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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Ivan Peña, et al.,) Case No. 2:09-CV-01185-KJM-CKD
)
Plaintiffs,) PLAINTIFFS' SUPPLEMENTAL
) BRIEF
v.)
)
Stephen Lindley)
)
Defendant.)
-----)

Come now Plaintiffs Ivan Peña, Roy Vargas, Doña Croston, Brett Thomas, the Second Amendment Foundation, Inc., and the Calguns Foundation, Inc., by and through undersigned counsel, and submit their Supplemental Brief in response to the Court's Order of June 5, 2014.

Dated: July 7, 2014

Respectfully submitted,

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PLAINTIFFS' SUPPLEMENTAL BRIEF

In response to the Court's questions, Plaintiffs respond:

- I. The California Unsafe Handgun Act's ("UHA") Microstamping Requirement Amounts to a De Facto Ban of Unrostered Weapons to which the Requirement Applies.

Unrostered handguns cannot be manufactured, caused to be manufactured, imported into the state for sale, kept for sale, offered or exposed for sale, given or even lent under penalty of imprisonment. Cal. Penal Code § 32000(a). While some minor exceptions apply, *e.g.*, for law enforcement or entertainment production, *id.* §§ 32000(b)(4), 32110(h), even those exempted individuals are scrutinized and may face prosecution if they engage in the business of buying and reselling "privately" unrostered handguns. See, *e.g.*, *United States v. McGowan*, E.D. Cal. No. 2:12-CR-00207-TLN. Nor may Californians purchase unrostered handguns from outside the state for use in California, as federal law bars individuals from acquiring handguns outside their state of residence. 18 U.S.C. §§ 922(a)(3) and (b)(3).¹

Accordingly, California residents simply have no meaningful access to unrostered handguns. Californians may only acquire unrostered handguns by establishing residence in another state, acquiring the handgun, and re-settling in California. Used, unrostered handguns are available only by happenstance, *e.g.*, inheritance, pawn sales, or private party transfers of handguns already in the state because they arrived while rostered, or through a law enforcement, family, or entertainment exemption.

¹The Act plainly bars dealers from "importing for sale" unrostered handguns. Cal. Penal Code § 32000(a). If the UHA contained a sweeping exemption allowing for private import transfers, it would not materially advance any state interest.

1 As microstamping technology is not commercially available, requiring
2 microstamping as a condition of rostering semi-automatic handguns effects a de facto
3 ban on all semi-automatic handguns that might now be designed, as well as all
4 previously rostered semi-automatic handgun models that have been updated (see
5 infra).
6

7 Various reasons explain microstamping's absence from the handgun market.
8 As two major firearms manufacturers have advised the Court, the technology is not
9 feasible.² The Court's June 5 order having invited additional "factual support,"
10 Plaintiffs now add the testimony and supporting exhibits of Lawrence Keane,
11 Secretary and General Counsel of the Sporting Arms and Ammunition
12 Manufacturers Institute ("SAAMI"), the accredited standards development
13 organization for the firearm industry's test methods, definitive proof loads, and
14 ammunition performance standards.³ Keane is "not aware of a single handgun
15 manufacturer worldwide that has produced a functioning, commercially available
16 semiautomatic pistol designed and equipped with [microstamping]." Keane Decl. ¶
17 20. It appears no manufacturer will comply with the microstamping requirement. *Id.*
18 "The reason is simple, microstamping does not work." *Id.*
19
20

21 "Independent, peer-reviewed studies, including ones by the inventor of
22 microstamping, Todd Lizotte, have confirmed that firearm microstamping is
23 unproven and unreliable to perform in the manner that the UHA requires." *Id.* ¶ 21.
24

25 ²Even were microstamping commercially available, requiring microstamping
26 would not materially advance the state's public safety interests. See *infra*.

27 ³Keane also chairs SAAMI's Legislative and Legal Affairs Committee, and is
28 the Senior Vice President, Assistant Secretary, and General Counsel to the National Shooting Sports Foundation.

1 According to one study, handguns that perform the highest number of readable
2 microstamping impressions cannot pass the UHA's firing reliability test. *Id.* ¶ 22 &
3 Exh. C. A 1988 U.C. Davis study concluded that variability in microstamping
4 performance counter-indicates adoption of a broad microstamping mandate. *Id.* ¶ 23
5 & Exh. D. A National Research Council study the same year likewise concluded that
6 "in-depth investigations on several topics are needed" before microstamping might
7 be implemented. *Id.* ¶ 24. Over a year after California adopted its microstamping
8 requirement, the technology's inventor conceded that "it is apparent that legitimate
9 questions exist related both to the technical aspects, production costs, and database
10 management associated with microstamping that should be addressed before wide
11 scale implementation is legislatively mandated." *Id.* ¶ 25 & Exh. E.

12
13
14 Mr. Lizotte has since stated that "complete recognition [of microstamping
15 impressions] is still not possible in all cases." *Id.* ¶ 26 & Exh. F.

16 But the UHA requires that each of three handguns of the same model seeking
17 to be added to the Roster not only produces complete and fully legible
18 microstamp markings on the first two casings they fire, but also that each
19 produces such markings on two additional casing after each has been fired
20 over 600 times, and that the markings are double checked for accuracy.
21 California Code of Regulations, Title 11 § 4060(h). In other words, the UHA
22 requires that there be complete recognition in all cases during testing; a feat
23 the independent studies demonstrate and the inventor Mr. Lizotte now admits
24 is not possible.

25
26 *Id.* ¶ 27.

27 Manufacturers are also not convinced that microstamping would materially
28 advance any state purpose.⁴

⁴The Court's order did not ask whether the microstamping requirement reasonably fits the UHA's goals, but the industry's belief about microstamping's lack of utility would re-enforce its opposition. And Plaintiffs do assert that microstamping, even if feasible, would fail even intermediate scrutiny.

1 The Krivosta and U.C. Davis studies demonstrate that the shallow
2 microscopic markings micro-laser engraved or etched on to the tip of a firing
3 pin can be easily removed from the firing pin in mere seconds using something
4 as common and simple as an emery board or sandpaper. In other words, those
5 seeking to perform criminal acts with a handgun could easily prevent their
6 handguns from leaving an identifying mark on casings. *See also* Dorothy
7 Kenney, *Firearm Microstamp Technology: Failing Daubert and Federal Rules*
8 *of Evidence 702*, 38 Rutgers Computer & Tech L.J. 199 (2012).

9 *Id.* ¶ 29.

10 The firing pin is the most commonly damaged, e.g. chipped, and replaced part
11 of a firearm. After-market replacement parts are widely available, including
12 firearm pins. A microstamped firing pin can be removed and replaced, either
13 as a common repair or for the purpose of evading the "technology," very
14 quickly, easily and inexpensively.

15 *Id.* ¶ 30.

16 Plaintiffs would add that microstamping would not aid in the investigation of crimes
17 committed with revolvers, which do not eject shell casings, or with rimfire
18 ammunition, which is microstamping-exempted.

19 The state might discount or dismiss these concerns, but for purposes of this
20 case it does not matter whether the reasons for not manufacturing microstamping
21 handguns are good and sufficient. The firearms industry is naturally incentivized to
22 profitably sell as many handguns as possible, but its views of microstamping are
23 doubtless sincerely held and plainly well-grounded. These views more than
24 adequately explain why microstamping is not a marketplace reality, and will not be
25 any time soon, if ever. Defendant has admitted that he does not know whether
26 microstamping will ever exist in the marketplace. Pl. SJ Exh. O, Admission 4; Pl. SJ
27 Exh. P, Interrogatory 8.

28 The microstamping requirement imposes a de facto ban on the unrostered
firearms to which it applies.

1 II. Even if the Microstamping Requirement Does Not Amount to a De Facto Ban
2 of the Unrostered Weapons to Which It Applies, the Extent of the
3 Requirement’s Burden on Second Amendment Rights is Severe.

4 The BATFE has updated the basic firearm manufacturing statistics Plaintiffs
5 relied upon in their moving brief, at pp. 13-14. In 2012, Americans manufactured
6 3,487,883 semi-automatic pistols, and 667,357 revolvers. See Bureau of Alcohol,
7 Tobacco, Firearms & Explosives, *Annual Firearms Manufacturing and Export*
8 *Report*, available at [https://www.atf.gov/sites/default/files/assets/pdf-files/](https://www.atf.gov/sites/default/files/assets/pdf-files/afmer_2012_final_web_report_17jan2014.pdf)
9 [afmer_2012_final_web_report_17jan2014.pdf](https://www.atf.gov/sites/default/files/assets/pdf-files/afmer_2012_final_web_report_17jan2014.pdf) (last visited July 7, 2014). Of the semi-
10 automatic pistols, 675,737 were chambered to .22, meaning the remainder, 2,812,146
11 of all 4,155,240 handguns manufactured—two-thirds—were centerfire.
12

13 None of these handguns could be rostered today in California, owing to the
14 microstamping requirement. Those that are, will continue falling off the roster at a
15 precipitous rate, as manufacturers make continuous improvements that fail the
16 “similar gun” exception and trigger the microstamping requirement, barring their
17 retesting. Older models will also continue to give way to truly newer models that
18 cannot be tested owing to the microstamping requirement.
19

20 When Plaintiffs moved for summary judgment, the roster contained 1,273
21 handguns, including 883 semi-automatics, 802 of which use centerfire ammunition.
22 Stip., Dec. 31, 2013. The roster now holds only 980 handguns, a nearly 25% decline in
23 under a year. Of these, 735 are semi-automatics. Of these semi-automatics, only 675
24 appear to be centerfire (subtracting those chambered in .22), a decline of nearly 16%.
25

26 That number is quickly heading to zero. Already, as two major manufacturers
27 have advised the Court, Californians are being denied the ability to purchase any
28 new centerfire handgun models. Microstamping “is currently preventing scores of

1 manufacturers, distributors and retailers from selling many semi-automatic pistol
2 models in the State of California that are widely available in more or less every other
3 state of the Union” Keane Decl., ¶ 31. Microstamping

4
5 also denies to California consumers innovations for durability, safety and
6 reliability of handgun models. They can only purchase those handguns on the
7 Roster. But manufacturing is not a stagnant process for any industry,
8 including firearms manufacturing. Manufacturers must, and will, make
9 normal enhancements and improvements to the design and manufacturing
10 process of their pistols. What will, and already is happening over time is that
11 California residents will not be able to purchase the newest, most durable,
12 reliable and safer handguns on the market that are available to consumers
13 outside of California. This is not a theoretical problem . . . Companies have
14 actually stopped doing business in California because of that requirement, not
15 because they wished to cease operations there.

16 *Id.*

17 Indeed, the Supreme Court rejected the idea that the Second Amendment
18 secures only ancient arms, as “[w]e do not interpret constitutional rights
19 that way . . . [T]he Second Amendment extends, prima facie, to all
20 instruments that constitute bearable arms” *District of Columbia v. Heller*, 554
21 U.S. 570, 582 (2008). The Court need not wait until every last centerfire semi-
22 automatic handgun has disappeared from California retailers to find the burden
23 severe. The microstamping requirement’s impact barring the latest, most up-to-date
24 models is in and of itself severe.

25 III. No Reasonable Fit Exists Between the UHA’s Testing Requirements
26 and the Statute’s Purposes.

27 The UHA purportedly advances the following interests: “reducing firearm
28 violence,” “consumer safety,” and “reduction of crime.” Def. SJ Br., at 17. When
evaluating whether a “fit” is reasonable, the law can be “not more extensive than is
necessary to serve” the government’s “substantial interest.” *Valle Del Sol Inc. v.*

1 *Whiting*, 709 F.3d 808, 825 (9th Cir. 2013) (quotation omitted). “In considering the
2 question of fit, we review the legislative history of the enactment as well as studies
3 in the record or cited in pertinent case law,” affording the government “a reasonable
4 opportunity to experiment” *Jackson v. City & County of San Francisco*, 746
5 F.3d 953, 966 (9th Cir. 2014) (quotations omitted). “[W]e require the government goal
6 to be substantial, and the cost to be carefully calculated.” *Bd. of Trs. v. Fox*, 492 U.S.
7 469, 480 (1989). The Government bears the burden of proof. *Id.*

8
9 A. The “Similar Gun” Exception, Cal. Penal Code § 32030.

10 “[I]t is the California DOJ’s position that handguns currently on the Roster
11 will be considered ‘new models’ if they have the slightest modification (beyond mere
12 cosmetics), no matter how minor.” Keane Decl. ¶ 19.

13
14 [F]or example, if a manufacturer of a semiautomatic handgun model that has
15 been on the Roster since 2004 outsources a single, minor component part for
16 the pistol from a different vendor who uses a different manufacturing process,
17 e.g. metal injection molding (MIM) versus forging, to make the part, DOJ
18 considers that handgun to be a “new model.” Another example, a
19 manufacturer figures out a metallurgical way to make a component part
20 stronger, more durable and reliable with less metal and consequently the
21 part's dimensions change. DOJ would deem that handgun a “new model.” In
22 both examples in order to be eligible for the Roster the semiautomatic pistol
23 would have to be equipped with microstamping, as well as a magazine
24 disconnect mechanism and a chamber load indicator.

25 *Id.*

26 Microstamping thus

27 creates a dilemma because it is a natural part of the manufacturing process of
28 any product to make minor improvements and enhancements to a product and
the manufacturing process to increase efficiencies, reduce cost, and to improve
durability, safety and reliability---handguns are no exception---but handguns
manufacturers cannot to do so because it is impossible for them to meet the
UHA’s then applicable microstamping requirements.

Id. ¶ 20. While the same dilemma impacts manufacturers who wish to modify an

1 existing model that was grandfathered before implementation of magazine
2 disconnect devices and chamber loaded indicators if it is unfeasible to add those
3 features to the model, microstamping's burden is impossible.

4
5 It is difficult to see how "similar gun" exception's extreme narrowness
6 advances the state's safety goals without substantially infringing the right to access
7 handguns. As the SAAMI/NSSF and manufacturers' declarations and amicus brief
8 show, this exception's narrowness simply narrows consumer choice rather than
9 entices the adoption of the state's desired technology. Moreover, the handguns being
10 effectively banned have already been proven to be "safe" enough for indefinite sale,
11 and presumably pass and will continue to pass any re-testing. And to the extent
12 consumers are able to access handguns, they are accessing handguns that are not as
13 up-to-date as they can be.

14
15 If the state's interest is to ensure that handguns maintain their function, it
16 could simply require that updated, "similar" handguns are functionally-equivalent to
17 already tested and approved handguns. See, *e.g.*, 501 Code Mass. Rules §§ 7.02,
18 7.04(2). Or, the state could allow retesting of an essentially updated model, without
19 requiring any substantially new features. The current practice, however, serves only
20 to arbitrarily and opportunistically prohibit handguns already proven "safe."
21

22 B. Safety Device, Firing, and Drop Safety Requirements,
23 Cal. Penal Code §§ 31910(a)(1), (2), (3) and (b)(1), (2) & (3).

24 Although Plaintiffs do not challenge the safety device, firing, and drop safety
25 testing requirements as such, these requirements do not reasonably fit the statute's
26 purposes given the manner in which the roster is compiled.

1 Many handguns that might well pass these requirements cannot be submitted
2 for testing, because Defendant accepts handguns for testing only from a current
3 manufacturer or importer. 11 Cal. Code Regs. § 4059(c). But public safety cannot be
4 advanced by *refusing* to test handguns for compliance with the UHA’s requirements.
5 In no way can this prohibition on the consideration of handguns for testing
6 reasonably fit the UHA’s purposes.
7

8 Handgun roster laws are already exceedingly rare before considering that
9 neither of the other state handgun rostering laws so restricts testing submissions.⁵
10 In Maryland, “any person” may petition the Handgun Roster Board to roster a
11 handgun. Md. Code Ann., Pub. Safety § 5-405(c)(2); Code Md. Regs. §§
12 29.03.03.01(B)(10), 29.03.03.11(A). Massachusetts considers firearms for placement
13 on its roster upon receiving reports from approved independent laboratories. 501
14 Code Mass. Rules § 7.03(1). Thereafter, “a person” may appeal the decision to
15 approve or reject a firearm’s rostering. *Id.* § 7.06(1). California should likewise be
16 open to testing any handgun for compliance with the safety device, firing, and drop
17 safety requirements.
18

19 It also serves no public safety purpose to remove fully-tested, compliant
20 handguns from the roster merely because a manufacturer, importer, or other
21 “responsible person,”⁶ has not paid the annual \$200 fee. 11 Cal. Code Regs. § 4071(d).
22 Again, neither Maryland nor Massachusetts appear to require an annual fee to
23
24

25 ⁵The District of Columbia does not independently create or maintain a
26 handgun roster, other than by referencing those of other states.

27 ⁶“Responsible party’ includes, but is not limited to, firearm
28 manufacturers/importers and law enforcement agencies.” 11 Cal. Code Regs. §
4049(s).

1 maintain handguns on their rosters, let alone from a narrow set of entities which, in
2 some cases, may no longer exist. The District of Columbia, which seeks to mimic
3 California's roster, allows the sale of handguns that were "removed from the
4 California Roster for any reason not related to the pistol's safety." D.C.M.R. § 24-
5 2323.2(b).
6

7 The UHA itself acknowledges that non-payment is a dubious ground for
8 exclusion from the roster. Consumers whose handguns are dropped from the roster
9 for non-payment during the purchasing process may complete their purchases, while
10 those whose handguns are dropped for having failed re-testing may not take their
11 handguns home. Cal. Penal Code § 32015(b)(3).
12

13 Having tested and certified a handgun as "not unsafe," the state's interest is
14 complete. The government is not ordinarily entitled to infringe a consumer's
15 fundamental constitutional right because it lacks ready access to its preferred
16 funding mechanism. It is manifestly unreasonable to punish consumers by limiting
17 their access to constitutionally-protected arms, on grounds that the arms are
18 "unsafe," when the state knows full and well that those arms are indeed "safe."
19

20 These impediments to accessing handguns that have already proven safe are
21 even less reasonable considering that all handguns automatically age-out of the
22 UHA's requirements upon becoming "curios and relics." Cal. Penal Code §§
23 32000(b)(3), 32110(g).⁷ The UHA thus advantages older, used handguns, which may
24 be less reliable, over newly manufactured handguns, particularly as the "similar
25 gun" exception's inflexibility shrinks the roster. Of course California had to make
26

27
28 ⁷The UHA adopts the federal definition of curios and relics, which include any
firearm that is fifty years old. 27 CFR § 478.11.

1 some allowance for handguns existing at the time of the roster's adoption that could
2 not be immediately tested, but Maryland demonstrates a more reasonable approach
3 to this issue, exempting from the rostering requirements all handguns manufactured
4 prior to 1985. See Md. Code Ann., Pub. Safety § 5-406(a)(2). Of course, were
5 California more open to allowing people to submit handguns for testing, an
6 exemption for older handguns, such as that sought by Plaintiff Thomas, would be
7 less pressing.
8

9 C. Magazine Disconnect Devices and Chamber Loaded Indicators,
10 Cal. Penal Code §§ 31910(b)(4)-(6).

11 As Glock advised the Court, "the overwhelming majority of law enforcement
12 agencies require pistols that do not have a magazine disconnect mechanism. In
13 addition to GLOCK pistols, the majority of semiautomatic pistols sold today do not
14 include a magazine disconnect mechanism because of its significant disadvantages."
15 Glock Amicus, at 3. Without a magazine disconnect device, a handgun may still be
16 fired if the magazine is lost or damaged, or if the user is in the process of changing
17 magazines, *id.*—all circumstances that might (and do) occur under duress. It is not at
18 all clear that these devices hurt rather than enhance safety, and tellingly, California
19 law enforcement is exempted from the roster.
20

21 Chamber loaded indicators might be misunderstood or malfunction. And
22 reliance on mechanical safety devices such as these may induce irresponsible, unsafe
23 gun handling practices and habits. For these reasons, at least, the state teaches that
24 "[a]ny machine can malfunction. A firearm is no different," SUF 19, and that one
25 must "[t]reat all guns as if they are loaded." SUF 21, 22. It bears repeating that the
26 state's specific instructions for unloading a semi-automatic handgun contained in its
27
28

1 gun safety study guide provides that mechanical safety mechanisms should not be
2 trusted. SUF 23. Plainly, the state cannot meet a burden of proof requiring that
3 magazine disconnect device and chamber loaded indicator mandates “reasonably fit”
4 its safety rationale when the state requires that handgun consumers learn to ignore
5 these features, for fear that they would provide a false sense of security.
6

7 CONCLUSION

8 The Court should enter summary judgment for Plaintiffs.

9 Dated: July 7, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

Plaintiffs' Supplemental Brief, Declaration of Lawrence Keane, and Supporting Exhibits

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 7th day of July, 2014, at Alexandria, Virginia.

/s/ Alan Gura
Alan Gura
Counsel for Plaintiffs