz Decl., ¶ 8 (explaining how his
 4 ability to acquire a Glock 19 Gen5 with an ambidextrous slide release and adjustable
 5 backstraps is “crucial to [his] gun safety training” due to his “unusually shaped
 6 hands,” but this is yet another handgun banned from California’s Roster). The Roster’s
 7 restrictions pose particular constraints for females, who are the fastest-growing
 8 demographic of new gun purchasers but are unable to purchase new models designed
 9 primarily for females. Phillips Decl., ¶ 15; *see also* ECF No. 13-15, Jaymes Decl., ¶
 10 10, ISO MTD. Opp.

11 **C. Plaintiffs Brought This Case To Enjoin Enforcement Of The Roster’s**
 12 **Handgun Ban.**

13 The single claim remaining in Plaintiffs’ Third Amended Complaint is a claim
 14 that the UHA, through the Roster’s ban on handguns in common use, violates the
 15 Second Amendment. Plaintiffs are individuals, firearms dealers, and firearms-related
 16 advocacy and public policy organizations that have been harmed by Defendants’
 17 enforcement of the UHA and will continue to be absent injunctive relief.

18 *Individual Plaintiffs.* Each of the individual plaintiffs is a law-abiding
 19 Californian who is constitutionally entitled to purchase and possess firearms under
 20 state and federal law, and who desires to purchase off-Roster pistols that are in
 21 common use for self-defense and other lawful purposes. For example, Plaintiff Renna
 22 has an injury to her right thumb that impacts her ability to apply physical force and
 23 therefore desires to purchase an off-Roster pistol specifically designed for people with
 24 limited hand strength. TAC, ¶¶ 17–19; Renna Decl., ¶¶ 4–5. Plaintiffs Laura
 25 Schwartz, Michael Schwartz, Cheryl Prince, Danielle Jaymes and John Phillips each
 26 hold an active license to carry a concealed weapon; Plaintiffs Phillips, Ryan Peterson,
 27 and John Klier are each trained firearm instructors. TAC, ¶¶ 20–38; ECF No. 13-21,
 28 L. Schwartz Decl., ¶ 4, ISO MTD. Opp.; ECF No. 13-22, M. Schwartz Decl., ¶ 4, ISO

1 MTD Opp.; ECF No. 13-14, C. Prince Decl, ¶ 5, ISO MTD Opp.; ECF No. 13-15,
 2 Jaymes Decl, ¶ 6, ISO MTD Opp.; ECF No. 13-19, Phillips Decl., ¶¶ 7–9, ISO MTD
 3 Opp.; ECF No. 13-18, Klier Decl., ¶ 5, ISO MTD Opp.; ECF No. 13-25, Peterson
 4 Decl., ¶ 7, ISO MTD Opp.

5 *Retailer Plaintiffs*. Plaintiffs PWGG, L.P. (operating as Poway Weapons &
 6 Gear and PWG Range), North County Shooting Center, Inc., and Gunfighter Tactical,
 7 LLC are licensed firearms retailers in San Diego County. TAC, ¶¶ 39, 43, 47. Each of
 8 these retailer Plaintiffs has customers who are interested in purchasing off-Roster
 9 handguns; but for the UHA, these firearms dealers would sell off-Roster handguns to
 10 eligible customers. TAC, ¶¶ 40–42, 44–46, 48–50; ECF No. 13-19, Phillips Decl., ¶¶
 11 4–5, 16, ISO MTD Opp.; ECF No. 13-16, D. Prince Decl., ¶¶ 4, 11, ISO MTD Opp.;
 12 ECF No. 13-25, Peterson Decl., ¶¶ 4, 17, ISO MTD Opp.

13 The ban not only violates the *individual* Second Amendment rights of the
 14 individual Plaintiffs and all those similarly situated to them, but it also upsets the
 15 necessary balance on the other side of the transaction: “restricting the ability to
 16 purchase an item is tantamount to restricting that item’s use,” and “Supreme Court
 17 cases hold that businesses can assert the rights of their customers” impacted by the
 18 restriction. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743 (5th Cir. 2008); *see*
 19 *also Craig v. Boren*, 429 U.S. 190, 195 (1976) (“As a vendor with standing to
 20 challenge the lawfulness of [the challenged law], appellant Whitener is entitled to
 21 assert those concomitant rights of third parties that would be ‘diluted or adversely
 22 affected’ should her constitutional challenge fail and the statutes remain in force.”).
 23 California’s ban has this very effect on Plaintiffs PWGG, L.P., North County Shooting
 24 Center, Inc., and Gunfighter Tactical, LLC and all similarly situated licensed vendors
 25 prohibited from selling or transferring the banned handguns.⁵

26 _____
 27 ⁵ “[V]endors and those in like positions have been uniformly permitted to resist
 28 efforts at restricting their operations by acting as advocates of the rights of third parties
 who seek access to their market or function,” for otherwise “the threatened imposition

1 burdens at trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546
2 U.S. 418, 429 (2006). So where, as here, the non-moving party bears the burden of
3 persuasion at trial, the moving party “must be deemed likely to prevail” if the non-
4 movant fails to make an adequate showing. *Ashcroft v. Am. Civil Liberties Union*, 542
5 U.S. 656, 666 (2004).

6 If the Court treats the motion as a motion for preliminary injunction, Plaintiffs
7 request that the Court advance the trial on the merits and consolidate it with the
8 preliminary injunction hearing. Fed. R. Civ. P. 65(a)(2). An expedited merits hearing
9 is appropriate because Plaintiffs’ challenge raises only issues of law such that
10 discovery and additional factual development is unnecessary. *See Slidewaters LLC v.*
11 *Wash. State Dep’t of Lab. & Indus.*, 4 F.4th 747, 760 (9th Cir. 2021).

12 Alternatively, Plaintiffs are entitled to summary judgment under Federal Rule
13 of Civil Procedure 56. Summary judgment is appropriate if the moving party
14 demonstrates that there is no genuine issue of material fact and that it is entitled to
15 judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S.
16 317, 322 (1986). A fact is material when, under the governing substantive law, it could
17 affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
18 (1986) “A genuine issue of material fact exists when the evidence is such that a
19 reasonable jury could return a verdict for the nonmoving party.” *Fortune Dynamic,*
20 *Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1031 (9th Cir. 2010)
21 (internal quotation marks and citations omitted). “Disputes over irrelevant or
22 unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv.,*
23 *Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). Where the
24 party moving for summary judgment does not bear the burden of proof at trial, “the
25 burden on the moving party may be discharged by ‘showing’—that is, pointing out to
26 the district court—that there is an absence of evidence to support the nonmoving
27 party’s case.” *Celotex Corp.*, 477 U.S. at 325.

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IV. ARGUMENT

A. Plaintiffs Will Prevail On The Merits Because The Handgun Ban Violates The Second Amendment.

1. Under *Bruen*, The Government Bears The Burden Of Justifying The Roster’s Handgun Ban.

In a prior challenge to the Roster brought in 2009, the Ninth Circuit acknowledged in that case that the Roster implicated the Second Amendment rights of California gun owners. *Pena*, 898 F.3d at 977–79. But the Ninth Circuit balanced away those Second Amendment rights by employing a two-step, intermediate-scrutiny test that *deferred* to the State’s bald assertion of “public safety” interests. *Id.* at 980–81 (deferring to State’s “represent[ations]” about the legislature’s public safety goals in requiring CLIs and MDMs and concluding that such requirements “reasonably fit with California’s interest in public safety”); *id.* at 981–86 (deferring to State’s representations about public safety interest behind microstamping requirement and finding a “‘reasonable fit’ between these substantial interests and the microstamping requirement”).

Bruen abrogated *Pena* by expressly and emphatically rejecting the “consensus” “two-step” approach used by the Ninth Circuit to evaluate Second Amendment cases. 142 S.Ct. at 2125–30. Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), “do not support applying means-end scrutiny in the Second Amendment context,” the “two-step approach” is “one step too many.” *Id.* at 2127. The Court in *Bruen* stated—and then repeated for clarity and emphasis—that lower courts must instead use the following test to evaluate Second Amendment Claims:

[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

1 *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961));
2 *see id.* at 2129–30 (restating the same standard).

3 Here, the conduct that Plaintiffs wish to engage in (keeping and bearing arms
4 not listed on the Roster for self-defense) is covered by the Second Amendment’s text.
5 And the “arms” they seek are likewise covered by the text. “The Second Amendment
6 extends, prima facie, to *all* instruments that constitute bearable arms.” *Bruen*, 142
7 S.Ct. at 2132 (emphasis added). So “even though the Second Amendment’s definition
8 of ‘arms’ is fixed according to its historical understanding, that general definition
9 covers modern instruments that facilitate armed self-defense.” *Id.* (citation omitted);
10 *see also Caetano v. Massachusetts*, 577 U.S. 411, 416 (2016) (Alito, J., concurring)
11 (the Second Amendment “guarantees the right to carry weapons ‘typically possessed
12 by law-abiding citizens for lawful purposes’”) (citation omitted). Because the
13 handguns California bans are bearable arms, they presumptively are covered by the
14 Second Amendment’s plain text.

15 California will not be able to demonstrate a historical tradition supporting its
16 ban. The Supreme Court has already done the historical work and determined that only
17 “dangerous and unusual” arms are unprotected—a category that necessarily does not
18 include arms in common use by law-abiding citizens. Plaintiffs seek access to modern
19 makes and models of handguns that are commercially available and in common use
20 for self-defense. Handguns are the “quintessential self-defense weapon.” *Heller*, 554
21 U.S. at 629. *Heller* confirmed that the Second Amendment’s protection extends to
22 firearms that are in “common use,” *id.* at 627, and *Bruen* reaffirmed that “handguns .
23 . . are indisputably in ‘common use’ for self-defense today.” 142 S.Ct. at 2143; *see*
24 *also Caetano*, 577 U.S. at 411–12 (per curiam) (the Second Amendment’s protection
25 of arms in “common use” includes “arms” “that were not in existence at the time of
26 the founding”) (citation omitted). Accordingly, a firearm that is in common use for
27 lawful purposes cannot be banned because there is no historical justification for such
28 a prohibition. *See Bruen*, 142 S.Ct. at 2143.

1 In short, the conduct Plaintiffs wish to engage in is “presumptively”
 2 constitutional and the Roster’s prohibition of such conduct is presumptively
 3 unconstitutional. *Bruen*, 142 S.Ct. at 2126. And, under *Bruen*, the Defendants cannot
 4 meet the burden of “justifying” the Roster’s ban by “demonstrat[ing] that [the Roster’s
 5 ban] is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* That
 6 is because the Supreme Court has already established the relevant historical
 7 tradition—restrictions on dangerous and unusual arms—and California’s ban is
 8 inconsistent with that tradition.

9 **2. The Roster’s Ban Has No Historical Analogue.**

10 Even if the contours of the historical tradition remained an open question,
 11 Defendants could not meet their burden under *Bruen* because nothing in the “Nation’s
 12 historical tradition of firearm regulation” could support the Roster’s broad ban on the
 13 purchase of handguns in common use throughout the United States. There is no
 14 analogous history to support such restrictions.

15 There is no founding era precedent for declaring “unsafe” and prohibiting the
 16 commercial sale of firearms otherwise widely available and in common use for lawful
 17 purposes among ordinary law-abiding citizens. Such regulations only exist now in
 18 three states, and all of these laws are of very recent origin—the *earliest* was
 19 Maryland’s, enacted in 1988.⁶ California followed suit with the UHA in 1997;
 20 Massachusetts enacted a handgun roster in 1998 (which is currently the subject of a
 21 similar challenge);⁷ and D.C. established a roster based on California’s in 2009.⁸
 22 *Bruen* rejected the argument that early 20th century regulations inconsistent with
 23 founding-era history are relevant under the historical-tradition test, 142 S.Ct. at 2153–
 24

25
 26 ⁶ Md. Code Ann., Pub. Safety § 5-405.

27 ⁷ Mass. Gen. Laws Ann. Ch. 140, § 123 & 501 Mass. Code Regs. 7.02–03; see
Granata v. Healy, 2022 WL 2236350, at *1–2 (D. Mass. May 19, 2022).

28 ⁸ D.C. Mun. Regs. tit. 24, § 2323.

1 56 & n.28, so these *late* 20th century laws plainly cannot establish a historical
2 tradition.

3 There is no constitutionally relevant difference between a handgun that is
4 available for sale under the Roster and one that is not. While some physical attributes
5 may differ—materials used in construction, ergonomics, and the like—they are, in all
6 relevant respects, the same. Indeed, they are all common firearms that use cartridges
7 inserted into a firing chamber, burn powder to expel projectiles through barrels, and
8 function in a semiautomatic or revolver mode of operation. They are all common
9 firearms that have the same cyclical rate of fire, firing one round for every pull of the
10 trigger. The fact that the Handgun Ban may act to ban hundreds of discrete designs
11 and configurations of common handguns held in respectively smaller numbers than
12 the over-arching category of “handguns” as a whole is irrelevant to the constitutional
13 inquiry under *Bruen* and *Heller*.

14 Defendants cannot analogize the UHA’s Roster scheme to Founding-era
15 restrictions on carrying “dangerous and unusual” weapons. *Bruen*, 142 S.Ct. at 2143.
16 Indeed, *Bruen* forecloses the possibility that a state may rely on this historical
17 regulation to justify banning handguns in common use throughout the United States
18 by simply declaring them “unsafe” based on their own policy judgments. The Court
19 reiterated that *Heller* “found it fairly supported by the historical tradition of
20 prohibiting the carrying of ‘dangerous and unusual weapons’ that the Second
21 Amendment protects the possession and use of weapons that are ‘in common use *at*
22 *the time.*’” 142 S.Ct. at 2128 (quoting *Heller*, 554 U.S. at 627) (emphasis added)
23 (cleaned up). And the Court reiterated for good measure that the defenders of for-
24 cause carry requirements in *Bruen* could not rely on Founding-era restrictions on the
25 carrying of arms that may have then been considered dangerous and unusual but are
26 now in common use:

27 [E]ven if respondents’ reading of these colonial statutes were correct, it
28 would still do little to support restrictions on the public carry of handguns
today. At most, respondents can show that colonial legislatures

1 sometimes prohibited the carrying of “dangerous and unusual
 2 weapons”—a fact we already acknowledged in *Heller*. See 554 U.S. at
 3 627. Drawing from this historical tradition, we explained there that the
 4 Second Amendment protects only the carrying of weapons that are those
 5 “in common use at the time,” as opposed to those that “are highly unusual
 6 in society at large.” *Ibid*. Whatever the likelihood that handguns were
 7 considered “dangerous and unusual” during the colonial period, they are
 indisputably in “common use” for self-defense today. They are, in fact,
 “the quintessential self-defense weapon.” *Id.* at 629. Thus, even if these
 colonial laws prohibited the carrying of handguns because they were
 considered “dangerous and unusual weapons” in the 1690s, they provide
 no justification for laws restricting the public carry of weapons that are
 unquestionably in common use today.

8 *Bruen*, 142 S.Ct. at 2143 (cleaned up) (italics in original, underlining added).

9 *Bruen* thus confirmed repeatedly that *Heller* already conducted the relevant
 10 historical analysis for determining whether particular arms fall within the Second
 11 Amendment’s protection: those “in common use at the time” cannot be banned. 142
 12 S.Ct. at 2128, 2143; *accord Caetano*, 577 U.S. at 417 (Alito, J., concurring) (“A
 13 weapon may not be banned unless it is *both* dangerous *and* unusual.”). Put simply,
 14 where a type of arm is in “common use,” the government cannot establish a historical
 15 tradition of banning it—by definition, a handgun that is in common use for lawful
 16 purposes cannot be “unusual.” *Bruen*, 142 S.Ct. at 2143.

17 In any event, it would make no sense that California could analogize to
 18 historical prohibitions on carrying “dangerous and unusual” weapons by declaring
 19 handguns that have been used for generations are suddenly “unsafe” because they
 20 don’t employ brand new (and in the case of microstamping, still-non-existent)
 21 technology. Nor, of course, could California render handguns in common use across
 22 the nation “unusual” simply by prohibiting their sale in the State. *Cf. Heller*, 554 U.S.
 23 at 628 (handguns are “overwhelmingly chosen by *American society*” for self-defense
 24 (emphasis added)); *Caetano*, 577 U.S. at 420 (Alito, J., concurring) (“stun guns are
 25 widely owned and accepted as a legitimate means of self-defense *across the country*”)
 26 (emphasis added).

27 Here, there can be no dispute that off-Roster handguns are in common use for
 28 self-defense outside of California today. See Phillips Decl. ISO Prelim. Inj., ¶¶ 3–15;

1 ECF No. 13-12, Ostini Decl., ISO MTD. Opp.; ECF No. 13-13, Ex. 1 to Ostini Decl.,
 2 ISO MTD. Opp. Thus, the Second Amendment prohibits California from banning
 3 them through the Roster’s regulation. The Roster’s unprecedented handgun ban is
 4 plainly inconsistent with the “Nation’s historical tradition of firearm regulation.”
 5 *Bruen*, 142 S.Ct. at 2130. Accordingly, the Roster’s restriction on the purchase and
 6 acquisition of firearms falls directly within—and are proscribed by—the Second
 7 Amendment’s “unqualified command.” *Id.* (citation omitted). The UHA’s prohibition
 8 on the purchase of constitutionally protected arms, as well as DOJ’s maintenance of
 9 the Roster to enforce this proscription, fails the historical test mandated by *Bruen*.

10 * * *

11 In short, Plaintiffs are likely to succeed on their claim that the UHA’s Roster
 12 ban violates the Second Amendment. If the Court considers the motion as a motion
 13 for summary judgment, for all the same reasons, there are no material facts in dispute
 14 and Plaintiffs are entitled to summary judgment as a matter of law. *Holt v. Noble*
 15 *House Hotels & Resort, Ltd.*, 370 F.Supp.3d 1158, 1162 (S.D. Cal. 2019) (“The Court
 16 shall grant summary judgment if the movant shows that there is no genuine dispute as
 17 to any material fact and the movant is entitled to judgment as a matter of law.”)
 18 (quoting Fed. R. Civ. P. 56(a)).

19 **B. Plaintiffs Will Be Irreparably Harmed Without A Preliminary Injunction.**

20 Plaintiffs are irreparably harmed by the Roster’s violation of their Second
 21 Amendment rights. As the Ninth Circuit has repeatedly emphasized, “[i]t is well
 22 established that the deprivation of constitutional rights ‘unquestionably constitutes
 23 irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting
 24 *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Because “constitutional violations cannot
 25 be adequately remedied through damages [such violations] therefore generally
 26 constitute irreparable harm.” *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d
 27 1046, 1059 (9th Cir. 2009) (citation omitted); *see also Ezell v. Chicago*, 651 F.3d 684,
 28 700 (7th Cir. 2011) (Second Amendment deprivation is “irreparable” because there is

1 “no adequate remedy at law”); and *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1135
 2 (S.D. Cal. 2017) (“Loss of . . . the enjoyment of Second Amendment rights constitutes
 3 irreparable injury.”). Indeed, in the absence of any material facts in dispute, Plaintiffs
 4 are entitled to a permanent injunction under the summary judgment standards.

5 **C. The Balance Of Equities And Public Interest Both Favor Plaintiffs.**

6 When the government is a party, the balance-of-equities and public-interest
 7 factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).
 8 And by establishing a likelihood that California has violated the Constitution,
 9 Plaintiffs have “also established that both the public interest and the balance of the
 10 equities favor a preliminary injunction.” *Arizona Dream Act Coal. v. Brewer*, 757 F.3d
 11 1053, 1069 (9th Cir. 2014). This is because “it is always in the public interest to
 12 prevent the violation of a party’s constitutional rights.” *Melendres*, 695 F.3d at 1002
 13 (citation omitted); *accord Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)
 14 (“Generally, public interest concerns are implicated when a constitutional right has
 15 been violated, because all citizens have a stake in upholding the Constitution.”).
 16 Likewise, as the Ninth Circuit has put it, “it is clear that it would not be equitable or
 17 in the public’s interest to allow the state . . . to violate the requirements of federal law,
 18 especially when there are no adequate remedies available. . . . In such circumstances,
 19 the interest of preserving the Supremacy Clause is paramount.” *Cal. Pharmacists*
 20 *Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009), reiterated in *United States*
 21 *v. California*, 921 F.3d 865, 893–94 (9th Cir. 2019).

22 Conversely, the government “cannot suffer harm from an injunction that merely
 23 ends an unlawful practice” *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir.
 24 2013); *see also Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (the State
 25 “cannot reasonably assert that it is harmed in any legally cognizable sense by being
 26 enjoined from constitutional violations”). The public interest is unquestionably served
 27 by preserving Californians’ Second Amendment right to purchase handguns that are
 28 in common use for lawful purposes. Any claims to the contrary would be based on the

1 legislature’s judgments about the potential dangers of “unsafe” handguns. This case
2 is about the right of law-abiding citizens to exercise conduct *covered* under the Second
3 Amendment according to “the balance struck by the founding generation,” which
4 “demands our unqualified deference” unless the government *justifies* the restriction as
5 “consistent with the Nation’s historical tradition of firearm regulation” *Bruen*, 142
6 S.Ct. at 2126, 2133, n.7, which California simply cannot do.

7 **D. The Court Should Waive Bond Or Require Only Nominal Security.**

8 Because the State will not suffer monetary hardship and this matter involves a
9 constitutional violation and the public interest, the Court should either waive Rule
10 65(c)’s bond requirement or impose only a nominal bond. *See, e.g., Barahona-Gomez*
11 *v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (district court has “discretion as to the
12 amount of security required, if any”); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d
13 1113, 1126 (9th Cir. 2005) (“requiring nominal bonds is perfectly proper in public
14 interest litigation”).

15 **V. CONCLUSION**

16 For the reasons set forth above, the Court should consolidate the preliminary
17 injunction hearing with the trial on the merits under Fed. R. Civ. P. 65(a)(2) and issue
18 an order declaring unconstitutional and restraining Defendants from enforcing the
19 Handgun Ban. Alternatively, it should enter summary judgment in Plaintiffs’ favor.

20 Dated: December 22, 2022

21 The DiGuiseppe Law Firm, P.C. Benbrook Law Group, PC

22
23 By s/ Raymond M. DiGuiseppe By s/ Bradley A. Benbrook
24 Raymond M. DiGuiseppe Bradley A. Benbrook
25 Attorneys for Plaintiffs Attorneys for Plaintiffs

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