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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

POLYMER80, INC., a Nevada Corporation; DAVID BORGES, an individual; LORAN KELLEY, an individual,

Defendants.

Case No. 21STCV06257

[Related to Case No. 21STCV29196]

[Assigned for all purposes to the Hon. Daniel S. Murphy, Department 32]

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR A STAY

Date: May 19, 2023
Time: 8:30 a.m.
Department: 32
Reservation ID: 305522480553

Complaint Filed: February 17, 2021
Trial Date: May 30, 2023

REQUEST FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 451, 452, and 453, Defendants Polymer80, Inc., David Borges, and Loran Kelley hereby request that the Court take judicial notice of the matters submitted herein in consideration of their Motion for Judgment on the Pleadings or, in the alternative, for a Stay.

Defendants request that the Court take judicial notice of certain judicial records. These records include an order and notice of appeal in the United States District Court for the Southern District of California; an order in the United States District Court for the Central District of California; an order in the United States Court of Appeals for the Ninth Circuit; an opinion and order in the United States District Court for the Northern District of Texas; and a memorandum in support of demurrer and associated order filed in this Court. All of these records are judicially noticeable under California law. Evid. Code §§ 451(a), 452(a), 452(d); *see Forty-Niner Truck Plaza, Inc. v. Union Oil Co.* (1997) 58 Cal.App.4th 1261, 1277 n.7 (taking judicial notice of unpublished federal district court orders). Accordingly, judicial notice is the appropriate procedure for bringing these records before the Court and Defendants hereby request judicial notice of the following true and correct copies of the documents attached hereto as Exhibits A through G and certified by the contemporaneously filed Declaration of Michael Marron in Support of Defendants' Request for Judicial Notice.

EXHIBIT	DOCUMENT
A.	Amended Order Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction, *Renna v. Bonta* (S.D. Cal. Apr. 3, 2023) No. 3:20-cv-02190-DMS-DEB, ECF No. 81
B.	Notice of Preliminary Injunction Appeal, *Renna v. Bonta* (S.D. Cal. Apr. 14, 2023) No. 3:20-cv-02190-DMS-DEB, ECF No. 86
C.	Order Granting Plaintiffs' Motion for Preliminary Injunction, *Boland v. Bonta* (C.D. Cal. Mar. 20, 2023) No. 8:22-cv-01421-CJC-ADS, ECF No. 60
D.	Order, *Boland v. Bonta* (9th Cir. Mar. 31, 2023) No. 23-55276, ECF No. 7
E.	Opinion & Order on Polymer80, Inc.'s Motion for Temporary Restraining Order and Preliminary Injunction, *Polymer80, Inc. v. Garland* (N.D. Tex. Mar. 19, 2023) No. 4:23-cv-00029-O, ECF No. 27
F.	Memorandum of Points and Authorities in Support of Demurrer of Defendants Polymer80, Inc., David Borges, and Loran Kelley to Complaint, *People of the*

State of California v. Polymer80, Inc. (Cal. Super. Ct. Apr. 20, 2021) No. 21STCV06257

G. Order re: Demurrer to Complaint, *People of the State of California v. Polymer80, Inc.* (Cal. Super. Ct. June 7, 2021) No. 21STCV06257

DATED: April 27, 2023

GREENSPOON MARDER LLP

By: _____
MICHAEL MARRON

Attorney for Defendants Polymer80, Inc., David Borges, and Loran Kelley

PROOF OF SERVICE

The People of The State of California vs. Polymer80, Inc., David Borges, Loran Kelley
Case No. 21STCV06257

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

I am employed in the County of Jefferson, State of Alabama. I am over the age of eighteen years and not a party to this action. My business address is 1819 5th Avenue N, Birmingham, AL 35203. On April 27, 2023, I served true and correct copies of the following document(s) described as **DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR A STAY** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address clamar@bradley.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission unsuccessful.

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

Executed on April 27, 2023, at Birmingham, Alabama.

/s/ W. Chadwick Lamar, Jr.
W. Chadwick Lamar, Jr.

SERVICE LIST

The People of The State of California vs. Polymer80, Inc., David Borges, Loran Kelley
Case No. 21STCV06257

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EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LANA RAE RENNA, et al.,

Plaintiffs,

v.

ROBERT BONTA, Attorney General of California; and ALLISON MENDOZA, Director of the California Department of Justice Bureau of Firearms,

Defendants.

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

AMENDED ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs seek to enjoin enforcement of California's handgun "roster" requirements, which have prohibited the manufacture and retail sale in California of a large segment of modern handguns that are otherwise in common use throughout the United States for self-defense and other lawful purposes. The challenged roster requirements are codified in California's Unsafe Handgun Act ("UHA") and limit handgun manufacturing and retail sales to those handguns that can satisfy numerous testing and safety feature requirements not required in 47 other states. As a result, Plaintiffs allege no modern handguns have been added to the roster's list and approved for commercial sale in more than a decade, and the limited number of handguns currently listed on the roster and available for sale continues to shrink because of the testing and safety feature requirements as well as the assessment

of annual roster fees on manufacturers as a condition to retention of their handguns on the roster. Plaintiffs further allege the roster will shrink at an accelerated pace in the future because of the UHA's "three-for-one" roster removal provision, which mandates that for each new roster-compliant handgun added to the roster, three "grandfathered" handguns must be removed in reverse order of their dates of admission to the roster.

Plaintiffs argue these roster requirements "all operate together" to ban the retail sale of hundreds of modern "off-roster" handguns in common use and violate their rights to "keep and bear arms" secured by the Second Amendment to the United States Constitution. Despite Plaintiffs' request to enjoin the entirety of the UHA's roster requirements, their focus has been on three specific requirements of the UHA and the impact of those requirements on a particular type of handgun: semiautomatic pistols. These types of handguns have been banned from commercial sale in California because they lack three features required by the UHA. Two of the mandated features became effective in 2007 and require that these arms have a chamber load indicator and magazine disconnect mechanism, both of which are designed to prevent accidental discharges and increase gun safety. The third requirement, microstamping, became effective in 2013 and is intended to help law enforcement solve gun-related crimes by allowing quick identification of the handgun used at a crime scene from information imprinted on spent cartridge casings. Defendants argue the California Legislature passed these requirements to further important state interests: gun safety, and general public safety through enhanced criminal investigations.

While the topic of gun regulation and its permissible scope is hotly debated in America's political theater, the role of this Court is to determine whether the roster provisions of the UHA violate Plaintiffs' Second Amendment rights under United States Supreme Court precedent in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). *Bruen* abrogated the "means-end" approach used by circuit courts across the country to determine the constitutionality of gun regulations under the Second Amendment, including a Ninth Circuit decision that previously upheld the UHA's chamber

load indicator, magazine disconnect mechanism, and microstamping requirements. *See Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018). Under *Bruen*, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct, in which case the State "may not simply posit that the regulation promotes an important interest," such as public safety. 142 S. Ct. at 2126. Rather, to justify its regulation, the State must demonstrate that the regulation is consistent with this Nation's historical traditions of firearm regulations. *Id.*

Under this newly formulated standard, the Court concludes that Plaintiffs' desire to commercially purchase newer models of semiautomatic handguns in common use is covered by the Second Amendment and presumptively protected. Because the State is unable to show the UHA's chamber load indicator, magazine disconnect mechanism, and microstamping requirements are consistent with the Nation's historical arms regulations, Plaintiffs are entitled to a preliminary injunction against the State's enforcement of those three provisions, which operate to prohibit the commercial sale of these arms, as well as the three-for-one roster removal provision, which depends on the enforceability of those provisions. However, Plaintiffs have not met their burden to show that the UHA's roster listing requirement, fees, and other safety and testing requirements, all of which became effective in 1999, themselves or in combination with other requirements of the UHA operate to effect a sales ban or violate Plaintiffs' Second Amendment rights. Plaintiffs' motion for preliminary injunction is therefore granted in part and denied in part.

I.
BACKGROUND

A. California's Unsafe Handgun Act

The UHA regulates the commercial sale of handguns by requiring the California Department of Justice ("CDOJ") to maintain a "roster" listing all handguns that have been tested by a certified testing laboratory, "have been determined to be *not* unsafe handguns," and may be lawfully manufactured and sold by licensed firearms dealers in California. Cal. Penal Code § 32015(a) (emphasis added). Under the UHA, all handguns are considered

"unsafe" and may not be commercially sold in California unless the CDOJ determines them "not to be unsafe" and authorizes their inclusion on the roster. Manufacturing or selling an "unsafe" handgun, i.e., an "off-roster" handgun, is a violation of the UHA and subjects the offender to misdemeanor criminal and civil penalties, including up to one year imprisonment and fines up to $10,000. *Id.* § 32000(a)(1)-(3).

An "unsafe handgun" is defined as "any pistol, revolver, or other firearm capable of being concealed upon the person" that does not have certain safety features and does not meet firing and drop-safety testing requirements. Cal. Penal Code § 31910. The statute is broken into two subparts: first, it provides that a revolver[1] is deemed "unsafe" unless it meets three specified criteria, *id.* § 31910(a)(1)-(3), and second, it provides that a "semiautomatic pistol"[2] is deemed "unsafe" unless it meets six specified criteria. *Id.* § 31910(b)(1)-(6). The first three criteria apply to both revolvers and semiautomatic pistols: they must have a mechanical "safety device,"[3] and they must satisfy fire testing and drop-safety testing requirements. Those three requirements were first enacted in 1999, *see* California Unsafe Handgun Act, 1999 Cal. Stat. ch. 248 (SB 15), and are currently set forth in Cal. Penal Code §§ 31910 (a)(1)-(3) (revolvers), and (b)(1)-(3) (semiautomatic pistols).

Over time, California enacted three more requirements for semiautomatic pistols—in addition to the safety device and testing requirements—for inclusion on the roster. Since 2007, semiautomatic pistols must have a chamber load indicator ("CLI") and magazine

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[1] A revolver has a cylinder in the center of the firearm with multiple chambers that hold the ammunition and rotates with each pull of the trigger.

[2] A semiautomatic pistol holds ammunition in a detachable magazine which, once inserted in the gun, automatically feeds a fresh round into the chamber of the gun with each pull of the trigger and ejected fired round. The UHA uses the term "pistol" to include semiautomatic handguns only, and "handgun" to include "any pistol, revolver, or other firearm capable of being concealed upon the person." Cal. Penal Code § 31910.

[3] Revolvers must have a "safety device that, either automatically in the case of a double-action firing mechanism, or by manual operation in the case of a single-action firing mechanism, causes the hammer to retract to a point where the firing pin does not rest upon the primer of the cartridge." Cal. Penal Code § 31910(a)(1). Semiautomatic pistols must "have a positive manually operated safety device." *Id.* § 31910(b)(1).

disconnect mechanism ("MDM"). *See id.* § 31910(b)(4)-(5). A CLI is a "device that plainly indicates that a cartridge is in the firing chamber." *Id.* § 16380. 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." *Id.* § 16900. Since 2013, semiautomatic pistols also must have "microstamping" capability. "Microstamping" is a set of "microscopic arrays of characters" that are imprinted onto the cartridge case of each fired round which can be used to "identify the make, model, and serial number of the pistol" used at a crime scene. *Id.* § 31910(b)(6)(A).[4] Accordingly, the UHA limits the manufacture and commercial sale of newer models of semiautomatic handguns to those that have a manually operated safety device, meet firing and drop-safety testing requirements, and have the CLI, MDM, and microstamping features. Stated differently, newer models of semiautomatic handguns that lack these safety features and have not met the testing requirements are deemed "unsafe," may not be added to the roster, and may not be manufactured or commercially sold in California.

The UHA contains a number of exceptions to its roster requirements. Semiautomatic pistols that were "already listed on the roster" when the CLI, MDM and microstamping requirements became effective are exempt. Cal. Penal Code §§ 31910(b)(4), (b)(5), (b)(6)(A) ("grandfather" provisions). Handguns sold to law enforcement officials, and certain curios or relics are also exempt. *Id.* § 32000(b)(3)-(4). Pistols used in Olympic target shooting are exempt, *id.* § 32105, as are handguns in private party transfers, in which two parties who are not licensed firearms dealers wish to enter into a sale. *Id.* § 32110(a). So, too, are handguns that are delivered for consignment sale or as collateral for a

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[4] The CLI provision applies only to centerfire semiautomatic pistols, not rimfire semiautomatic pistols. *See* Cal. Penal Code § 31910(b)(4). The MDM and microstamping requirements apply to both centerfire and rimfire semiautomatic pistols. *See id.* §§ 31910(b)(5), (6). Rimfire ammunition is generally lower velocity, less lethal and smaller than centerfire ammunition. The distinction between rimfire and centerfire arms or ammunition is not relevant to the determination of this case.

pawnbroker loan, and handguns used solely as props for video production. *Id.* § 32110(f), (h). The UHA does not restrict *possession* of off-roster handguns in the home or elsewhere; rather, its focus is to limit the manufacture and commercial *sale* of such handguns.

Manufacturers must also pay an initial $200 testing fee for a new handgun to be added to the roster. *Id.* § 32015(b)(1); Cal. Code of Regs. tit. 11 ("CCR"), §§ 4070-4072. Once a handgun is added to the roster, it is valid for one year, after which the manufacturer may renew the listing by paying an annual fee. 11 CCR § 4070; *see id.* § 4071. A handgun model may be removed from the roster for a variety of reasons, including if: (1) the annual fee is not paid; (2) the handgun model sold after certification is modified from the model submitted for testing; or (3) the handgun is deemed "unsafe" based on further testing. 11 CCR § 4070(c); *see also* Cal. Penal Code § 32015(b)(2) (stating any handgun "manufactured by a manufacturer who . . . fails to pay" the roster fee "may be excluded from the roster."). In addition, in January 2021, the California Legislature accelerated the removal of semiautomatic handguns from the roster by requiring removal of three such grandfathered handguns for every approved semiautomatic pistol added to the roster ("three-for-one removal provision"). Cal. Penal Code § 31910(b)(7).

B. The Plaintiffs and Their Claim

Plaintiffs are law-abiding individuals, licensed firearm retailers, and organizations, with individual and retail members, who allege the UHA prevents them from exercising their Second Amendment rights to purchase handguns not listed on the roster for self-defense, *i.e.,* off-roster handguns. (Third Amended Complaint ("TAC") ¶¶ 16, 17-54, 59 (alleging the UHA "prevent[s] Plaintiffs … from purchasing [off-roster] handguns that are categorically in common use for self-defense and other lawful purposes, and thus violate[s] the Second and Fourteenth Amendments to the United States Constitution.").)[5]

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[5] "Strictly speaking, [a state] is bound to respect [an individual's] right to keep and bear arms because of the Fourteenth Amendment, not the Second." *Bruen*, 142 S.Ct. at 2137. However, since the protections of the Second Amendment are made applicable to the states through the Due Process Clause of the

Plaintiffs allege that, but for the UHA, they would have available for purchase on the retail market hundreds of these off-roster handguns. (*See* TAC ¶¶ 17-38.) Because of the roster, the number of handguns available for retail sale "is a small fraction of the total number of handgun makes and models commercially available throughout the vast majority of the United States[.]" (*Id.* ¶ 71.) Plaintiffs also allege that each layer of regulation under the UHA has hastened the dramatic shrinkage of handguns available for purchase in California. Plaintiffs allege there were nearly 1,300 makes and models of approved handguns on the roster in 2013, but that the list has steadily declined over the past decade to 815 as of October 24, 2022. (*Id.* ¶ 73.).

Plaintiff Lana Rae Renna alleges that but for the UHA she would purchase the Smith & Wesson M&P® 380 SHIELD™ EZ® (*id.* ¶ 18); Danielle Jaymes would purchase a Sig 365, G43X, Glock 19 Gen5, Sig P320, and/or a Nighthawk Lady Hawk (*id.* ¶ 21); Laura Schwartz would purchase a Glock 19 Gen5 and/or Springfield Armory Hellcat (*id.* ¶ 23); Michael Schwartz would purchase a Glock 19 Gen5 and/or Springfield Armory Hellcat (*id.* ¶ 25); John Klier would purchase a Glock 19 Gen5 (*id.* ¶ 27); Justin Smith would purchase a CZ P10, Walther Q5 SF, and/or Glock 19 Gen4 and/or Gen5 (*id.* ¶ 29); John Phillips would purchase a Sig Sauer P365, Sig Sauer P320 M17, Glock 17 Gen5 MOS, Fabrique National Herstal 509, and/or Fabrique National Herstal FNX-9 (*id.* ¶ 31); Cheryl Prince would purchase a Sig Sauer P365 (*id.* ¶ 33); Darin Prince would purchase a Sig Sauer P320 AXG Scorpion (*id.* ¶ 35); and Ryan Peterson would purchase a Fabrique National Herstal 509 Tactical, Sig Sauer P220 Legion (10mm), Staccato 2011, Glock 19 Gen5, Glock 17 Gen5 MOS, and Wilson Combat Elite CQB 1911 (9mm). (*Id.* ¶ 38.) The retailer Plaintiffs allege that but for the UHA they would purchase at wholesale and "make available for [retail] sale . . . all of the constitutionally protected [off-roster] new handguns on the market that are available outside of California." (*Id.* ¶¶ 42, 46, 50.) The institutional

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Fourteenth Amendment, *McDonald v. Chicago,* 561 U.S. 742 (2010), the Court refers to the claim at issue here as one under the Second Amendment.

Plaintiffs promote Second Amendment rights and are filled with individual and retailer members who desire to purchase and sell off-roster handguns. (*Id.* ¶¶ 51-54.)

All of the handguns identified in the TAC are semiautomatic pistols, not revolvers. While revolvers and semiautomatic pistols are subject to the UHA's mechanical safety device and firing and drop-safety testing requirements, Cal. Penal Code § 31910(a)(1)-(3) & (b)(1)-(3), the focus of the subject litigation has been on the UHA's CLI, MDM, microstamping, and three-for-one removal requirements, *id.* § 31910(b)(4)-(7), as those requirements apply only to the peculiar mechanics and operation of semiautomatic pistols, the arms specifically identified in the TAC.

Based on these allegations, Plaintiffs filed this action on November 10, 2020. (ECF No. 1.) Plaintiffs initially challenged the UHA, AB 1621, and other state regulations. (*See id.*) On January 4, 2021, Plaintiffs filed a FAC, alleging two claims under 42 U.S.C. § 1983—one for deprivation of Second Amendment rights, as secured by the Fourteenth Amendment, and one for violation of the Fourteenth Amendment right to equal protection of laws. (ECF No. 10.) Defendants moved to dismiss the FAC, (ECF No. 12), and this Court granted in part and denied in part the motion on April 23, 2021. (ECF No. 17.) Specifically, this Court granted Defendants' motion and dismissed Plaintiffs' Second Amendment challenge to the CLI, MDM, and microstamping provisions as "foreclosed" by *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018), (ECF No. 17 at 6), and denied the motion as to Plaintiffs' challenge to the three-for-one roster removal provision. (*Id.* at 9-14) (holding Defendants "have not met their burden to show the imposition of the three-for-one provision is a reasonable fit for their stated [public safety] objective.")

Thereafter, on June 23, 2022, the Supreme Court issued its opinion in *Bruen*, which fundamentally changed Second Amendment jurisprudence. *See United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023) (stating prior two-step means-end inquiry used by circuit courts to analyze laws that might impact Second Amendment is rendered "obsolete" by *Bruen*). In light of *Bruen*, Plaintiffs filed a Second Amended Complaint ("SAC") (ECF No. 49), and motion for preliminary injunction. (ECF No. 53.) The motion for preliminary

injunction targeted portions of AB 1621, which prohibited computer numerical control ("CNC") milling machines used to make untraceable, non-serialized firearms or parts (*i.e.*, "ghost guns"). (*See id.*) The Court heard argument after a full round of briefing, but prior to any decision on the matter, Plaintiffs withdrew their motion and voluntarily dismissed the AB 1621 claim. (ECF No. 63.)

The parties thereafter stipulated that Plaintiffs would file a Third Amended Complaint. (ECF No. 65.) The TAC solely challenges the UHA under the Second and Fourteenth Amendments. (ECF No. 67.) That challenge is now before the Court on the present motion.

C. The Ninth Circuit's Decision in *Pena v. Lindley*

In *Pena*, the Ninth Circuit addressed whether the CLI, MDM, and microstamping provisions of the UHA violated the plaintiffs' Second Amendment rights using the now obsolete two-step means-end inquiry. 898 F.3d 969 (9th Cir. 2018). Under that approach, the *Pena* court noted it must first consider whether the UHA "burdens conduct protected by the Second Amendment, and if it does, we apply an appropriate level of scrutiny." *Id.* at 975 (citation and quotations omitted). At the first step, *Pena* assumed without deciding that the CLI, MDM and microstamping provisions of the UHA burdened conduct protected by the Second Amendment. *Id.* at 976. After determining the "UHA does not effect a substantial burden" on the plaintiffs' Second Amendment rights, *Pena* concluded the appropriate standard of review was "intermediate scrutiny," *id.* at 979, and then applied that level of scrutiny to determine whether the UHA was reasonably tailored to address the State's substantial interests in public safety and criminal investigation.

Applying that standard, *Pena* focused on a number of factors it believed lessened the severity of the burden on the plaintiffs' Second Amendment rights, including the plaintiffs' ability under the UHA to "buy an operable handgun suitable for self-defense—just not the exact gun they want," and the exceptions provided by the UHA to purchase grandfathered guns (without CLI, MDM, and microstamping features) and off-roster guns through private transactions. *Id.* at 978-79. Applying the UHA and its CLI, MDM and microstamping

requirements to the plaintiffs' conduct (i.e., the ability to commercially purchase off-roster semiautomatic handguns), the Ninth Circuit upheld the UHA because the law was reasonably tailored to address the important state interests of public safety and law enforcement investigation. *Id.* at 979-86.

Under *Bruen,* however, the two-step means-end inquiry employed by *Pena* is now obsolete. 142 S.Ct. at 2127. As noted, when the Second Amendment's plain text covers an individual's conduct, as here, the Constitution presumptively protects that conduct, in which case the state "may not simply posit that the regulation promotes an important interest." *Id.* at 2126. So today, *Pena* and its analysis of the subject regulations are of limited relevance. Instead, the State must demonstrate the UHA is consistent with this Nation's historical traditions of firearm regulations. *Id.* With this background in mind, the Court turns to whether Plaintiffs are entitled to a preliminary injunction against enforcement of these provisions of the UHA under the *Bruen* framework.[6]

II.

DISCUSSION

A. Preliminary Injunction

Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "The purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (internal quotation marks omitted). A preliminary injunction requires Plaintiffs to show that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm without preliminary relief, and (3) the balance of equities tips in their favor and an injunction is in the public interest. *Winter*,

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[6] *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (explaining in situations "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority" district courts are required to "reject the prior circuit opinion as having been effectively overruled.").

555 U.S. at 20; *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (stating balance of equities and public interest merge into one factor when the government is a party). Likelihood of success on the merits is a "threshold inquiry," and thus if a movant fails to establish that factor, the court "need not consider the other factors." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

Plaintiffs move to enjoin the entirety of the UHA's roster requirements codified in Cal. Penal Code §§ 31910, 32000(a), and 32015(a),(b)(2). Plaintiffs argue:

> To be clear, the Plaintiffs contend that the UHA's roster fees, the testing requirements, and the roster removal provisions all operate together, along with the UHA's primary mechanisms—the requirements that semiautomatic handguns must have chamber load indicator, magazine disconnect mechanism, and microstamping capability to join the roster[]—to accomplish the [sales] ban.

(Reply Br. at 5 (ECF No. 74).) Defendants correctly note that the UHA has many distinct roster provisions, enacted at different times for different purposes, and any relief must be specific. *See Orantes-Hernandez v. Tornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (explaining "an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled."). The UHA's roster listing requirement, fees, safety device, and firing and drop-safety testing requirements have been in place since 1999, and it is apparent revolvers and semiautomatic pistols (including several with CLI and MDM capabilities) have been approved for retail sale and added to the roster since its inception in 1999 and up to 2013, when the microstamping requirement was enacted. Thus, it is unclear on the present record how the earlier roster requirements from 1999 impact the retail sale of handguns, contribute to contraction of the roster, or otherwise violate Plaintiffs' Second Amendment rights. Specifically, Plaintiffs have not met their burden to show the UHA's manufacturer roster fee assessment violates their Second Amendment rights. Plaintiffs are individuals, retail sellers, and nonprofit organizations and foundations consisting of individuals and retail sellers, not manufacturers. It is unclear how Plaintiffs have standing to complain about fees that must be paid by manufacturers to have their handgun models

remain on the roster. Similarly, Plaintiffs have failed to address how the firing and drop-safety testing requirements for revolvers and semiautomatic pistols violate their rights. Plaintiffs also presented no argument or evidence that the roster listing requirement *itself* or the mechanical "safety device" requirements for revolvers and semiautomatic pistols violate their rights. Accordingly, the Court denies without prejudice Plaintiffs' motion for such relief.

However, as discussed in detail below, Plaintiffs have shown likely success on their claim that the UHA's CLI, MDM and microstamping requirements violate their Second Amendment rights. In addition, because the UHA's three-for-one removal provision depends on the CLI, MDM, and microstamping provisions, it too is unenforceable. *See* Cal. Penal Code § 31910(b)(7) (stating "for each semiautomatic pistol newly added to the roster," CDOJ shall "remove from the roster exactly three semiautomatic pistols lacking one or more of the applicable [CLI, MDM and microstamping] features described in [§ 31910(b)(4)-(6)]").

1. Likelihood of Success on the Merits

"A plaintiff seeking a preliminary injunction must establish he is likely to succeed on the merits." *Winter*, 555 U.S. at 20. Thus, Plaintiffs must show likely success on their claim that the UHA's CLI, MDM, and microstamping requirements violate their Second Amendment rights. *Bruen* sets out two analytical steps to determine whether a firearm regulation violates an individual's Second Amendment rights. First, courts must determine whether "the Second Amendment's plain text covers [the] individual's conduct." 142 S. Ct. at 2129-30. If so, then "the Constitution presumptively protects that conduct," and the government "must justify its regulation by demonstrating that it is consistent with the Nation's historical traditions of firearm regulation." *Id.* at 2130. "Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (citation omitted). Under this framework, Plaintiffs must first demonstrate the Second Amendment's plain text covers their conduct.

/ / /

a. Second Amendment and Plaintiffs' Conduct

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. To determine whether the plain text of the Amendment covers the conduct regulated by the challenged law, it is necessary to "identify and delineate the specific course of conduct at issue." *National Ass'n for Gun Rights, Inc. v. City of San Jose*, --- F.Supp.3d ---, 2022 WL 3083715, at *8 (N.D. Cal. Aug. 3, 2022) (citing *Bruen*, 142 S. Ct. at 2134). The course of conduct at issue here is Plaintiffs' desire to commercially purchase off-roster semiautomatic handguns that are in common use for self-defense and other lawful purposes.

Determining the scope of the Second Amendment and whether it covers the conduct at issue is "rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S. Ct. at 2127. In *Bruen*, the Supreme Court interpreted the Second Amendment in light of "historical tradition" and held the Amendment protects all arms "in common use," and "handguns . . . are indisputably in 'common use' for self-defense today." *Bruen*, 142 S. Ct. at 2143 (citing *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)) (cleaned up). Because the arms at issue (semiautomatic pistols) are handguns, and handguns are "indisputably in common use" today, *id.*, semiautomatic pistols categorically are "Arms" covered by the Second Amendment. The Amendment does not parse between types, makes and models of arms. *See Heller*, 554 U.S. at 629 (stating "[i]t 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.") All handguns are covered, so long as they are in common use. Thus, Plaintiffs' ability to commercially purchase off-roster semiautomatic handguns falls within the plain text of the Second Amendment and is presumptively protected.

Defendants do not dispute that handguns, as a category, are covered by the Second Amendment. Nor do Defendants dispute that "the right to keep arms, necessarily involves the right to purchase them." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017)

(cleaned up). Rather, Defendants argue that Plaintiffs' desire to purchase at retail *particular* semiautomatic handguns (those without the CLI, MDM and microstamping features) is not covered by the Second Amendment. In support of this argument, Defendants note the UHA is not a categorical ban on *all* handguns like that in *Heller*, as Plaintiffs have available for purchase on the retail market hundreds of handguns on the roster, including single shot handguns,[7] revolvers and older models of grandfathered semiautomatic pistols. (ECF No. 72 at 20-21.) Defendants point out that as of December 31, 2022, the roster list included many handguns from which Plaintiffs could choose, including 16 single-shot handguns, 314 revolvers and 499 semiautomatic pistols. (*Id.* at 21) (citing Declaration of Salvador Gonzalez ISO Defendants Opposition to Preliminary Injunction ("Gonzalez Decl.") ¶ 19.) But the *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. Defendants' argument is therefore rejected as it fails to address the plain text of the Amendment.[8]

Next, Defendants argue the Second Amendment is limited to arms in "common use." The Supreme Court in *Heller* recognized that the "right to keep and carry" under the Second Amendment is limited to arms "in common use at the time[,]" 554 U.S. at 627

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[7] A single-shot handgun is capable of holding only a single round of ammunition and must be manually reloaded with each fired round.

[8] Defendants advance a related non-textual argument that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose[,]" quoting *Heller*, 554 U.S. at 628. (Opp'n at 22) (ECF No. 72.) However, as noted, *Heller* admonishes that "[i]t 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. Thus, Defendants' argument that it is constitutionally permissible to prohibit commercial sales of state-of-the-art semiautomatic pistols, so long as Plaintiffs can purchase single shot handguns, revolvers and older grandfathered models of semiautomatic pistols that are shrinking in number and less desirable runs headlong into *Heller's* admonition. As *Bruen* reiterates, the Second Amendment "is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" 142 S. Ct at 2156 (quoting *McDonald v. City of Chi., Ill.,* 561 U.S. 742, 780 (2010)).

(citations omitted), and noted that "limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* The State does not argue that the off-roster semiautomatic handguns at issue are "dangerous and unusual." Indeed, many of these handguns are used by law enforcement. Rather, it argues Plaintiffs have failed to show that these handguns are "in common use" and therefore Plaintiffs' conduct is not covered by the Amendment. (ECF No. 72 at 24.) This argument is a stretch under any reasonable assessment.

Defendants argue Plaintiffs have not produced any raw data to support the proposition that off-roster handguns are in "common use." Yet, the Supreme Court has already stated that handguns are "'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family.'" *Heller*, 554 U.S. at 628-29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)). Indeed, handguns are the "quintessential self-defense weapon[,]" *Heller*, 554 U.S. at 629, and "are indisputably in 'common use' for self-defense today." 142 S. Ct. at 2143. The most popular handguns today are semiautomatic pistols. (ECF No. 71-5, Declaration of John Phillips ISO Plaintiffs' Motion for Preliminary Injunction ("Phillips Decl.") ¶¶ 12-18 (stating semiautomatic handguns identified by Plaintiffs in this litigation are top-sellers across the country).) And the roster *itself* shows even older models of grandfathered semiautomatic pistols are the most popular type of handgun in California, far outpacing revolvers: 499 to 314. (ECF No. 72 at 21 n.11 (citing Gonzalez Decl. ¶ 19).

Plaintiffs submitted several declarations in support of their motion and argument that off-roster handguns are in common use, to which Defendants lodged objections. Discussion of one those declarations suffices to address Defendants' objections.

Declarant John Phillips is president and founder of Poway Weapons & Gear and PWG Range ("PWGG"), a licensed firearms dealership in Poway, California, and operator of one the largest indoor gun ranges in the country. (Phillips Decl. ¶ 2) (stating PWGG serves more than 200,000 people a year in its retail store, more than 80,000 on its ranges for target shooting, and more than 8,000 students for firearms training and education).

Phillips is a member of a nationwide buying group with more than 450 retail members in all 50 states, whose members "order more than $1 billion in firearms annually." (*Id.* ¶ 5.) Phillips also serves on the retail advisory board of Smith & Wesson Brands, Inc., where he is familiar with market needs and purchasing trends. (*Id.* ¶ 6.) He is versed in the roster, meets with all major firearms manufacturers who visit PWGG to sell their products, and reviews retailers' online sales portals and authoritative industry publications which identify handguns that are available and commonly used throughout the nation. (*Id.* ¶¶ 6-8.) He is licensed to carry concealed, and he is a trained firearms instructor. (*Id.* ¶ 21.) Based on his training, experience and personal knowledge, Phillips states that the roster has shrunk over the past decade from nearly 1,300 approved handguns to just over 800, (*id.* ¶ 10), and Californians are left to choose from a contracting list of aging handgun models that are inferior to and less desirable than newer models of semiautomatic pistols in terms of ergonomics, reliability, ambidextrous configurations, and safety. (*Id.* ¶¶ 10-13.) He further states the semiautomatic handguns identified by Plaintiffs in this litigation are top-sellers and in common use throughout the country, and the roster bans all of these handguns in addition to "many hundreds, and likely thousands, of other models of handguns in common use throughout the United States[.]" (*Id.* ¶¶ 10-18.)

Defendants object to Phillips's declaration on grounds of improper lay opinion and insufficient evidence to support the witness's personal knowledge under Federal Rules of Evidence 701 and 602, respectively. Specifically, Defendants object to Phillips's opinions that the Glock43 is one of the top-selling firearms designed for concealed carry in the country, that the Sig Sauer 320 is the most popular carry gun in the nation, and that those handguns in addition to the Sig 365, Glock 17 Gen 5, FN 509 and FNX-0 are widely sold and possessed outside of California and in common use throughout the country. The objections are overruled as Phillips's opinions are based on his particular training, experience and personal knowledge in the industry. His opinions are proper lay opinions based on sufficient data, facts and experience. Phillips's opinions corroborate what is evident—that the roster bans commercial sale of newer models of semiautomatic handguns

that are in common use. Therefore, any limitation of the Second Amendment to arms in common use imposed by *Heller* does not assist Defendants because the arms in question are in common use.

Finally, Defendants argue the UHA falls within a category of "lawful regulatory measures" identified in *Heller*. The Supreme Court in *Heller* catalogued a number of "presumptively lawful regulatory measures" that are presumed to be consistent with the historical scope of the Second Amendment, including: "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [ ] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [ ] *laws imposing conditions and qualifications on the commercial sale of arms*[,] … [and laws] prohibiting the carrying of dangerous and unusual weapons." 554 U.S. at 626-27 (emphasis added). In a single conclusory pronouncement, Defendants argue that because the CLI, MDM, and microstamping requirements of the UHA do not ban possession of handguns and do not bar commercial sales of hundreds of grandfathered handguns on the roster that are suitable for self-defense, the UHA merely "'imposes conditions and qualifications on the commercial sale of arms'" and "[is] 'presumptively lawful'" under *Heller*. (ECF No. 72 at 23 (quoting *Heller*, 554 U.S. at 626-27).)

A one sentence conclusion by Defendants that the provisions of the UHA are presumptively lawful "conditions and qualifications on the commercial sale of arms" is insufficient, particularly in light of *Pena* and persuasive authority to the contrary. In *Pena*, the Ninth Circuit declined to define "the parameters of the Second Amendment's individual right in the context of commercial sales." 898 F.3d at 976. *Pena* observed the Ninth Circuit "has strained to interpret the phrase 'conditions and qualifications on the commercial sale of arms'" and viewed the language as "sufficiently opaque" such that it cannot be relied upon alone. *Id.* at 976 (cleaned up). Judge Bybee, concurring in *Pena*, noted that "the Supreme Court in *Heller* could not have meant that anything that *could* be *characterized* as a condition and qualification on the commercial sale of firearms is immune from more searching Second Amendment scrutiny." *Id.* at 1007 (original emphasis) (Bybee, J.,

concurring). Similarly, in *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d. Cir. 2010), the Third Circuit noted that "[i]f there were somehow a categorical exception for [commercial sales] 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*." The Court agrees.

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), certain federal statutes prohibited licensed firearms dealers from selling handguns and handgun ammunition to anyone under the age of 21. The Fourth Circuit rejected the government's argument that those federal laws were presumptively lawful regulations as "conditions and qualifications on the commercial sale of arms." 5 F.4th at 416. It stated, "[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." *Id.* at 416 (original emphasis). *Hirschfeld* noted that the federal laws in question there "operate as a total ban on *buying* a gun from a licensed dealer that has met the required [licensing] conditions and qualifications to sell arms," *id.* (original emphasis), and therefore declined to find that those laws constituted conditions on commercial sales.[9]

Hirschfeld reasoned 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)). Providing examples of commercial sales laws that turn "a condition or qualification into a functional prohibition" the court referenced: "a Chicago ordinance that allowed firearm transfers only outside city limits;" a "ban on firing ranges within city limits" that was "a serious encroachment" on law-abiding citizens of Chicago

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[9] *But see NRA v. Bondi*, --- F.4th ---, 2023 WL 2484818, at *2 (11th Cir. Mar. 9, 2023) (stating a Florida statute prohibiting persons under the age of 21 from buying firearms is a law imposing conditions and qualifications on the commercial sale of firearms). Although the court stated the Florida statute is an example of a commercial sales regulation, it did not further elaborate and instead assumed the "'Second Amendment's plain text' covers 18-to-20-year-olds when they buy firearms." *Id.* at *6.

from "engaging in target practice in the controlled environment of a firing range;" and "a commercial zoning and distancing law [that] worked in tandem to functionally preclude any gun ranges, thus severely restricting Second Amendment rights." *Hirschfeld*, 5 F.4th at 416 (citations and quotations omitted).

Here, like the examples cited in *Hirschfeld*, the CLI, MDM, and microstamping provisions of the UHA operate as a "functional prohibition." Collectively they prohibit the commercial sale of a large subset of handguns in common use—hundreds of state-of-the-art semiautomatic pistols—and have done so for more than a decade, thus precluding law-abiding citizens from purchasing these arms on the retail market for lawful purposes. These handguns are sold throughout the United States, in 47 states. California is a distinct outlier. 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. The Court, therefore, declines the State's invitation to characterize the CLI, MDM, and microstamping requirements as a law merely imposing conditions and qualifications on the sales of arms. It is undisputed that there are no commercially available semiautomatic handguns manufactured in the United States that have the CLI, MDM and microstamping features. (ECF No. 71-5; Phillips Decl., ¶ 9.) "As a result, literally no new models of [semiautomatic handguns] have been added to the [r]oster since 2013."[10] (*Id.*) Accordingly, the Court rejects Defendants' argument and finds these provisions of the UHA are not regulations that merely impose conditions and qualifications on the commercial sales of arms but operate collectively as an outright

[10] Aside from the UHA exemptions for grandfathered handguns and private sales, Defendants acknowledge Plaintiffs can only purchase on the retail market "revolver[s], *non*-semiautomatic pistol[s], [and] any firearm that is not a handgun." *See* Opp'n at 22 (ECF No. 72) (emphasis added). It is also undisputed that private sales of off-roster handguns to ordinary people are generally limited to supplies (and sales) from law enforcement officials and people who move from out of state into California with an off-roster handgun. Those sales opportunities are few in number and carry a significant price markup compared to retail sales.

prohibition on commercial sales of a wide segment of modern arms in common use for self-defense and other lawful purposes.[11]

For these reasons, the Court concludes Plaintiffs' desire to purchase the arms in question on the retail market falls within the plain text of the Second Amendment and is not subject to any presumptively lawful exception identified in *Heller*. As such, Plaintiffs' conduct is presumptively protected and the burden shifts to Defendants to justify the UHA by proffering historically analogous firearms regulations. *See Baird v. Bonta*, --- F.Supp.3d ---, 2022 WL 17542432, at *6 (E.D. Cal. Dec. 8, 2022) (stating for a preliminary injunction plaintiffs bear the burden of proving the textual analysis under *Bruen* and defendants bear the burden of proving historical analogues under *Bruen*).

b. Historical Precedent

The State has the burden of showing relevant "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *Bruen*, 142 S. Ct. at 2131-32. The State need not identify a "historical *twin*," for a "well-established and representative historical *analogue*" is sufficient. *Id.* at 2133 (original emphasis). "[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." *Bruen*, 142 S.Ct. at 2133 (citations omitted). Thus, *Bruen* "distilled two metrics for courts to compare the Government's proffered analogues against the challenged law: *how* the challenged law burdens the right to armed self-defense, and *why* the law burdens that right." *Rahimi*, 61 F.4th at 454 (citing *Bruen*, 142 S. Ct. at 2133). Despite the need to assess the how and why, *Bruen* cautioned "[t]his does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry." *Bruen*, 142 S. Ct. at 2133 n.7. The key question, therefore, is whether the challenged law, here the CLI, MDM, and

[11] The parties did not address the UHA's roster fee requirement and whether it might fall within the presumptively lawful category of "conditions and qualifications on the commercial sale of arms."

microstamping provisions of the UHA, and the State's proffered analogues are "relevantly similar." *Id.* at 2132.

The analogical inquiry begins with determining "how" and "why" the UHA "burden[s] a law-abiding citizen's right to armed self-defense." *Id.* at 2133. The UHA (1) prohibits the commercial sale of semiautomatic handguns, that (2) lack CLI, MDM, and microstamping technology. The first aspect of the UHA goes to *how* the statute accomplishes its goal (prohibiting retail sales of newer models of semiautomatic pistols), and the second goes to its goal, the *why* (public safety and furthering law enforcement investigative tools). To sustain the UHA's burden on Plaintiffs' Second Amendment rights, the State must proffer "relevantly similar" historical regulations that imposed "a comparable burden on the right of armed self-defense" that were also "comparably justified." *See Rahimi*, 61 F.4th at 455 (citing *Bruen,* 142 S.Ct. at 2136).

Defendants argue that states "have regulated for firearm safety, particularly to prevent accidents and unintentional detonations, since the earliest days of the republic," (Opp'n at 27), and cite to four historical laws and a declaration from Dr. Saul Cornell, the Paul and Diane Guenther Chair in American History at Fordham University, to meet its burden. Initially, Defendants point to an 1805 Massachusetts law that required certain guns to be inspected, marked, and stamped by an inspector ("prover") before they could be sold. (ECF No. 72-5, Cornell Decl. at ¶ 33; *id.* at Ex. 3.)[12] The law required that the prover test certain muskets and pistols to ensure they safely discharged. 1805 Mass. Acts 588, § 1. The provers duty "shall be to prove" that the "musket barrels and pistol barrels" are "sufficiently ground, bored and breeched," and to prove the musket and pistol barrels "will carry a twenty-four-pound shot" 80 yards and 70 yards, respectively, without the barrels

[12] In *Boland, et al. v. Bonta*, 22-cv-1421, 2023 WL 2588565, at *6-7 (C.D. Cal. Mar. 20, 2323), the State proffered additional proving laws as comparators to the challenged UHA provisions. *See id.* ECF Nos. 56 at 13-14; 56-3, Ex. 31 at 1-15 (noting Continental Army, Rhode Island, New Hampshire, New Jersey, Maryland, Maine, and Pennsylvania had similar proving laws to the 1805 Massachusetts law).

"burst[ing]" or "in no respect fail[ing.]" *Id.* If the firearm passed the test, the prover would stamp his initials and the year of inspection on the firearm. *Id.*

The "why" of the1805 law is to ensure off-brand firearms operated safely—to prevent "introduct[ion] [of firearms] into use which are unsafe." *Id.* at Preamble. In this respect, the goal of the law is similar to the CLI and MDM requirements under the UHA: public safety. But "how" the 1805 law accomplished its goal is entirely different from the CLI, MDM, and microstamping requirements of the UHA. While the 1805 law prohibits introduction of firearms that failed inspection (and are "unsafe"), it did not apply to Springfield Armory, which produced the majority of guns in the state,[13] and it did not preclude the purchase of firearms manufactured out of state. The 1805 law required only that all other muskets and pistols be "proved" to ensure they fired and discharged safely without malfunctioning, in which case the prover would stamp the firearm and approve it for commercial sale. *Id.* § 3.[14] But the 1805 law stopped there. It did not prescribe particular safety features, nor did it require manufactures to add safety features to already safe arms. 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.

In addition, the "why" of the 1805 stamping requirement is not comparable to microstamping under the UHA, as the former requirement served only to verify that the arm had been tested, was safe—in that it fired without barrel bursting or otherwise failing, and could be sold. California's microstamping requirement is designed to assist law enforcement in criminal investigations, not firearm discharge safety. Defendants concede

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[13] Defendants acknowledge that at the time in Springfield, Massachusetts, most guns were manufactured by Springfield Armory, which was under federal control. (ECF No. 72 at 27-28; Cornell Decl. at ¶ 32.)

[14] In this respect, the 1805 law and its barrel safety testing requirements may be similar to the UHA provisions that require handguns to meet firing and drop-safety testing requirements. The Court reserves ruling on that issue as it was not briefed by the parties. Similarly, the parties did not address the UHA's safety device requirement.

this point. (Opp'n Br. at 5) ("Microstamping is intended to provide important investigative leads in solving gun-related crimes by allowing law enforcement personnel to quickly identify information about the handgun from spent cartridge casings found at the crime scene.") (citation and quotations omitted).

The comparable burden on the right to self-defense is notable too. As noted, the 1805 law allowed purchasers to buy firearms from Springfield Armory and out of state manufacturers, without proofing. In contrast, the CLI, MDM, and microstamping provisions prohibit retail sales in the state of a significant segment of the most common self-defense firearm sold in America today. Accordingly, the State has not shown that the 1805 Massachusetts law is relevantly similar or imposed a comparable burden on the right of armed self-defense to the three UHA provisions at issue.

Next, Defendants point to three examples of laws regulating the storage of weapons with or near gun powder, and the storage of gun powder.[15] The Court considers these examples in tandem since the goal of these laws, the "why," is the same. First is a 1783 Massachusetts law that prohibited storing a loaded weapon in a home. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 37, An Act in Addition to the Several Acts Already Made for the Prudent Storage of Gun Powder within the Town of Boston. Defendants state the text of the statute is clear—to prevent "the unintended discharge of firearms [which] posed a serious threat to life and limb." (ECF No. 72 at 28.) However, that characterization is not consistent with the Supreme Court's assessment, where it addressed the same law, and stated the 1783 Massachusetts law "text and its prologue[]makes clear that the purpose of the prohibition was to eliminate the danger to firefighters posed by the depositing of loaded Arms in buildings." *Heller*, 554 U.S. at 631. The goal of the statue, the why, is to guard

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[15] Here, too, the State in *Boland* proffered additional laws regarding storage of weapons with or near gun powder, and the storage of gunpowder. *See Boland*, 2023 WL 2588565, at *7-8, 8:22-cv-1421, ECF No. 56-3, Ex. 31 at 1-15 (C.D. Cal.) (noting gunpowder regulations in New Jersey, Rhode Island, Pennsylvania, New Hampshire, Connecticut, Iowa, Indiana, Ohio, Vermont, Tennessee, Nebraska, Kentucky, California, and Oklahoma).

against fires and protect firefighters in times when highly combustible gun powder was exposed to kerosine lanterns and candles. *See* 2 Acts And Laws Of The Commonwealth Of Massachusetts 120 (1890) (stating "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"); *see also Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (stating Boston's firearm-and-gunpowder storage law is historically distinct from the challenged firearm regulation in light of *Heller*).

Defendants also cite to a 1792 New York City statute, which granted the government authority to search for gun powder and transfer gun powder to the public magazine for safe storage. An Act to Prevent the Storage of Gun Powder, within in Certain Parts of New York City, 2 LAWS OF THE STATE OF NEW-YORK, COMPRISING THE CONSTITUTION, AND THE ACTS OF THE LEGISLATURE, SINCE THE REVOLUTION, FROM THE FIRST TO THE FIFTEENTH SESSION, INCLUSIVE at 191-2 (Thomas, Greenleaf, ed., 1792). The statute "prevent[ed] the storing of Gun-Powder, within certain Parts of the City of New-York." *Id.* Defendants additionally cite to an 1821 Maine law, which authorized government officials to enter any building in any town to search for gun powder. 1821 Me. Laws 98, An Act for the Prevention of Damage by Fire and the Safe Keeping of Gun Powder, chap. 25, § 5. Its purpose: "Prevention of Damage by Fire." *Id.* Like the Massachusetts law, the New York City and Maine laws regulated gun powder "due to the substance's dangerous potential to detonate if exposed to fire or heat." (ECF No. 72-5, Cornell Decl. at ¶ 42.)

The 1783 Massachusetts law, 1792 New York City statute, and 1821 Maine law are not analogues to the challenged provisions of the UHA. Those laws regulated the storage of gunpowder and loaded firearms with gun powder for fire-safety reasons, not gun-operation safety reasons. Thus, 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). These statutes "do not remotely burden the right of self-defense as much as an absolute ban on handguns." *Heller*, 554 U.S. at 632. While the CLI, MDM, and microstamping provisions

of the UHA are not an absolute ban on handguns, the provisions operate to ban commercial acquisition of a significant segment of popular handguns designed for self-defense. The foregoing 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.

Defendants have not met their burden of presenting relevantly similar, historically comparable analogues to the UHA's CLI, MDM, and microstamping provisions. Plaintiffs have therefore demonstrated likely success on the merits of these claims.

c. Scope of Injunction

Any relief granted in a preliminary injunction must be narrowly tailored. *See Orantes-Hernandez*, 919 F.2d at 558. Having determined the CLI, MDM, and microstamping provisions of the UHA violate Plaintiffs' Second Amendment rights, the Court must address whether the remaining UHA provisions at issue are severable. If a challenged statute contains "unobjectionable provisions separable from those found to be unconstitutional," the court must sever such provisions. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (cleaned up). "A court should refrain from invalidating more of [a] statute than is necessary." *Id.* "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those [unconstitutional] provisions … independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* (cleaned up). In conducting this inquiry, a court must ask "whether the law remains fully operative without the invalid provisions." *Murphy v. Nat. Collegiate Athletic Ass'n*, 138 S Ct. 1461, 1482 (2018) (cleaned up).

The initial iteration of the UHA in 1999 deemed revolvers and semiautomatic pistols "unsafe" if they lacked a safety device and did not meet firing and drop-safety testing requirements. Cal. Penal Code § 12126(a)(1)-(3), (b)(1)-(3). Those provisions stood independently for many years, and later were incorporated in more recent iterations of the UHA. *See id.* § 31910(a)(1)-(3), (b)(1)-(3). As discussed, the Legislature thereafter

enacted the CLI and MDM provisions in 2003, effective at a later date, *see* Sen. Bill No. 489 (Cal. 2003-2004 Reg. Sess.), § 1, and the microstamping provision in 2007, also effective at a later date. *See* Assem. Bill No. 1471 (Cal. 2007-2008 Reg. Sess.), § 2. It is clear the Legislature would have enacted, and in fact did enact, the earlier provisions without the CLI, MDM and microstamping provisions. Therefore, the CLI, MDM, and microstamping provisions, Cal. Penal Code § 31910(b)(4)-(6), are severable from the rest of the UHA and may be separately enjoined.

Under the three-for-one roster removal provision, for each approved semiautomatic pistol added to the roster, "three semiautomatic pistols lacking one or more of the applicable features described in paragraphs (4), (5), and (6) of subdivision (b)[,]" are removed. Cal. Penal Code § 31910(b)(7). Paragraphs (4), (5), and (6) of subdivision (b) refer to the CLI, MDM, and microstamping provisions, respectively. *Id.* § 31910(b)(4)-(6). The text of subdivision (b)(7) makes clear it was "obviously meant to work together" with its companion subdivisions (b)(4)–(6). *Murphy*, 138 S. Ct. at 1483. Therefore, the three-for-one removal provision cannot be severed as it is not "fully operative without the invalid provisions." *Id.* at 1482. As such, the California Legislature could not have intended for it to stand independently of the invalid provisions. The three-for-one removal provision is therefore enjoined.

Unless it is evident the Legislature would not have enacted the rest of the law, "the invalid provisions may be dropped if what is left is fully operative as a law." *New York v. United States*, 505 U.S. 144, 186 (1992). Here, the remaining UHA roster provisions are fully operative without the CLI, MDM, microstamping, and three-for-one removal provisions. There is no indication the Legislature would not have enacted the remaining

roster provisions without the invalid provisions. Therefore, the invalid provisions, Cal. Penal Code §§ 31910(b)(4)-(7), are severed and separately enjoined.[16]

d. Discovery Request

Defendants request additional time to conduct historical research and consult additional experts. However, Defendants have had three months to mount a defense since the filing of the TAC. In addition, *Bruen* was decided on June 23, 2022, more than 19 months before Defendants' Opposition Brief was filed in this matter on January 27, 2023. And in light of *Bruen*, the parties stipulated in July 2022 to vacating the scheduling order and the filing of a Second Amended Complaint by Plaintiffs. (ECF No. 45.) The need for a historical deep dive to find regulations comparable to the UHA is no surprise to Defendants. In fact, Defendants were presented with this exact task in November 2022 in *Boland, et al. v. Bonta*, No. 8:22-cv-1421 (C.D. Cal.). Defendants there briefed a nearly identical challenge under the Second Amendment to the CLI, MDM, and microstamping requirements of the UHA and appeared for a preliminary injunction hearing with the same expert they retained here, Dr. Cornell. Following that hearing, Defendants provided two additional rounds of briefing on the merits. The district court in *Boland* issued its decision on March 20, 2023, and provided a reasoned analysis and similar conclusions to those reached by this Court.

Defendants also point to authorities cited to the district court in *Pena v. Lindley*, No. 2:09-cv-01185 (E.D. Cal.) (ECF No. 76), which demonstrate the CLI and MDM technology has existed since the late 1800's and 1910, respectively. Defendants assert additional time is needed to evaluate those authorities. However, those authorities simply note the existence of CLI and MDM technology, not regulations mandating use of that technology on arms then for sale.

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[16] Because the three-for-one roster removal provision is not severable from the CLI, MDM and microstamping provisions, the Court declines to address Defendants' arguments that Plaintiffs' challenge to the roster removal provision fails for lack of standing and ripeness. (Opp'n at 17) (ECF No. 72.)

Finally, the State is engaged in a significant number of related cases in addition to the present case and *Boland*. *See Defending California's Commonsense Firearms Laws*, CALIFORNIA DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, Sept. 19, 2022, https://oag.ca.gov/ogvp/2a-cases (listing twenty-five lawsuits in which the State is currently defending various California gun laws under Second Amendment challenges.) Given the amount of time and resources the State has already spent researching historical analogues in this and similar cases, as well as the posture of this case—on for preliminary injunction with the opportunity to further develop the record on a motion for permanent injunction—the Court respectfully denies the State's request for additional time.

2. Irreparable Harm

It is well-established that loss of "the enjoyment of Second Amendment rights constitutes irreparable injury." *Duncan v. Becerra*, 265 F.Supp.3d 1106, 1135 (S.D. Cal. 2017). "[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009)); *see also Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (stating infringements of the Second Amendment are irreparable and cannot be compensated by damages). So it is here. The UHA's CLI, MDM, and microstamping provisions infringe Plaintiffs' Second Amendment rights, thus causing irreparable harm.

3. Balance of Equities and Public Interest

At this step, it is necessary to "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24. Defendants contend if this Court enjoins enforcement of the UHA, it creates "public safety risks" because "[t]he absence of a chamber load indicator or magazine disconnect mechanism in a semiautomatic pistol increases the risk of accidental discharge and injury to Californians." (ECF No. 72 at 33.) But grandfathered handguns without CLI, MDM, or microstamping features are already available to Californians. Of the 499 grandfathered

semiautomatic pistols, only 32 have CLI and MDM features. (*See* ECF No. 72-4, Gonzalez Decl. at ¶ 7.)

Defendants also argue "[t]he status quo poses no threat of injury to Plaintiffs, and an injunction would seriously undermine California's considered effort to improve the safety of handguns sold in California." (ECF No. 72 at 2.) However, when challenged government action involves the exercise of constitutional rights, "the public interest . . . tip[s] sharply in favor of enjoining" the law. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). As discussed, Plaintiffs have demonstrated likely success that the CLI, MDM, and microstamping requirements violate their rights under the Second Amendment. Therefore, the balance of equities and public interest tips in favor of Plaintiffs. A preliminary injunction shall therefore issue.

B. Bond Requirement

When a motion for preliminary injunction is granted, the plaintiff is required to post security "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). District courts have wide discretion in determining the amount of bond. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005). In public interest litigation, "requiring nominal bonds is perfectly proper," *id.*, and "[c]ourts routinely impose no bond or minimal bond in public interest … cases." *City of South Pasadena v. Slater*, 56 F.Supp.2d 1106, 1148 (C.D. Cal. 1999). This is such a case. Accordingly, the Court waives bond.

C. Stay Pending Appeal

Under Federal Rule of Civil Procedure 62(c), the district court has discretion to stay enforcement of an injunction pending appeal. Defendants ask the Court to stay enforcement pending appeal. A stay is not a matter of right and depends on the circumstances of the particular case. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). Courts consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent

a stay; (3) whether issuance of the stay will substantially injure the other parties in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The first two factors are "most critical" in determining whether a stay is appropriate. *Id.*

While Plaintiffs have demonstrated likely success on the merits, and Defendants will not be irreparably injured absent a stay, the Court believes an orderly process is in the best interests of the parties. The UHA has prohibited commercial sales of the handguns at issue for more than a decade. This lawsuit has been pending since November 10, 2020, and the parties have litigated at a leisurely pace since its inception. Everyone was waiting for *Bruen*. Its arrival does not erase the prior pace of this litigation, and need not hasten it now. Moreover, the district court in *Boland* recently enjoined enforcement of the CLI, MDM, and microstamping provisions. *See Boland*, 2023 WL 2588565, at *1. There, the court stayed enforcement of the injunction for fourteen days pending the State's decision whether to file an appeal. The State filed an emergency motion for partial stay pending appeal of the preliminary injunction issued in *Boland*. *See Boland et al. v. Bonta*, No. 23-55276 (Dkt. No. 2-1) (9th Cir. Mar. 27, 2023). The Ninth Circuit granted the State's motion, and issued a stay as to the CLI and MDM requirements of the UHA. *Id.* at Dkt. No. 7 at 1. On March 22, 2023, after the decision in *Boland* was filed, this Court held a status conference with the parties. Both parties requested that the Court issue its decision, as this case was filed first and presents issues not addressed in *Boland*. Therefore, the Court issues its decision herein but stays enforcement pending appeal or further hearing on this matter.

IV.

CONCLUSION AND ORDER

For these reasons, the Court hereby **ORDERS** the following: (1) Plaintiffs' motion for a preliminary injunction is **GRANTED** as to California Penal Code §§ 31910 (b)(4), (5), (6) & (7) (CLI, MDM, microstamping, and three-for-one removal provisions); (2) Plaintiffs' motion for a preliminary injunction is **DENIED** as to all other challenged

provisions of the UHA; (3) Defendants are **ENJOINED** from enforcing California Penal Code §§ 31910 (b)(4), (5), (6) & (7) (CLI, MDM, microstamping, and three-for-one removal provisions); (4) posting of bond is waived; and (5) the preliminary injunction is **STAYED** pending appeal or further hearing on this matter, whichever occurs first.

The Court sets the matter for a telephonic status conference on April 14, 2023, at 1:30 p.m., at which time the parties shall advise the Court how they wish to proceed.

IT IS SO ORDERED.

Dated: April 3, 2023

Hon. Dana M. Sabraw, Chief Judge
United States District Court

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

LANA RAE RENNA et al.,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of California; and ALLISON MENDOZA, in her official capacity as Director of the Department of Justice Bureau of Firearms,

Defendants.

Case No. 3:20-cv-02190-DMS-DEB

NOTICE OF PRELIMINARY INJUNCTION APPEAL

Judge: The Honorable Dana M. Sabraw
Action Filed: 11/10/2020

PLEASE TAKE NOTICE that Defendants-Appellants Rob Bonta, in his official capacity as Attorney General of the State of California, and Allison Mendoza, in her official capacity as Director of the Department of Justice Bureau of Firearms,[1] hereby appeals to the United States Court of Appeals for the Ninth Circuit from this Court's Amended Order Granting In Part and Denying In Part Plaintiffs' Motion for Preliminary Injunction, issued on April 3, 2023 (Dkt. 81).

Dated: April 14, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
ANTHONY R. HAKL
Supervising Deputy Attorney General

/s/ Gabrielle D. Boutin
GABRIELLE D. BOUTIN
Deputy Attorney General
Attorneys for Defendants Rob Bonta and Allison Mendoza, in their official capacities

[1] Allison Mendoza's appointment to the position of Director of the Department of Justice Bureau of Firearms, effective March 2, 2023, was announced on March 24, 2023.

CERTIFICATE OF SERVICE

Case Name: **Lana Rae Renna et al. v. Rob Bonta, et al.** No. **3:20-cv-02190-DMS-DEB**

I hereby certify that on April 14, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF PRELIMINARY INJUNCTION APPEAL

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 under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 14, 2023, at Sacramento, California.

Ritta Mashriqi	/s/*Ritta Mashriqi*
Declarant	Signature

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EXHIBIT C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

LANCE BOLAND, MARIO SANTELLAN, RENO MAY, JEROME SCHAMMEL, and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of the State of California, and DOES 1-10,

Defendant.

Case No.: SACV 22-01421-CJC (ADSx)

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Dkt. 23]

I. INTRODUCTION

The Second Amendment guarantees the right to keep and bear arms for self-defense. U.S. Const. amend. II. That right is so fundamental that to regulate conduct covered by the Second Amendment's plain text, the government must show more than

that the regulation promotes an important interest like reducing accidental discharges or solving crime. *New York State Rifle & Pistol Association, Inc., v. Bruen*, 142 S. Ct. 2111, 2126 (2022). Rather, to be constitutional, regulations of Second Amendment rights must be "consistent with this Nation's historical tradition of firearm regulation." *Id.*

California's Unsafe Handgun Act (the "UHA") seeks to prevent accidental discharges by requiring handguns to have particular safety features. First, the UHA requires certain handguns to have a chamber load indicator ("CLI"), which is a device that indicates whether a handgun is loaded. Cal. Penal Code §§ 16380, 31910(b)(4). Second, the UHA requires certain handguns to have a magazine disconnect mechanism ("MDM"), which prevents a handgun from being fired if the magazine is not fully inserted. *Id.* §§ 16900, 31910(b)(5). Third, the UHA requires certain handguns to have the ability to transfer microscopic characters representing the handgun's make, model, and serial number onto shell casings when the handgun is fired, commonly referred to as microstamping capability. *Id.* § 31910(b)(6). No handgun available in the world has all three of these features.

These regulations are having a devastating impact on Californians' ability to acquire and use new, state-of-the-art handguns. Since 2007, when the CLI and MDM requirements were introduced, very few new handguns have been introduced for sale in California with those features. Since 2013, when the microstamping requirement was introduced, not a single new semiautomatic handgun has been approved for sale in California. That is because the technology effectuating microstamping on a broad scale is simply not technologically feasible and commercially practical. The result of this is that when Californians today buy a handgun at a store, they are largely restricted to models from over sixteen years ago.

In this case, Plaintiffs Lance Boland, Mario Santellan, Reno May, Jerome Schammel, and California Rifle & Pistol Association, Incorporated, allege that the UHA's CLI, MDM, and microstamping requirements are unconstitutional, contending that they violate the Second Amendment under *Bruen*.[1] Before the Court is Plaintiffs' motion for a preliminary injunction enjoining California from enforcing those requirements. (Dkt. 23 [Motion for Preliminary Injunction, hereinafter "Mot."].) Because the plain text of the Second Amendment covers Plaintiffs' proposed course of conduct of purchasing state-of-the-art handguns, and the UHA's CLI, MDM, and microstamping requirements are not consistent with this Nation's historical tradition of firearm regulation, Plaintiffs' motion is **GRANTED**.

II. BACKGROUND

The California legislature enacted the UHA in 1999. The statute's goals include "reduc[ing] the number of firearm deaths in the state," *Pena v. Lindley*, 898 F.3d 969, 973 (9th Cir. 2018), and "curbing handgun crime, as well as promoting gun safety," *Fiscal v. City & Cnty. of San Francisco*, 158 Cal. App. 4th 895, 913 (2008). Under the Act, a handgun may not lawfully be manufactured or sold on the primary market if it is "unsafe." Cal. Penal Code §§ 31910, 32000. An "unsafe handgun" is defined as "any pistol, revolver, or other firearm capable of being concealed upon the person" that does not meet firing reliability requirements, satisfy drop safety requirements, or have certain safety features. *Id.* § 31910.

All handgun models that have been tested by a certified testing laboratory and have been determined not to be "unsafe handguns" are added to an official list known as the

[1] Although their Complaint appears to challenge the entire UHA, Plaintiffs clarified that they seek to enjoin only the CLI, MDM, and microstamping requirements. (Dkt. 34 [Reply] at 7; Dkt. 50 at 96, 98.)

"Roster." Cal. Penal Code § 32015. Admission to the Roster is valid for one year and must be renewed annually with a fee. Cal. Code Regs. tit 11, §§ 4070(a)-(b) & 4072(b).

Over time, the California legislature changes what features a handgun must have to be considered not "unsafe." *See Pena*, 898 F.3d at 973. When it does so, handguns previously on the Roster that do not have the newly required features are not removed from the Roster, but rather are "grandfathered" and are still permitted to be sold even though they now would be considered "unsafe." *See* Cal. Penal Code § 31910(b)(5), (7); *Pena*, 898 F.3d at 974; (Dkt 54 [Transcript for Proceedings of Evidentiary Hearing Day 1, hereinafter "Tr."] at 173 [Testimony of Special Agent Salvador Gonzalez]).

For example, as of 2007, to be eligible for primary market sale in California, new-to-market semiautomatic pistols must have two "safety features designed to limit accidental discharges that occur when someone mistakenly believes no round is in the chamber." *Pena*, 898 F.3d at 974. First, a new-to-market centerfire semiautomatic pistol must have a chamber load indicator, which is a "device that plainly indicates that a cartridge is in the firing chamber." Cal. Penal Code §§ 16380, 31910(b)(4). Second, a new-to-market centerfire or rimfire semiautomatic pistol must have a magazine disconnect mechanism (sometimes referred to as a magazine detachment mechanism), which 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." *Id.* §§ 16900, 31910(b)(5); *Pena*, 898 F.3d at 974.

Since these requirements were added to the UHA, only 32[2] semiautomatic pistols have been added to the Roster that have a CLI and MDM. (Mot. at 5; Tr. at 179 [Special

[2] This number is misleadingly high, as the Roster treats handguns that are the same except for small details like color or coating as different handguns. (*See* Tr. at 224 [Special Agent Gonzalez].)

Agent Gonzalez].) But handguns on the Roster before 2007 that lack a CLI or MDM are "grandfathered" and may still be sold. *See* Cal. Penal Code §§ 31910(b)(4), (5) (defining as "unsafe handguns" only those without the required features "not already listed on the roster"). Accordingly, 800 "unsafe" handguns remain on the Roster without a CLI or MDM. (*See* Tr. at 179.)

More problematic, as of 2013[3], new-to-market semiautomatic pistols must "include a feature called 'microstamping': each such pistol must imprint . . . microscopic arrays of characters that identify the make, model, and serial number of the pistol onto the cartridge or shell casing of each fired round."[4] *Pena*, 898 F.3d at 974; *see* Cal. Penal Code § 31910(b)(6). "Designed to help solve crimes, microstamping provides law enforcement with identifying information about a handgun fired at a crime scene." *Pena*, 898 F.3d at 974.

The microstamping requirement has prevented any new handgun models from being added to the Roster since May 2013. Although the California Department of Justice certified on May 17, 2013 that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions, the technology still was not available. *See Nat'l Shooting Sports Found., Inc. v. State*, 420 P.3d 870, 872 (Cal. 2018) (noting the government's concession that the certification did not confirm "the availability of the technology itself"). Indeed, to this day, a decade after

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[3] The California legislature amended the definition of unsafe handguns in 2007 to include all semiautomatic pistols not already on the Roster that lacked microstamping capability. *Nat'l Shooting Sports Found., Inc. v. State*, 420 P.3d 870, 871 (2018). That definition was to take effect in 2010, but only if the Department of Justice certified that the technology used to create the imprint was available to more than one manufacturer unencumbered by any patent restrictions. *Id.* at 872. Because the Department of Justice did not so certify until 2013, the microstamping requirement did not take effect until then. *Id.*

[4] When the microstamping requirement was first implemented, the law required microstamping in two locations. As of September 2020, only single-location microstamping is required. (Mot. at 6; Opp. at 4; Tr. at 85 [Salam Fatohi].)

the requirement took effect, no firearm manufacturer in the world makes a firearm with this capability. (*See* Tr. at 77 [Salam Fatohi testifying that no commercial manufacturer has ever produced a handgun with microstamping technology]; *id.* at 114 [Michael Beddow testifying that he was not aware of efforts by firearm manufacturers to implement microstamping]).)

As a result, *none* of the 832[5] Roster listings meets the current definition of a handgun that is not "unsafe." (*See* Tr. at 180 [Special Agent Gonzalez testifying that no handgun with microstamping has been added to the Roster].) *Not one* of the handguns currently being sold in California has a CLI, MDM, and microstamping ability. (*See id.*) *Every single* handgun on the Roster is a grandfathered handgun—one the California legislature now deems "unsafe." (*See id.*)

The UHA's prohibition on sales of "unsafe" handguns is subject to exceptions as well. It does not apply to sales to law enforcement personnel, personnel from agencies including the California Highway Patrol, the Department of Justice, the Youth and Adult Correctional Agency, and the district attorney's office, or any member of the military. *See* Cal. Penal Code §§ 31910(b), 32000(a)–(b). It also does not prohibit *possessing* Off-Roster handguns lawfully acquired on the secondary market or lawfully transferred into California. *See id.* § 32110. The result is that "unsafe" Off-Roster handguns may be purchased by ordinary people on the secondary market from law enforcement officials and others, often at a high markup. (*See* Tr. at 51 [Reno May testifying that "[b]ecause of the high demand (for Off-Roster handguns) and the very low supply, usually being supplied by law enforcement or people who move from out of state into this state with one of those firearms, it's hard to come by, and it is very expensive"].)

[5] This number is current as of March 20, 2023. The Roster is available at https://oag.ca.gov/firearms/certified-handguns/search .

There are legitimate reasons a person might want a handgun California considers "unsafe." One reason is that it is difficult to find a handgun well-suited for a left-handed shooter on the Roster. (*See* Tr. at 36 [Lance Boland testifying that he advises clients to find ergonomic firearms for left-handed shooters Off-Roster].) Numerous Off-Roster semiautomatic handgun models allow fully ambidextrous configuration of critical firearm controls—including the slide stop and release, magazine release, and any manual safety—allowing left-handed shooters to handle the handgun more easily, more quickly, and more safely. (*Id.* at 35–36 [Lance Boland testifying that left-handed shooters sometimes have to "add[] steps of manipulation to the gun that, if we had an ambidextrous firearm or a left-handed firearm, we wouldn't have to do," which takes time in a situation where "seconds or micro-seconds of time can be the difference between being able to use your firearm successfully, defensively, and potentially losing your life"].) According to Plaintiffs, only one semiautomatic handgun on the Roster is completely ambidextrous, and not only is it expensive, but its sub-compact size means it is harder to grip and has a sharp recoil impulse. (Mot. at 9; *see* Tr. at 233 [Special Agent Gonzalez testifying that he was not familiar with "any models currently on the roster that have the ability to configure the magazine release, the safety and slide release ambidextrously"].)

III. DISCUSSION

A preliminary injunction is an extraordinary and drastic remedy that may only be awarded upon a clear showing that the moving party is entitled to relief. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To obtain a preliminary injunction, Plaintiffs must establish (1) that they are likely to succeed on the merits, (2) that they are likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that the public interest favors an injunction. *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *AK Futures LLC v. Boyd Street Distro, LLC*, 35

F.4th 682, 688 (9th Cir. 2022). "When the government is a party, the last two factors merge." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018). The Ninth Circuit balances these factors using a "sliding scale" approach, in which "a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). However, Plaintiffs must "make a showing on all four prongs." *Id.* at 1135.

A. Likelihood of Success on the Merits

Plaintiffs are likely to succeed on the merits of their claim that the UHA's CLI, MDM, and microstamping requirements violate the Second Amendment of the United States Constitution.

In the years after the Supreme Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Courts of Appeals "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny." *New York State Rifle & Pistol Association, Inc., v. Bruen*, 142 S. Ct. 2111, 2125 (2022). Courts analyzed whether there was a "reasonable fit between the government's stated objective and the regulation" considering "the legislative history of the enactment as well as studies in the record or cited in pertinent case law." *Pena*, 898 F.3d at 979. The Supreme Court recently expressly rejected that approach. *Bruen*, 142 S. Ct. at 2126. Instead, the Supreme Court in *Bruen* held "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* "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." *Id.*

There are two steps in the *Bruen* framework. First, courts determine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* Second, the government bears the burden to show that the regulation "is consistent with the Nation's historical tradition of firearm regulation." *Id.*

Bruen's first step asks "whether the plain text of the Second Amendment protects [the plaintiffs'] proposed course of conduct." *Bruen*, 142 S. Ct. at 2134; *Doe v. Bonta*, 2023 WL 187574, at *6 (S.D. Cal. Jan. 12, 2023) ("[T]he first step in assessing whether a regulation violates the Second Amendment is to determine whether the plain text of the Second Amendment covers the conduct regulated by the challenged law."). The Second Amendment reads: "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. "The first step under *Bruen*, therefore, is to determine whether the law at issue 'infringe[s]' on 'the right of the people to keep and bear Arms.'" *United States v. Kelly*, 2022 WL 17336578, at *2 (M.D. Tenn. Nov. 16, 2022).

The challenged UHA provisions unquestionably infringe on the right to keep and bear arms. Plaintiffs seek to purchase state-of-the-art handguns for self-defense. (Mot. at 16 [explaining that Plaintiffs seek to have the "full scope of choices for the quintessential self-defense weapon that the marketplace has to offer"].) The UHA prevents this. To acquire the latest model of a semiautomatic handgun, Plaintiffs must buy one secondhand if they can find one, and at a high markup. (*See* Tr. at 37 [Lance Boland testifying he purchased his Off-Roster firearms used and at "significant price markups"]; *id.* at 51 [Reno May testifying that it is "very difficult" to find Off-Roster handguns in California and "when you do find one, it is usually two, potentially three times the asking price of a brand new firearm in another state"].)

Put differently, under the UHA, Californians must rely for self-defense on handguns brought to market more than a decade ago. Since 2007, when the CLI and MDM requirements were added to the UHA, only 32 new semiautomatic firearms have been added to the Roster of over 800 handguns. (Tr. at 179 [Special Agent Gonzalez].) Not a single new semiautomatic handgun has been added to the Roster since May 2013, when the microstamping requirement was implemented. (*See id.*) Requiring Californians to purchase only outdated handguns for self-defense without question infringes their right to keep and bear arms.

Nevertheless, the government contends that the plain text of the Second Amendment does not protect Plaintiffs' proposed course of conduct because Plaintiffs are still able to purchase *some* firearms and therefore keep and bear them. (Dkt. 30 [Opposition, hereinafter "Opp."] at 13–14 ["[T]he CLI, MDM, or microstamping requirements do not prevent plaintiffs from either keeping handguns in the home or carrying them in public for self-defense."]; *see* Dkt 56 [Defendant's First Closing Brief, hereinafter "Govt. Cl. Br."] at 3 [framing the Step One inquiry as "whether the regulation at issue prevents any 'people' from 'keep[ing]' or 'bear[ing]' 'Arms' for lawful purposes"].) But a law does not have to be a complete ban on possession to meet *Bruen*'s first step. *Kelly*, 2022 WL 17336578, at *3 (rejecting the government's argument that step one was not met because "a bar on receiving a new firearm is not a total ban on weapons possession," and noting that the law found to be unconstitutional in *Bruen* was not a total ban on possession of firearms either).

Indeed, the Constitution protects much more than the bare right to keep and bear any outdated firearm for self-defense. *Cf. Heller*, 554 U.S. at 629 ("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."). The Second Amendment also protects attendant rights that make the underlying right to keep and bear arms

meaningful. *See, e.g.*, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (explaining that the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them, because "without bullets, the right to bear arms would be meaningless"); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (striking down Chicago ordinance that barred firing ranges within city limits, and stating that "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective"); *Rigby v. Jennings*, 2022 WL 4448220, at *8 (D. Del. Sept. 23, 2022) (reasoning that "the right to keep and bear arms implies a corresponding right to manufacture arms" because "the right to keep and bear arms would be meaningless if no individual or entity could manufacture a firearm"). Those attendant rights include the right to acquire state-of-the-art handguns for self-defense.[6]

Contrary to the government's assertion, the fact that Californians may purchase other firearms—including long guns or single-shot guns (which are not subject to the UHA), outdated On-Roster handguns, or Off-Roster handguns on the secondary market—does not mean that the Second Amendment does not cover their proposed conduct of purchasing state-of-the-art handguns on the primary market. *Cf. Frein v. Pennsylvania State Police*, 47 F.4th 247, 250 (3d Cir. 2022) (rejecting government's argument that seizure of parents of murder convict's guns did not violate the Second Amendment because they could retain or acquire other firearms, explaining, "[w]e would never say the police may seize and keep printing presses so long as newspapers may replace them,

[6] Indeed, before *Bruen*, it was clear in the Ninth Circuit that acquiring arms was conduct covered by the Second Amendment because people cannot keep and bear arms without acquiring them. *See, e.g.*, *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (referring to the "right to acquire arms" that a "would-be operator of a gun store. . . ha[d] derivative standing to assert . . . on behalf of his potential customers").

or that they may seize and keep synagogues so long as worshippers may pray elsewhere").

The Constitution presumptively protects Plaintiffs' proposed conduct. The burden now shifts to the government. Since the UHA provisions implicate conduct protected by the Second Amendment, they are presumptively unconstitutional unless the government can meet its burden to "demonstrat[e] that [the relevant UHA provisions are] consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130.

To carry its burden, the government must provide "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *Id.* at 2131–32 (cleaned up); *see id.* at 2127–28 (reiterating *Heller*'s statement that "*the public understanding* of a legal text in the period after its enactment or ratification" was "a critical tool of constitutional interpretation"). The government need only "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133. In other words, "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Id.* "The core question is whether the challenged law and proffered analogue are 'relevantly similar.'" *United States v. Rahimi*, 2023 WL 2317796, at *6 (5th Cir. Mar. 2, 2023) (citing *Bruen*, 142 S. Ct. at 2132).

The government proffers two historical analogues to the UHA's CLI and MDM requirements: "proving" laws and gunpowder storage laws. Neither is sufficiently analogous. To compare the government's proffered analogues to the challenged law, courts look to "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S. Ct. at 2133. "Therefore, whether 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.* (cleaned up).

The first type of law the government cites as analogous to the CLI and MDM requirements are "proving" laws. (Govt. Cl. Br. at 13; Dkt. 56-3 [Declaration of Saul Cornell, hereinafter "Cornell Decl."] ¶¶ 32–33.) These laws, which Massachusetts enacted for firearms in 1805 and Maine in 1821, required the appointment of inspectors "who would 'prove,' i.e. test and inspect, all musket barrels and pistol barrels" before the firearm could be sold. (Cornell Decl. ¶¶ 32–33.) New Hampshire, Maryland, and Pennsylvania also enacted similar "proving" laws as early as 1775. (*Id.* Ex. 31 at 2.) Proving involved "testing the firearm to ensure it would not fail and that it could carry a shot over a certain distance." (*Id.* ¶ 32, Ex. 31 at 4.) Inspectors stamped passing firearms with the inspector's initials and the year onto the barrel so that the stamp could not be erased or disfigured. (*Id.*) Only firearms that passed inspection and were stamped could be sold, and the sale of firearms without a stamp was subject to a fine. (*Id.*)[7]

The "modern-day regulation[s]" of CLI and MDM requirements are not "analogous enough" to "historical precursors" of proving laws "to pass constitutional muster." *Bruen*, 142 S. Ct. at 2133. CLIs and MDMs are "safety features designed to limit accidental discharges that occur when someone mistakenly believes no round is in the chamber." *Pena*, 898 F.3d at 974. Their goal is to ensure that the user of the gun has appropriate expectations, understanding whether the gun is loaded or not. They do this by requiring handgun models to have additional features beyond basic handgun features, specifically a CLI, which helps users see whether a bullet is in the chamber, and an MDM, which prevents users from firing the handgun if the magazine is not fully inserted.

[7] The government also points to similar "proving" laws that required the inspection of gunpowder in Massachusetts, Rhode Island, New Jersey, New Hampshire, and Pennsylvania. (Govt. Cl. Br. at 13; Cornell Decl. ¶ 48.)

The goal behind proving laws, on the other hand, was to ensure that a firearm was adequately manufactured. (*See* Cornell Decl. ¶ 31 [explaining that proving laws combatted "[t]he danger posed by defective arms, or poorly manufactured ones"].) They did this by making sure that the firearm's basic features were not defective. (*See id.*)

The differences between how and why these laws burden a law-abiding citizen's right to armed self-defense is evident. *See Bruen*, 142 S. Ct. at 2133. Whereas CLI and MDM requirements add additional required features to and alter the operation of an otherwise well-manufactured handgun, proving laws focused only on confirming the basic operating features of a firearm. Whereas CLI and MDM requirements aim to prevent harm to others resulting from the user not knowing the firearm is loaded, proving laws targeted the firearm itself and aimed to protect the safety of the person using the firearm. (Tr. at 153 [Clayton Cramer].) Whereas CLI and MDM requirements are effectuated by checking only a few examples of a particular handgun model, proving laws were effectuated by examining each firearm manufactured. Whereas proving laws supported the use of firearms for self-defense by ensuring the weapon worked properly and safely, the MDM requirement can actually work against the use of a handgun for self-defense because it will not fire without the magazine. Put simply, requiring each model of handgun to contain additional features to potentially help a user safely operate the handgun is completely different from ensuring that each firearm's basic features were adequately manufactured for safe operation.

Moreover, the CLI and MDM requirements do not impose a comparable burden as proving laws on the right of armed self-defense. *See Bruen*, 142 S. Ct. at 2133. Whereas proving laws kept out of the hands of law-abiding citizens only firearms with manufacturing defects, CLI and MDM requirements keep out of their hands virtually all new, state-of-the-art handguns. Indeed, since 2007, an exceptionally small number of handguns with CLIs and MDMs have been added to the Roster of over 800 handguns.

(Tr. at 179 [Special Agent Gonzalez].) Despite California's law, manufacturers are simply not making handguns with these features. (*See id.* at 17 [Stephen Helsley testifying that "they're just not needed from the manufacturer's standpoint"]; *id.* at 73 [Salam Fatohi testifying "because it's not something that is desired by the market, manufacturers will not spend the time and money and resources to implement those designs into their manufacturing process for their pistols"].) This is a much greater burden on the right of armed self-defense than the proving laws presented.

The next category of laws that the government contends are analogues to CLI and MDM requirements are gunpowder storage laws. (Govt. Cl. Br. at 14.) Gunpowder is corrosive and "attract[s] moisture like a sponge." (Cornell Decl. ¶ 27.) And it has a "dangerous potential to detonate if exposed to fire or heat." (*Id.* ¶ 43.) For those reasons, numerous historical laws regulated gunpowder storage and the government's ability to conduct searches to ensure compliance with gunpowder storage laws.

For example, a 1783 Massachusetts law prohibited the storage of a weapon loaded with gunpowder in a home, and a 1792 New York City law and 1821 Maine law allowed government officials to search for gunpowder in any building. (*Id.* ¶¶ 44, 52.) An 1825 New Hampshire law penalized the sale of gunpowder "in any highway, or in any street, lane, or alley, or on any wharf, or on parade or common." (*Id.* ¶ 45.) Numerous state laws from the 1800's delegated authority to local governments to regulate the sale of gunpowder for public safety. (*Id.* ¶ 46.) And other laws limited the amount of gunpowder people could store in their homes. (Tr. at 152 [Clayton Cramer].)

But the goals of gunpowder storage laws and the means used to achieve those goals are very different from those of the UHA's CLI and MDM requirements. The main goal of the gunpowder storage laws was to prevent fire. (*See* Cornell Decl. ¶ 43 ["Every aspect of the manufacture, sale, and storage of gun powder was regulated due to the

substance's dangerous potential to detonate if exposed to fire or heat."].) The primary way they achieved this goal was to regulate where and how gunpowder could be stored and sold, and to allow searches to ensure compliance with those storage laws. (*Id.* ¶¶ 44, 45, 52.) In contrast, the CLI and MDM requirements are meant to prevent inadvertent discharge or firing of the firearm. *See Pena*, 898 F.3d at 974. They achieve this goal by requiring particular safety features in handguns. How and why these regulations burden a law-abiding citizen's right to armed self-defense are too different to pass constitutional muster. *Cf. Nat'l Ass'n for Gun Rts., Inc. v. City of San Jose*, 2022 WL 3083715, at *10 (N.D. Cal. Aug. 3, 2022) (explaining that historical gunpowder regulations "were often specific to gunpowder and not easily translatable to firearm regulations").

Next, the government argues that since microstamping is "an extension of identification methods long used in imprinting serial numbers on guns," "historical analogues sufficient to support the federal law prohibiting the possession of a firearm with an obliterated serial number are sufficient to support the microstamping requirement." (Govt. Cl. Br. at 15.) It points to "commercial firearm regulations relating to the conditions of the firearms trade, the government's storage of guns, and the locations where individuals could sell guns." (*Id.*) The Court is not persuaded.

In analyzing possible analogues, one of the aspects of the laws the Court must consider is whether the historical "restrictions imposed a substantial burden on [the Second Amendment right] analogous to the burden created by" the current law. *Bruen*, 142 S. Ct. at 2145. Historical laws regarding serial numbers, and the historical analogues justifying serial numbers, do not impose anywhere close to the substantial burden on people's Second Amendment right that the UHA's microstamping provision does. The microstamping provision requires handguns to have a particular feature that is simply not commercially available or even feasible to implement on a mass scale.

Michael Beddow, a forensic firearms examiner for the Phoenix Police Department, testified about a study he performed regarding the feasibility of microstamping while he was a graduate student at the University of California at Davis in 2005. (Tr. at 92–93, 95–96.) Beddow published the study as his master's thesis through the University of California, and it was also published as a paper written to the California Policy Research Center and in the Association of Firearm and Toolmark Examiners Journal. (*Id.* at 93, 97.) At all three levels, it was peer reviewed. (*Id.* at 97.)

Beddow's study concluded that microstamping technology "was not suitable for mass implementation." (*Id.*) It "could not be directly implemented into every make and model of new firearms or semi-automatic handguns without additional research to determine if it would work in those firearms." (*Id.* at 98.) In other words, "because of the vast differences that exist between the mechanical design of the firearms and the differences in metallurgy of the different brands of ammunition to include finishing processes such as primer, lacquer, things of that nature in combination together," it would be very difficult to develop any technology that could work on multiple models of handguns. (*Id.* at 98–99.) According to Beddow's communications with manufacturers, the technology would have to be adapted for every make and model of handgun and design of a firing pin. (*Id.* at 104–05; *see id.* at 127 [agreeing that microstamping "is not practically, as we sit here today, a technology that is capable of being taken by a manufacturer and implemented into their handguns right now, without further development for their specific handgun"].)

More telling and in contrast to the requirement of a serial number, which has been universally and easily implemented by manufactures across the globe, not a single manufacturer has implemented microstamping technology, and indeed it is not feasible to implement such technology broadly. Because of this, not a single new model of semiautomatic handgun has been added to the Roster since the microstamping

requirement was implemented in May 2013. Californians have not had access to new semiautomatic models of handguns since that date. (*See* Tr. at 180 [Special Agent Gonzalez].) The rest of the country, on the other hand, has access to handguns that over the years have become more ergonomic, durable, reliable, affordable, and possibly even safer. (*See* Dkt. 59 [Plaintiffs' Rebuttal Brief] at 10.) This is a substantial burden on Californians' Second Amendment right to keep and bear arms. *See Bruen*, 142 S. Ct. at 2145 (rejecting historical analogues because "[n]one of these restrictions imposed a substantial burden on public carry analogous to the burden created by New York's restrictive licensing regime").

Because Plaintiffs' proposed course of conduct is covered by the plain text of the Second Amendment, and the government has failed to proffer any historical regulation analogous to the UHA's CLI, MDM, or microstamping requirements, Plaintiffs have shown that they are likely to succeed on the merits of their claim that those requirements are unconstitutional.

B. Irreparable Harm

To obtain a preliminary injunction, a plaintiff must show that irreparable harm is likely in the absence of preliminary relief. *Winter*, 555 U.S. at 20. "The right to keep and bear arms has long been recognized as a fundamental civil right." *Rahimi*, 2023 WL 2317796, at *12 (Ho, J., concurring) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49–50 n.10 (1961)). It "is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (cleaned up); *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005) (explaining that a party seeking preliminary injunctive relief for violation of a constitutional right can establish irreparable injury sufficient to merit the grant of relief by demonstrating the

existence of a colorable constitutional claim); *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[I]njuries to constitutional rights are considered irreparable for even minimal periods of time.") (cleaned up); *Goldie's Bookstore, Inc. v. Superior Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) ("An alleged constitutional infringement will often alone constitute irreparable harm."); Wright and Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed. 2019) ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary."). Because Plaintiffs have shown it is likely that the UHA's CLI, MDM, and microstamping requirements violate their Second Amendment rights, they have demonstrated that irreparable harm is likely without a preliminary injunction enjoining the enforcement of those requirements.

C. Balance of Equities and Public Interest

Before issuing a preliminary injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017); *CTIA - The Wireless Association v. City of Berkeley*, 928 F.3d 832, 852 (9th Cir. 2019). Because the government is a party, the Court considers the balance of the equities and the public interest together. *Azar*, 911 F.3d at 581.

The balance of the equities and the public interest weigh in favor of granting an injunction. Without a preliminary injunction enjoining enforcement of the UHA's CLI, MDM, and microstamping provisions, Plaintiffs will continue to suffer harm because the government will continue infringing their Second Amendment rights. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Cal. Chamber of Commerce v. Council for Education and Research on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022) (cleaned up). Indeed, "public interest concerns are implicated when a

constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005); *see Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (explaining that it is in the public interest to halt the "ongoing enforcement of the potentially unconstitutional regulations" because those regulations would infringe not only on the constitutional rights of the plaintiffs but also of the rest of the public subject to the same regulation). Moreover, the government "cannot suffer harm from an injunction that merely ends an unlawful practice" such as denying Californians' Second Amendment rights. *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). The balance of the equities therefore tips in Plaintiffs' favor.

The government argues that the balance of the equities weighs in its favor because an injunction would "permit[] unsafe handguns to be sold in California prior to trial, creating public safety risks." (Opp. at 18.) But the government's safety concern rings hollow. Every single semiautomatic handgun available for sale in California at this time is a grandfathered handgun—one the government ostensibly considers "unsafe." 800 of 832 handguns on the Roster today lack CLI and MDM features. (*See* Tr. at 179 [Special Agent Gonzalez].) The government cannot credibly argue that handguns without CLI, MDM, and microstamping features pose unacceptable public safety risks when virtually all of the handguns available on the Roster and sold in California today lack those features.

Similarly, if Off-Roster firearms were truly unsafe, California would not allow law enforcement to use them in the line of duty, when the stakes are highest. But the substantial majority of California's law enforcement officers use Off-Roster handguns in the line of duty. (Dkt. 57-2 [Declaration of Brian R. Marvel, President of Peace Officers Research Association of California, hereinafter "Marvel Decl."] ¶ 5 ["Most agencies issue officers the latest models of either Glock or Sig Sauer handguns, which lack

magazine safety disconnects, chamber load indicators, and of course microstamping."]; *see id.* ¶ 7 ["For example, many officers are issued 4th or 5th-generation Glock pistols, which are off-roster and lack magazine safety disconnects, chamber load indicators, and of course microstamping."].) Indeed, the government's own witness, Special Agent Salvador Gonzalez, testified that he uses an Off-Roster duty handgun without a CLI, MDM, or microstamping capability. (Tr. at 243–44.) If CLIs and MDMs truly increased the overall safety of a firearm, law enforcement surely would use them. (Marvel Decl. ¶ 5.) But they do not. Instead, they choose to use "newer, improved and safer generations of handguns" that are Off-Roster. (*Id.* ¶ 7.)

In support of its position, the government points to studies that indicate CLIs and MDMs could have prevented accidental shooting injuries and deaths. (*See, e.g.*, Tr. at 200–05 [discussing Exhibits 12 and 13]; *see also* Govt. Cl. Br. at 19.) But the idea that *if* firearms used for unintentional violence *in the past* had CLIs and MDMs, such unintentional violence could have been prevented, is unhelpful to the government here. Indeed, only 32 out of 832 firearms currently authorized for purchase in California have those features. (*See* Tr. at 179 [Special Agent Gonzalez].) The likelihood that a person will purchase a handgun with a CLI and MDM and that those features will prevent accidental shootings, injuries, or deaths is entirely speculative.[8]

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[8] Similarly, Plaintiffs present a study concluding that between 2005 and 2015, "[s]elf-inflicted [firearm] injuries and unintentional injuries remained relatively stable." (Dkt. 57-1 [Declaration of Alexandra A. Frank], Ex. 1 [Spitzer, *et al.*, *Incidence, Distribution, and Lethality of Firearm Injuries in California from 2005 to 2015*, JAMA Network Open 1 (2020)].) This tends to indicate that CLIs and MDMs have not made a meaningful impact on injuries from accidental discharges. Admittedly, the study states that "self-inflicted injuries decreased by 13.4% and unintentional injuries decreased by 12.7%." (*Id.*) But there is absolutely no indication that CLI or MDM requirements, instituted in 2007, caused these decreases, when handguns with CLIs and MDMs remain exceedingly rare.

IV. CONCLUSION

The Second Amendment enshrines a fundamental constitutional right for law-abiding citizens to keep and bear arms for self-defense. Increasingly in modern times, with "the ubiquity of guns and our country's high level of gun violence," ordinary law-abiding people feel a need to possess handguns to protect themselves against violence. *Bruen*, 142 S. Ct. at 2158 (Alito, J., concurring). This may be because they "live in high-crime neighborhoods," or because they "must traverse dark and dangerous streets in order to reach their homes after work or other evening activities," or because they "reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury." *Id.*

Californians have the constitutional right to acquire and use state-of-the-art handguns to protect themselves. They should not be forced to settle for decade-old models of handguns to ensure that they remain safe inside or outside the home. But unfortunately, the UHA's CLI, MDM, and microstamping requirements do exactly that. Because enforcing those requirements implicates the plain text of the Second Amendment, and the government fails to point to any well-established historical analogues that are consistent with them, those requirements are unconstitutional and their enforcement must be preliminarily enjoined. Accordingly, Plaintiffs' motion for a preliminary injunction is **GRANTED**.

DATED: March 20, 2023

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

EXHIBIT D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 31 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LANCE BOLAND, an individual; et al., Plaintiffs-Appellees, v. ROB BONTA, in his official capacity as Attorney General of the State of California, Defendant-Appellant, and DOES, 1-10, Defendant.	No. 23-55276 D.C. No. 8:22-cv-01421-CJC-ADS Central District of California, Santa Ana ORDER

Before: TASHIMA, S.R. THOMAS, and KOH, Circuit Judges.

The motion (Docket Entry No. 5) to take judicial notice in support of the opposition to the emergency motion for partial stay is granted.

The emergency motion (Docket Entry No. 2) to stay in part the district court's March 20, 2023 preliminary injunction pending appeal is granted. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). The preliminary injunction is stayed as to the chamber load indicator and magazine disconnect mechanism requirements of California's Unsafe Handgun Act. *See* Cal. Penal Code § 31910(b)(4), (5).

The opening brief is due April 28, 2023. The answering brief is due May

26, 2023. The option reply brief is due within 21 days after service of the answering brief. *See* 9th Cir. R. 3.3.

No streamlined extensions of time will be approved. *See* 9th Cir. R. 31-2.2(a)(3). The Clerk will place this on the next available calendar upon the completion of briefing. *See* 9th Cir. Gen. Ord. 3.3(f).

EXHIBIT E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

POLYMER80, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:23-cv-00029-O**
	§	
MERRICK GARLAND, et al.,	§	
	§	
Defendants.	§	

OPINION & ORDER ON POLYMER80, INC.'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Before the Court are Plaintiff Polymer80, Inc.'s Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 14) and Brief in Support (ECF No. 15), filed March 7, 2023; Defendant's Response (ECF No. 20), filed March 9, 2023; and Plaintiff's unopposed Motion for Leave to File Reply in Excess of Page Limit and Reply (ECF No. 26), filed March 26, 2023. Because there is good cause and the motion is unopposed, the Court **GRANTS** Plaintiff's motion to file an overlength brief (ECF No. 26). Having considered the parties' briefing and applicable law, the Court **GRANTS** Plaintiff's motion for leave to file an overlength brief (ECF No. 26) and for a temporary restraining order and preliminary injunction (ECF No. 14). Because it is not a jurisdictional issue relating to this Court's power to adjudicate the instant motion, the Court **RESERVES** ruling on the issue of venue raised in Defendant's response and pending Motion to Dismiss Complaint for Improper Venue or, in the Alternative, to Transfer Venue (ECF No. 12), filed March 7, 2023.

I. INTRODUCTION

a. Statutory & Regulatory Background

The Gun Control Act of 1968 regulates firearms in interstate commerce. 18 U.S.C. § 921

("GCA" or "the Act"). Among other things, the Act requires manufacturers and dealers of firearms to have a federal firearms license. *Id.* § 923(a). Dealers must also conduct background checks before transferring firearms to someone without a license, and they must keep records of firearm transfers. *Id.* §§ 922(t), 923(g)(1)(A).

The Act defines the term "firearm" four different ways: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." *Id.* § 921(a)(3). But "[s]uch term does not include an antique firearm." *Id.* Congress delegated authority to administer and enforce the Act to the Attorney General. *Id.* § 926(a). The Attorney General, in turn, delegated that authority to the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). 28 C.F.R. § 0.130(a).

In 1968, ATF promulgated a rule interpreting the phrase "frame or receiver." The rule defined the "frame or receiver" of a firearm as "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." Commerce in Firearms and Ammunition, 33 Fed. Reg. 18,555, 18,558 (Dec. 14, 1968) (codified at 26 C.F.R. § 178.11). In the decades since, ATF's definition of "frame or receiver" remained in place until the recent promulgation of the Final Rule. And the agency has not made any indication that it was changing course with respect to its

interpretation of the Act.[1] Indeed, on three occasions in the last eight years, ATF confirmed that Polymer80's products are not "firearms" for purposes of the GCA.[2]

However, in April 2022, ATF published a Final Rule changing, among other things, the 1968 definition of "frame or receiver." *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478, and 479). The Rule took effect on August 24, 2022. ATF split the phrase into two parts, assigning the term "frame" to handguns and the term "receiver" to any firearm other than a handgun, such as rifles and shotguns. *See* 27 C.F.R. § 478.12(a)(1), (a)(2). ATF then defined the terms "frame" and "receiver" along the same lines as the 1978 rule, though with updated, more precise technical terminology.[3] But ATF did not stop there.

Rather than merely updating the terminology, ATF decided to regulate *partial* frames and receivers. Under the new Final Rule, "[t]he terms 'frame' and 'receiver' shall include a partially

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[1] *See, e.g.*, Gov't's Mot. to Dismiss, *California v. ATF*, No. 3:20-cv-06761, 2020 WL 9849685 (N.D. Cal. Nov. 30, 2020) ("Congress has chosen to exclude firearm parts from the scope of the GCA, including parts that could be assembled with a homemade receiver and frame to make a firearm.").

[2] Pl.'s Br. 6–7, ECF No. 15; Pl.'s App. 140–56, ECF No. 16, Classification Letter, Bureau of Alcohol, Tobacco, Firearms & Explosives (Jan. 18, 2017) (determining Polymer80's PF940C pistol blank frame is not a firearm); Pl.'s App. 130–148, ECF No. 16, Classification Letter, Bureau of Alcohol, Tobacco, Firearms & Explosives (Nov. 2, 2015) (determining Polymer80's Glock-type GC9 pistol frame blank and Warrhogg receiver blank are not firearms); and Pl.'s App. 158–59, ECF No. 16, Classification Letter, Bureau of Alcohol, Tobacco, Firearms & Explosives (Feb. 3, 2015) (determining Polymer80's AR-15 pattern receiver blank is not a firearm).

[3] The two terms are defined as follows:

> (1) The term "frame" means the part of a handgun, or variants thereof, that provides housing or a structure for the component (i.e., sear or equivalent) designed to hold back the hammer, striker, bolt, or similar primary energized component prior to initiation of the firing sequence, even if pins or other attachments are required to connect such component (i.e., sear or equivalent) to the housing or structure.
>
> (2) The term "receiver" means the part of a rifle, shotgun, or projectile weapon other than a handgun, or variants thereof, that provides housing or a structure for the primary component designed to block or seal the breech prior to initiation of the firing sequence (i.e., bolt, breechblock, or equivalent), even if pins or other attachments are required to connect such component to the housing or structure.

27 C.F.R. § 478.12(a).

complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." *Id.* § 478.12(c). But "[t]he terms shall not include a forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon (e.g., unformed block of metal, liquid polymer, or other raw material)." *Id.* When determining whether an object is a frame or receiver, the ATF Director is not limited to looking only at the object. "When issuing a classification, the Director may consider any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with the item or kit . . . ." *Id.* To determine whether an object may "readily" be converted into a firearm, ATF may consider relevant factors such as (1) time, (2) ease, (3) expertise, (4) equipment, (5) parts availability, (6) expense, (7) scope, and (8) feasibility. *Id.* § 478.11. The Final Rule also amends ATF's definition of "firearm" to include weapon parts kits. The ATF's new definition of "firearm" "shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive." *Id.*

In the months since the Final Rule was published, on December 27, 2022, ATF issued informal guidance to industry members, identifying specific manufacturers of frame and receiver blanks and particular products that ATF considered subject to the Final Rule ("Open Letter").[4] The same day, and without having received a classification request, ATF sent a letter to Polymer80 identifying several of the company's products as "firearms" for purposes of the GCA

[4] Pl.'s App. 108–17, ECF No. 16, Open Letter to All Firearm Licensees 1, Bureau of Alcohol, Tobacco, Firearms & Explosives (Dec. 27, 2022) (identifying "partially complete Polymer80 . . . striker-fired semiautomatic pistol frames, including, but not limited to, those sold within parts kits" as "frames" and, therefore, "firearms" for purposes of the GCA).

and the Final Rule, even when those items are sold separately and not in a kit ("Polymer80 Letter").[5] Less than two weeks later, Polymer80 filed this lawsuit and sought to intervene in a related lawsuit.[6]

b. Procedural Background

The Court is currently addressing challenges to ATF's Final Rule in *Vanderstok v. Garland*, No. 4:22-CV-00691-O (N.D. Tex. filed Aug. 11, 2022). Though the *Vanderstok* plaintiffs did not raise all of the same claims as Polymer80, they raised some identical claims, including that the Final Rule exceeds the lawful scope of ATF's statutory authority under the GCA.[7] That case was filed in early August, after the Final Rule was announced on April 26, 2022 and before it took effect on August 24, 2022. Within a week of filing suit, the *Vanderstok* plaintiffs moved for a nationwide injunction.[8] The Court denied that request for relief on September 2, 2022.[9]

In the weeks and months following that September decision, Polymer80 "attempted in good faith to comply with the Final Rule."[10] But after receiving the Open Letter and Polymer80 Letter from ATF in December 2022 and learning it would be "forced . . . to discontinue sales of unfinished-frame kits *and* unfinished frames as they are currently designed," Polymer80 sought to intervene in the *Vanderstok* litigation as other successful intervenors had.[11] Simultaneously,

[5] Pl.'s App. 119–28, Letter to Polymer80, Bureau of Alcohol, Tobacco, Firearms & Explosives (Dec. 27, 2022); Kelly Decl. ¶ 12, Pl.'s App. 4–5, ECF No. 16.
[6] Compl., ECF No. 1; Pl.'s Mot. to Intervene, *Vanderstok*, No. 4:22-CV-00691-O (N.D. Tex. Jan. 9, 2023).
[7] Compl., *Vanderstok*, No. 4:22-CV-00691-O (N.D. Tex. Aug. 11, 2022) (claiming the Final Rule was issued in excess of ATF's statutory jurisdiction and authority (Count I)); Pl.'s Compl. 31, ECF No. 1 (same).
[8] Mot. for Prelim. Inj., *Vanderstok*, No. 4:22-CV-00691-O (N.D. Tex. Aug. 18, 2022).
[9] Opinion & Order, *Vanderstok*, No. 4:22-CV-00691-O (N.D. Tex. Sept. 2, 2022).
[10] Kelley Decl. ¶ 14, Pl.'s App. 5, ECF No. 16.
[11] Kelley Decl. ¶ 15, Pl.'s App. 6, ECF No. 16 (emphasis added); Pl.'s Reply 18, ECF No. 26-1; *see generally Vanderstok*, No. 4:22-CV-00691-O (N.D. Tex. filed Aug. 11, 2022).

Polymer80 filed its own lawsuit.[12] Six weeks later on March 7, 2023, Polymer80 filed the instant TRO and sought an expedited briefing schedule, which the Court granted.[13] Earlier that day, the Government filed a motion to dismiss or transfer based on improper venue and sought its own expedited briefing schedule.[14] On March 12, 2023, the Court denied the Government's motion to expedite on grounds that the motion to dismiss or transfer identified no emergency and did not challenge anything running to the merits of the case or ability to hear it, such as the Court's subject matter jurisdiction.[15]

c. *The Parties*

Plaintiff Polymer80, Inc. is a commercial enterprise that "manufactures, markets, and distributes firearms, non-firearm products such as receiver blanks (partially complete, disassembled, or nonfunctional frames), and other innovative products, components and accessories," such as jigs, tools, and associated parts kits.[16] Polymer80's core business is selling these items, which are subject to the Final Rule.[17] For years, and based on ATF's representations that the company's products were not "firearms," Polymer80 structured "its business model," "invested capital," and lawfully sold receiver blanks directly to consumers throughout the country and in this district.[18] After Final Rule was promulgated, and in a good faith effort to comply with the Rule, Polymer80 stopped selling its receiver blanks with accompanying jigs.[19] However, ATF's Open Letter and Polymer80 Letter make clear that even selling blanks

[12] Compl., ECF No. 1.
[13] Pl.'s Mot., ECF No. 14; Pl.'s Mot. to Expedite, ECF No. 17; Order, ECF No. 18.
[14] Def.'s Mot. to Dismiss, ECF No. 12; Def.'s Mot. to Expedite, ECF No. 19.
[15] Order, ECF No. 22.
[16] Compl. 1–2, ECF No. 1.
[17] Kelley Decl. ¶ 5, Pl.'s App. 3, ECF No. 16.
[18] *Id.* ¶ 9.
[19] *Id.* ¶ 14.

separately is violative of the Final Rule.[20] The inability to sell receiver blanks or parts kits has "caused profound economic harm to Polymer80 and threaten[s] its very existence as a going concern."[21] Without immediate relief, Polymer80 estimates it "can survive as a corporate entity for perhaps as little as three weeks."[22]

Plaintiff has sued the Attorney General, Department of Justice, ATF, and the ATF Director over the Final Rule and its implementation of the regulation.[23] Plaintiff now asks the Court to enter a temporary restraining order ("TRO") and enjoin Defendants from enforcing or otherwise implementing (e.g., through informal guidance letters or otherwise) the Final Rule against Plaintiff.[24]

Plaintiff attacks ATF's Final Rule and subsequent guidance letters as unlawful in several respects: (1) that "ATF has exceeded its statutory authority by creating and implementing a new definition of 'firearm' [that] contradicts the plain language of the Gun Control Act" and that ATF's attempts to implement the regulation are arbitrary and capricious;[25] (2) that the Final Rule violates Polymer80's First Amendment rights because the regulation "is a content-based restriction on protected speech" that cannot pass strict scrutiny;[26] (3) that the Final Rule in conjunction with the ATF letters violate Polymer80's Second Amendment rights by regulating constitutionally protected conduct "in a way that is inconsistent with the Nation's historical tradition of firearm regulation" contrary to Supreme Court precedent;[27] and (4) that the Final Rule in conjunction with the ATF letters violate Polymer80's Fifth Amendment rights because

[20] *Id.*
[21] *Id.* ¶ 16.
[22] *Id.* (dated Mar. 7, 2023).
[23] Compl. 5–6, ECF No. 1.
[24] Pl.'s Mot. 1, ECF No. 14.
[25] Pl.'s Mot. 2, ECF No. 14; Pl.'s Br. 13, ECF No. 15.
[26] Pl.'s Br. 14, ECF No. 15.
[27] *Id.* at 16 (analyzing *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)).

(i) they "effectuate a regulatory taking without just compensation" and (ii) deny due process as impermissibly vague.[28] The parties have briefed the issues and the motion is ripe for review.

II. LEGAL STANDARDS

The decision to grant or deny injunctive relief is committed to the district court's discretion. *See Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985). To establish entitlement to a preliminary injunction, the movant must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) that the balance of hardships weighs in its favor; and (4) that the issuance of the preliminary injunction will not disserve the public interest. *Daniels Health Servs., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013). The last two factors merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "A [temporary restraining order] is simply a highly accelerated and temporary form of preliminary injunctive relief, which requires that the party seeking such relief establish the same four elements for obtaining a preliminary injunction." *Greer's Ranch Café v. Guzman*, 540 F.Supp.3d 638, 644–45 (N.D. Tex. 2021) (O'Connor, J.) (cleaned up).

Upon determining that a party is entitled to injunctive relief, a court must also decide the appropriate scope of that prospective injunction. "[T]he scope of injunctive relief is dictated by the extent of the violation established[.]" *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). And because it is considered an extraordinary remedy, an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 756 (1994) (cleaned up). As movant, the party seeking relief bears the burden of proving all four elements of the preliminary injunction. *Nichols v. Alcatel*

[28] *Id.* at 18–21.

USA, Inc., 532 F.3d 364, 372 (5th Cir. 2008); *Miss. Power & Light Co.*, 760 F.2d at 621.

III. ANALYSIS

A.

Because the Government claims improper venue, the Court will briefly address (but not resolve) the issue as a threshold matter. As noted above, the Government moved to dismiss this action based on improper venue and, after Plaintiff filed its TRO, moved to expedite the venue briefing. The Court denied the Government's motion to expedite. Order, ECF No. 22.[29] In its Order the Court noted that, unlike Plaintiff's demonstrated need for emergency relief, the Government "offered no equivalent existential reason why the Court should consider its venue motion on an expedited basis." *Id.* at 1.

Specifically, the Government claims improper venue based on the fact that Plaintiff cannot show that a "substantial" part of the events giving rise to its claim occurred in this district. 28 U.S.C. § 1391(e)(1). Because Plaintiff avers that it routinely transacts business in and attends sales events in the Northern District of Texas (i.e., it has some connection to this venue), the dispute is whether the events giving rise to the instant lawsuit that occurred within this district are substantial *enough*. As the Court previously held, that question requires further analysis that need not be rushed to the top of the Court's docket, ahead of the numerous cases (including several other requests for emergency relief) currently pending, given that it does not implicate the Court's *jurisdictional* authority. *Bywaters v. United States*, 196 F.R.D. 458, 464 (E.D. Tex. 2000) ("Venue does not relate to the power to adjudicate, but to the place where that power is to be exercised and 'is a concept oriented around the convenience of the litigants and the court system.'") (quoting *Jones v. United States*, 407 F. Supp. 873, 876 (N.D. Tex. 1976)).

[29] Rather than accept that decision, the Government apparently attempts an end-run around the Court's previous Order by incorporating its venue arguments in its response to the TRO. Def.'s Br. 8–11, ECF No. 25.

Moreover, the Government did not then—nor does it now—cite any binding authority dictating that this Court *must* resolve a non-subject matter jurisdictional venue motion before it addresses Plaintiff's motion for emergency relief. *Id.* at 1–3. The Court will address the Government's venue motion in due course. But for the reasons discussed, it will not expedite consideration of that issue and, accordingly, **RESERVES** ruling on the venue question in the interim.

B.

1. Substantial Likelihood of Success on the Merits

To show a substantial likelihood of success on the merits, Polymer80 need not show it is entitled to summary judgment on its claim, but must present a prima facie case. *Daniels Health Servs.*, 710 F.3d at 582. Polymer80 has met that burden with respect to at least one of its claims—that the Final Rule exceeds the scope of ATF's statutory authority—and has, therefore, satisfied "arguably the most important" of the four preliminary injunction factors. *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005).

The Administrative Procedure Act ("APA") instructs courts to "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). Plaintiff contends that ATF's Final Rule, and its implementation of the regulation, exceeds the agency's statutory authority under the plain language of the GCA "because its redefinition of 'frame or receiver' and treatment of parts kits are inconsistent with the [Act's] plain language."[30] Plaintiff is correct.[31]

[30] Pl.'s Br. 13, ECF No. 15; Compl. 32–33, ECF No. 1.

[31] This Court has already determined that the Final Rule likely exceeds ATF's statutory authority and incorporates its prior reasoning here. Opinion & Order 6–16, *Vanderstok*, No. 4:22-CV-00691-O (N.D. Tex. Sept. 2, 2022).

a. Parts that *may become* receivers are not receivers.

The text of the Gun Control Act resolves this motion. When "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). The Court "begin[s] with the assumption that the words were meant to express their ordinary meaning." *United States v. Kaluza*, 780 F.3d 647, 659 (5th Cir. 2015) (citation and internal quotation marks omitted). But when a statute "includes an explicit definition," the Court "'must follow that definition,' even if it varies from a term's ordinary meaning." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) (citation omitted). "Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (citation omitted).

Congress carefully defined its terms in the Gun Control Act. The primary definition of "firearm" in the Act contains three parts: "any weapon (including a starter gun) which [1] will or [2] is designed to or [3] may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A). Under this primary definition, a firearm is first and foremost a *weapon*. Underscoring that point, Congress explicitly named starter guns in the definition because starter guns are not obviously weapons. Then, because weapon parts also are not "weapons," Congress created a secondary definition covering specific weapon parts: "the frame or receiver of any such weapon." *Id.* § 921(a)(3)(B). Congress did not cover all weapon parts—only frames and receivers. And *only* the frames and receivers "of any such weapon" that Congress described in the primary definition.

Congress did not define the phrase "frame or receiver," so the words receive their ordinary meaning. *See Kaluza*, 780 F.3d at 659. In the Final Rule, ATF interprets the phrase as two separate parts. ATF says the "term 'frame' means the part of a handgun . . . that provides housing or a structure for the component (i.e., sear or equivalent) designed to hold back the hammer, striker, bolt, or similar primary energized component prior to initiation of the firing sequence." 27 C.F.R. § 478.12(a)(1). ATF defines "receiver" similarly, though it says the term refers to a "rifle, shotgun, or projectile weapon other than a handgun." *Id.* § 478.12(a)(2).

But the Final Rule did not merely update ATF's terminology. ATF added an entirely new section expanding its jurisdiction to include "partially complete, disassembled, or nonfunctional frame[s] or receiver[s]." *Id.* § 478.12(c). ATF now claims authority to regulate parts that are "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." *Id.* The parts must be "clearly identifiable as an unfinished component part of a weapon." *Id.* In deciding whether something is a partially complete frame or receiver, ATF may consider other materials such as molds, instructions, and marketing materials "that are sold, distributed, or possessed with the item or kit." *Id.*

The Final Rule's redefinition of "frame or receiver" conflicts with the statute's plain meaning. The definition of "firearm" in the Gun Control Act does not cover all firearm parts. It covers specifically "the frame or receiver of any such weapon" that Congress defined as a firearm. 18 U.S.C. § 921(a)(3)(B). That which *may become* a receiver is not itself a receiver. Congress could have included firearm parts that "may readily be converted" to frames or receivers, as it did with "weapons" that "may readily be converted" to fire a projectile. But it omitted that language when talking about frames and receivers. "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) (citation and internal quotation marks omitted). Likewise, when Congress uses a phrase in one part of a definition and excludes that phrase from another part of the very same definition, courts should give effect to Congress's deliberate exclusion.

Congress excluded other adjectives that ATF adds to its definition. The Final Rule covers "disassembled" and "nonfunctional" frames and receivers. 27 C.F.R. § 478.12(c). Congress's definition does not. Again, compare the language in Congress's primary definition of "firearm" to its secondary definition covering frames and receivers. The primary definition of "firearm" includes any "weapon" that "is designed to" fire a projectile. 18 U.S.C. § 921(a)(3)(A). That language covers disassembled, nonfunctional, and antique firearms because they are "designed" to fire projectiles even if they are practically unable to do so. But Congress wanted to exclude antiques, so it explicitly said the "term does not include an antique firearm," once again demonstrating awareness of the scope of the language it chose. *Id.* § 921(a)(3). In contrast, Congress did not choose to cover firearm parts that are "designed" to be frames or receivers—that is, incomplete, nonfunctional frames or receivers. "That omission is telling," particularly when Congress used that more expansive terminology in the same definition. *Collins*, 141 S. Ct. at 1782.

ATF's new definition of "frame or receiver" in 27 C.F.R. § 478.12(c) is facially unlawful. By comparison, the Final Rule includes definitions of "frame" and "receiver" in § 478.12(a) that appear to be consistent with the statute. This further highlights that the Final Rule's expansion of authority in § 478.12(c) to firearm parts that are *not yet* frames or receivers goes beyond Congress's definition. In other words, § 478.12(a) describes the full scope of frames

and receivers that are consistent with the statutory scheme. ATF's expansion in § 478.12(c), on the other hand, covers *additional* parts that are "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." 27 C.F.R. § 478.12(c). But Congress intentionally omitted that language from the definition. Section 478.12(c) is thus facially unlawful because it describes only parts that Congress intentionally excluded from its definition of "firearm." It is purely an expansion of authority beyond the statutory language. That the firearm part is "designed" to be or may one day become a frame or receiver does not change the fact that, in that moment, it is not "the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3)(B).

Defendants' counterarguments are unpersuasive. First, Defendants urge the Court to reject its own prior reasoning and adopt "the persuasive reasoning of other decisions denying preliminary relief to plaintiffs challenging the [Final] Rule."[32] Having reviewed those decisions, the Court is not persuaded by the fairly cursory statutory analysis of *Morehouse Enters v. ATF*, or by the decision in *Div. 80, LLC v. Garland*, which did not address the merits of plaintiff's claim.[33] In this Court's view, the *Morehouse* court's analysis does not reflect "the level of rigor that usually accompanies statutory interpretation," *In re Harris*, 988 F.3d 239, 241 (5th Cir. 2021) (Oldham, J., concurring), because it does not meaningfully engage Congress' precise treatment of particular statutory terms (i.e., "weapons" versus "firearms").[34] "[T]he regulatory

[32] Def.'s Br. 12, ECF No. 25 (citing *Morehouse Enters. v. ATF*, No. 3:22-CV-116, 2022 WL 3597299 (D.N.D. Aug. 23, 2022) *appeal docketed*, *Arizona v. ATF*, No. 22-2812 (8th Cir.) and *Div. 80, LLC v. Garland*, No. 3:22-CV-148, 2022 WL 364854 (S.D. Tex. Aug. 23, 2022)).

[33] *Morehouse Enters. v. ATF*, No. 3:22-CV-116, 2022 WL 3597299, at *5–6 (D.N.D. Aug. 23, 2022) *appeal docketed*, *Arizona v. ATF*, No. 22-2812 (8th Cir.) (dedicating four paragraphs to interpretive arguments that the Court addressed at length in *Vanderstok*); *Div. 80, LLC v. Garland*, No. 3:22-CV-148, 2022 WL 364854, at *6 (S.D. Tex. Aug. 23, 2022) ("Because [plaintiff] failed to establish [irreparable harm], the court need not address its likelihood of success on the merits.").

[34] *See, e.g.*, *Morehouse Enters.*, at *5–6 ("[T]he GCA itself defines 'firearm' as 'any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of

goals of the Gun Control Act were narrow[]: the Act ensured that '*weapons* [were] distributed through regular channels and in a traceable manner and [made] possible the prevention of sales to undesirable customers and the detection of the origin of particular *firearms*.'" *New York v. Burger*, 482 U.S. 691, 713 (1987) (emphases added) (alterations in original) (citing *United States v. Biswell*, 406 U.S. 311, 315–16 (1972)). When Congress sought to regulate *parts* of weapons, it did so meticulously.

Second, Defendants contend that the Court's reasoning in *Vanderstok* is inapplicable in this case because, there, "the Court concluded that the Rule's amended definition of 'frame or receiver' likely exceeded ATF's statutory authority because it would 'regulate a component as a "frame or receiver" even after ATF determines that the component in question is *not* a frame or receiver.'"[35] Defendants argue this case is different because, in its Open Letter and Polymer80 Letter, ATF *did* conclude that Polymer80's products are "frames" and therefore "firearms" for purposes of the GCA.[36] Indeed, "[n]owhere in either letter does ATF determine these products are not frames."[37] But the facts are not as straightforward as Defendants suggest. Importantly, ATF issued its December 2022 letters characterizing Polymer80's products as "firearms" in the midst of ongoing litigation over its Final Rule and entirely unprompted, not because Plaintiff had submitted a request for classification of its products. Even more importantly, ATF *had*, on multiple occasions in the preceding years, previously determined that Polymer80's receiver

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an explosive[.]' 18 U.S.C. § 921(a)(3)(A). . . . Congress defined 'firearm' more broadly than simply a fully operational weapon, as the statute expressly includes items that 'may readily be converted to expel a projectile.'").

[35] Def.'s Br. 13, ECF No. 25 (emphasis in original) (quoting Opinion 10, *Vanderstok*, No. 4:22-CV-00691-O (N.D. Tex. Sept. 2, 2022)).

[36] *Id.*

[37] *Id.*

blanks are *not* firearms for purposes of the GCA.[38] In short, the Court sees no reason to depart from earlier reasoning with respect to the Final Rule.

b. A weapon parts kit is not a firearm.

Plaintiff is also likely to succeed on its claim that the Final Rule unlawfully treats weapon parts kits as firearms. The Final Rule contains its own definition of "firearm," notwithstanding that the GCA already defines the term. Under the Final Rule, "[t]he term shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive." 27 C.F.R. § 478.11 (definition of "firearm"). That language conflicts with the statute's definition of "firearm."

Despite Defendants' arguments to the contrary, ATF has no general authority to regulate weapon parts.[39] But the Final Rule grants ATF that general authority by copying language used throughout the statutory definition. It takes phrases like "designed to" and "may readily be converted" and "assembled" from various places in the statute, cobbling them together to form ATF's own definition of "firearm." Those terms may add a patina of credibility to the drafting, but they tarnish Congress's carefully crafted definition. More importantly, they unlawfully expand ATF's authority beyond the boundaries set by the Act.

Under § 921(a)(3)(B), the only firearm parts that fall under ATF's purview are "the frame or receiver of any such weapon" that Congress defined as a firearm. 18 U.S.C. § 921(a)(3)(B). But the Final Rule regulates weapon parts kits that are "designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive." 27 C.F.R. § 478.11. The statute covers "any *weapon*" that is "designed to" or "may readily be converted to" fire a projectile. 18 U.S.C. § 921(a)(3)(A) (emphasis added). Congress's definition

[38] See note 2 *supra*.
[39] Def.'s Br. 15, ECF No. 25.

does not cover weapon *parts*, or aggregations of weapon parts, regardless of whether the parts may be readily assembled into something that may fire a projectile.[40]

The statutory context repeatedly confirms that Congress intentionally chose not to regulate "weapon" parts generally. As further evidence, look to § 921(a)(4)(C), which does allow for the regulation of "parts." But it allows for the regulation only of parts of "destructive devices"—one of the four statutory sub-definitions of "firearm." *Id.* § 921(a)(3)(D). The term "destructive device" is defined as "any explosive, incendiary, or poison gas," such as a bomb, grenade, mine, or similar device. *Id.* § 921(a)(4)(A). The definition of "destructive device" also includes "any type of weapon" that "may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter." *Id.* § 921(a)(4)(B). For example, suppose a manufacturer tried to sell a parts kit to make a homemade grenade. ATF could regulate that parts kit because it can regulate "any combination of parts either designed or intended for use in converting any device into" a grenade, from which a grenade "may be readily assembled." *Id.* § 921(a)(4)(C). Likewise for bombs, rockets, missiles, and other destructive devices. But commonly sold firearms such as 9mm pistols or .223 rifles do not fall under the specialized definition of "destructive devices," so weapon parts kits for those firearms cannot be properly regulated as components of "destructive devices." *Id.* § 921(a)(4).

In sum, the Gun Control Act's precise wording demands precise application. Congress *could have* described a firearm as "any combination of parts" that would produce a weapon that could fire a projectile. It used that language elsewhere in the definition. *Id.* § 921(a)(4)(C). Congress could have described a firearm as any part "designed" to be part of a weapon. It used

[40] Def.'s Br. 14–15, ECF No. 25.

that language too. *Id.* § 921(a)(3)(A), (a)(4)(C). Congress could have described a firearm as a set of parts that "may be readily assembled" into a weapon, as it did for "destructive device." *Id.* § 921(a)(4)(C). Congress could have written all those things, and the very definition of "firearm" demonstrates that Congress knew the words that would accomplish those ends.[41] But Congress did not regulate firearm parts as such, let alone parts kits that are "designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive." 27 C.F.R. § 478.11.

* * * *

For the reasons discussed, the Court stands by its earlier reasoning and finds that Plaintiff has demonstrated a strong likelihood of success on the merits of its claims that the Final Rule—specifically, 27 C.F.R. §§ 478.11, 478.12(c)—exceeds the scope of ATF's authority under the Gun Control Act. Because it has satisfied this element with its APA claim, the Court need not address the merits of its remaining claims.

2. Substantial Threat of Irreparable Harm

In the Fifth Circuit, a harm is considered "irreparable only 'if it cannot be undone through monetary remedies.'" *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quoting *Interox Am. v. PPG Indus., Inc.*, 736 F.2d 194, 202 (5th Cir.1984)). A showing of

[41] Congress's definition of "machine gun" elsewhere in the U.S. Code is a great example of a definition would fit the kind of rule ATF has in mind:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, *any part* designed and intended solely and exclusively, or *combination of parts* designed and intended, for use in converting a weapon into a machinegun, *and any combination of parts from which a machinegun can be assembled* if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (emphases added); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006) ("Our more natural reading is confirmed by the use of the word 'contract' elsewhere in the United States Code . . . .").

economic loss is usually insufficient to establish irreparable harm because damages may be recoverable at the conclusion of litigation. *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). However, "an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business." *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989). And where costs are not recoverable because the government-defendant enjoys sovereign immunity from monetary damages, as is the case here, irreparable harm is generally satisfied. *See Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021).

Plaintiff alleges that it continues to suffer irreparable harm in the form of unrecoverable compliance costs and—within days of this Order—is threatened with having to dissolve its business if its economic losses continue unabated.[42] Defendants contest Plaintiff's alleged injury on grounds that it purportedly waited eleven months to seek an injunction and that any harm Polymer80 is suffering is purely "self-inflicted."[43] The Court disagrees.

Because Defendants in this case are entitled to sovereign immunity, and therefore not liable for damages, Plaintiff's economic injuries cannot be recovered. Moreover, Plaintiff alleges that its business enterprise faces certain dissolution if the Court does not provide immediate relief from compliance with the Final Rule. In this way also, Polymer80's harm "threaten[s] the existence of [its] business," and is therefore irreparable for purposes of injunctive relief. *Atwood*, 875 F.2d at 1179. Notably, Defendants do not contest the assertion that the company's dissolution will likely result.[44]

Importantly, irreparable harm need not be financial in nature. Even "alleged" deprivations of constitutional or procedural rights may justify injunctive relief. *See, e.g.*, *Opulent*

[42] Pl.'s Br. 21–22, ECF No. 15.
[43] Def.'s Br. 22–24, ECF No. 25.
[44] *See* Def.'s Br. 23–24, ECF No. 25.

Life Church v. City of Holly Springs, Miss., 697 F.3d 279, 294–97 (5th Cir. 2012) (finding irreparable harm where plaintiffs "alleged" violations of constitutional rights on grounds that "[t]he loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, No. 6:22-CV-01934, 2022 WL 2960031, at *13 (W.D. La. July 26, 2022) (finding irreparable harm where plaintiffs alleged action in excess of statutory authority and APA violations). Plaintiff's Complaint alleges deprivations of both constitutional and procedural rights. For this reason, Plaintiff need not cure its economic harm by simply opting to comply with a regulation that is likely unlawful, as Defendants suggest.[45]

The Court is unpersuaded by Defendants' argument that Plaintiff's harm is "self-inflicted" and therefore does not constitute irreparable harm.[46] For this, Defendants' rely on the Fifth Circuit's decision in *State v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021).[47] In that case, the Fifth Circuit indicated that "self-inflicted" injuries do not qualify as irreparable harm. *Biden*, 10 F.4th at 558.

But the facts in *Biden* are distinguishable from the facts of this case. There, the plaintiffs (two states) sued the defendants (several federal government actors, including DHS) over the latter's suspension of a prior presidential administration's immigration program. *Id.* at 543–46. The states prevailed in the district court and DHS was required to resume the program. *Id.* Thereafter, DHS sought an emergency stay pending appeal, which required it to make a showing of irreparable harm. *Id.* at 545. Among other things, DHS tried to substantiate its irreparable injury by claiming it had already begun administratively winding down the program and that

[45] *Id.*
[46] Def.'s Br. 23–24.
[47] *Id.*

requiring it to resume would inflict a great degree of harm. *Id.* at 558. The Fifth Circuit rejected this argument. *Id.* It found that DHS's decision, in the middle of ongoing litigation, to terminate and unwind the program—and its attempt to use this decision to support a showing of irreparable harm—was a "self-inflicted" harm that severely undermined its claim for emergency relief. *Id.* In the court's view, DHS could have avoided this injury by simply waiting for resolution of the underlying legal dispute before winding down the program. *Id.*

By contrast, Polymer80 stopped selling its products in response to the Government's Final Rule and subsequent guidance letters, which it claims violate its statutory and constitutional rights. Thus, Polymer80 faces irreparable injury whatever course it takes—suffer economic injury or comply with a regulation it alleges the Government has no authority to enforce. For this reason, and because Defendants' contrary arguments overlook clear Fifth Circuit precedent identifying such injuries as irreparable harm, the Court is satisfied that Polymer80's alleged injuries are indeed irreparable and are not self-inflicted.

Finally, while Defendants claim Plaintiff waited nearly a year to seek relief, this suggested timeline is exaggerated. Whether a period of delay militates against a finding of irreparable harm turns on the facts of the particular case. *See, e.g.*, *ADT, LLC v. Cap. Connect, Inc.*, 145 F. Supp. 3d 671, 699 (N.D. Tex. 2015) (finding an eight-month delay reasonable); *Wireless Agents, L.L.C. v. T-Movile USA, Inc.*, No. 3:05-CV-0094-D, 2006 WL 1540587, at *3 (N.D. Tex. June 6, 2006) (finding a year's delay unreasonable). Plaintiff initially thought its interests would be protected by a possible nationwide injunction that was pending in *Vanderstok*, a lawsuit that commenced before the Final Rule took effect.[48] When it learned in September 2022 that its interests would not be protected by an injunction in that case, Plaintiff made good

[48] Pl.'s Reply 18, ECF No. 26-1.

faith efforts to comply with the regulation.[49] However, upon receiving the guidance letters from ATF in late December 2022, Plaintiff learned its business model was no longer viable.[50] Less than two weeks later, Plaintiff sought to intervene in the *Vanderstok* case and simultaneously filed the instant lawsuit. Six weeks thereafter, Plaintiff sought this TRO. On these facts, the Court finds that Plaintiff's purported delay does not weigh against a finding of irreparable harm and finds this element is satisfied.

3. Balance of Hardships & the Public Interest

Next, the Court must weigh the equities and the public interest, which "merge" when the Government is a party. *Nken*, 556 U.S. at 435. Defendants assert a public interest in "preventing individuals from obtaining and using in criminal activity unserialized firearms that cannot be traced by law enforcement," an interest that it contends an injunction will thwart.[51] Meanwhile, Plaintiffs assert the public interest in ensuring the Government abides by its statutory and constitutional obligations.[52] There is undoubtedly "an overriding public interest [in] . . . an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). And "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009). Nor do Defendants dispute that the core of Plaintiff's clientele base is comprised of law-abiding citizens who wish to engage in the lawful conduct of manufacturing personal firearms—conduct that has been lawful for the last half-century. Moreover, Defendants concede that their asserted public interest can be adequately protected by excluding from any

[49] *Id.*
[50] Def.'s Br. 24–25, ECF No. 25.
[51] *See* Defs.' Resp. 43, ECF No. 41.
[52] Pl.'s Reply 20, ECF No. 26-1.

relief persons prohibited from possessing firearms under 18 U.S.C. § 922(g), as the Court has done in crafting similarly situated manufacturer's relief.[53]

While both parties claim valid public interests, on balance, the equities and public interest weigh in favor of Plaintiff. Any injury to Defendants is further outweighed by Plaintiff's strong likelihood of success on the merits of its statutory interpretation claim. *See Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 316 (5th Cir. 2021). Finally, the Court will tailor the scope of the temporary restraining order and preliminary injunction with careful attention to avoid further upsetting the balance of these competing public interests.

* * * *

In sum, Polymer80, Inc. has shown it is entitled to preliminary injunctive relief. Having considered the arguments, evidence, and law, the Court holds that the relevant factors weigh in favor of a preliminary injunction. When ordering injunctive relief, the Court is obligated to state "specifically" and "in reasonable detail . . . the act or acts restrained or required" under the injunction. Fed. R. Civ. P. 65(d)(1)(b). Accordingly, the Court preliminarily **ENJOINS** Defendants and their officers, agents, servants, and employees are enjoined from implementing or enforcing against Polymer80, Inc. or its customers, in any manner, the provisions in 27 C.F.R. § 478.11 and 478.12 that this Court has determined are likely unlawful. In keeping with the relief this Court has afforded to other similarly situated manufacturers, the Court also extends the injunction to Polymer80's customers, who must be willing to transact business with Polymer80 without fear of criminal liability, in order for Polymer80's relief to be effective. The Court defines "customers" as: individuals or entities who purchase directly from Polymer80 any

[53] Def.'s Br. 25, ECF No. 25; *see, e.g.*, Order 1–2, *Vanderstok*, No. 4:22-CV-00691-O (N.D. Tex. Oct. 3, 2022).

product classified as a "firearm" under 27 C.F.R. § 478.11 or § 478.12(c). This definition does not include persons prohibited from possessing firearms by 18 U.S.C. § 922(g).

IV. CONCLUSION

For the reasons discussed, the Court **GRANTS** Plaintiff's motion for leave to file an overlength brief (ECF No. 26) and for a temporary restraining order and preliminary injunction (ECF No. 14). The Court **ORDERS** that Defendants and their officers, agents, servants, and employees are enjoined from implementing or enforcing against Polymer80, Inc. or its customers, in any manner, the provisions in 27 C.F.R. § 478.11 and 478.12 that this Court has determined are likely unlawful. The Court waives the security requirement of Fed. R. Civ. P. 65(c). *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996).

SO ORDERED this **19th day** of **March, 2023**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

EXHIBIT F

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

POLYMER80, INC., a Nevada corporation; DAVID BORGES, an individual; LORAN KELLEY, an individual,

Defendants.

Case No.: 21STCV06257

[Assigned for all purposes to the Honorable Daniel S. Murphy; Dept. 32]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF DEFENDANTS POLYMER80, INC., DAVID BORGES, AND LORAN KELLEY TO COMPLAINT

Hearing Date: June 7, 2021
Hearing Time: 8:30 a.m.
Department: 32
Reservation ID: 799308383329

Complaint Filed: February 17, 2021

INTRODUCTION

Plaintiff, Los Angeles City Attorney Michael N. Feuer, on behalf of the People of the State of California (the "State"), has sued Polymer80, Inc. and two of its principals (collectively "Defendants"), alleging violations of the Unfair Competition Law ("UCL") and creation of a public nuisance. The State's central theory is that Defendants have manufactured and sold items that meet the legal definition of "firearm" without adhering to various regulations imposed on "firearm" commerce. Defendants demur to the State's Complaint.

Defendants demur to both Causes of Action in the Complaint on the basis that the Complaint fails to explain how Defendants' products meet the very technical elements of the federal definitions of "firearm" or "handgun" in sufficient detail. The State's failure in this regard precludes Defendants from adequately evaluating the State's claims and responding accordingly.

Defendants additionally demur to both Causes of Action for their failure to state a valid claim. The State's First Cause of Action is comprised of various sub-claims alleging violations of the UCL under that Act's unlawful, unfair, and fraudulent prongs. Each of them is defective.

First, the Complaint fails to plead a cause of action under the "unlawful" prong because the Complaint fails to adequately allege that Defendants' products are "firearms" and thus subject to the firearm-sale regulations that the State accuses Defendants of violating. The State's aiding and abetting theory likewise fails to state a cause of action as a matter of law because the supposed underlying crime is not a business act or practice subject to the UCL; even if it was, the State fails to allege how Defendants participated in any crime.

Second, the Complaint fails to plead a cause of action under the "fraudulent" prong because Defendants' statement that the State contends is fraudulent is a true and accurate statement that would not deceive a reasonable person. Additionally, because the Complaint fails to allege Defendants' products are "firearms," there is no basis in the Complaint for the comment to be deceiving.

Finally, the Complaint fails to plead a cause of action under the "unfair" prong for either unfair competition or consumer fraud. The Complaint fails to allege that competitors cannot lawfully engage in the same conduct as Defendants and no injury to consumers is alleged.

The State's Second Cause of Action for public nuisance fails for effectively the same reasons as its First. It depends on Defendants' products being "firearms," which the Complaint has failed to adequately allege. Because the Complaint fails to allege that the products are firearms, it necessarily fails to allege that Defendants have a duty to treat their products like firearms in the manner the State is demanding. As such, State's Second Cause of Action fails.

For these reasons, and those explained below, this Court should sustain this demurrer.

STATEMENT OF ALLEGED FACTS

The State asserts two causes of action in its Complaint. The First alleges violations of the UCL and the Second alleges liability under California's public nuisance statute. The gravamen of both of the State's Causes of Action is the same. The State alleges that Defendants manufacture and sell items that meet the definitions of "firearm" and "handgun" under federal law and that Defendants are liable under both causes of action for selling those items without adhering to California and federal regulations governing firearm sales. (Complaint ¶¶ 39-82.) While the Complaint quotes definitions for "firearm" and "handgun" under federal law, it does not adequately explain how Defendants' products meet the various technical elements of each of those definitions. (Complaint ¶¶ 39-40.) That is the fundamental problem with the Complaint that is the basis for this demurrer.

Counsel for all the parties met and conferred about the bases for this demurrer via telephone on March 26, 2021.

LEGAL STANDARD

A demurrer may be sustained where the pleading does not state facts sufficient to constitute a cause of action or is uncertain. (Code Civ. Proc. § 430.10(e); (f).) "[W]hether an alleged business practice violated the UCL [] may be resolved at the demurrer stage in appropriate cases." (*Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal. App. 4th 247, 252.) In ruling on a demurrer, the court looks to the face of the complaint, and to matters of which the court may take judicial notice. (*Franz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) Although the allegations of a complaint are presumed true, a court is not obligated to accept bare legal conclusions as true for purposes of a demurrer. (*Serrano v. Priest* (1971) 5 Cal.3d. 854, 591.)

I. The Complaint Is Too Uncertain Because It Fails to Explain the State's Theories for How the Items Constitute "Firearms" or "Handguns" Under Federal Law

Federal law defines "firearm," in relevant part, as "(A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon." (18 U.S.C. § 921, subd. (a)(3).) Short of conclusory statements, the Complaint is devoid of explanation as to how the blanks alone or the blank kits can be deemed "firearms" under federal law. Merely reciting the elements of the definition and claiming that the kits meet them is insufficient. (Complaint ¶¶ 39-40.)

The State likewise fails to plead sufficient facts explaining its position on how the blanks or kits meet the definition of "handgun" under federal law. Federal law defines "handgun" as either "(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled." (18 U.S.C. § 921, subd. (a)(29).) The State utterly fails to explain how Defendants' products specifically meet this technical definition.

Defendants are entitled to know at the pleading stage what specifically they are being sued for. The State must address the vagueness of these critical allegations. In sum, the State must more specifically explain its theories for how Defendants' products meet these very technical definitions. Because the State has failed to do so, the demurrer should be sustained for the Complaint being uncertain.

II. The Complaint Fails to Plead a Valid UCL Violation

A. The Complaint Fails to Plead "Unlawful" Conduct

The Complaint alleges that Defendants have directly violated federal laws and aided and abetted violations of California law as the predicates for the claims under the "unlawful" prong of Section 17200. (Complaint ¶¶ 62-67.) If there are no such violations, then there is no UCL violation under the "unlawful" prong of section 17200. (*See Krantz v. BT Visual Images*, 89 Cal.App.4th 164, 178 (2001) [the viability of an "unlawful" UCL claim "stands or falls" with the underlying claim]; *Whiteside v. Tenet Healthcare Corp.*, 101 Cal.App.4th 693, 706 (2002) [if the complaint fails to state a violation of an underlying law, the § 17200 claim on which it is

premised fails too].) Because the Complaint fails to adequately allege that Defendants' products are "firearms" or "handguns" under the GCA, the Complaint necessarily also fails to allege that Defendants have violated any federal laws by selling their products. Regardless of the definitional issue, the Complaint also fails to allege aiding and abetting liability under the UCL. Thus, no UCL violation alleged in the Complaint under the "unlawful" prong of Section 17200 can stand.

1. The Complaint Fails to Adequately Allege How the Sale of Defendants' Products Violates Any Federal Law

The Complaint alleges that "because these products are in fact 'firearms' under federal law, Polymer80's business practice of selling them without serial numbers, without conducting background checks, and to purchasers residing in a different state, is illegal." (Complaint ¶ 13.) The converse of that statement is that if those products do not meet the definition of "firearm" under federal law, then there is no UCL violation under the "unlawful" prong of section 17200 by selling them. As explained above in Section I, the State has failed to adequately allege that the products at issue are "firearms" under federal law.

The Complaint also alleges that the Buy Build Shoot ("BBS kit") kit meets the federal definition of "handgun" and thus, by selling that kit without being accompanied by a "supplemental or external locking device or gun storage container," Defendants have violated the federal 2005 Child Safety Lock Act. (Complaint ¶ 48.) Again, as explained above in Section I, the Complaint fails to allege facts explaining specifically how the blank or blank kits meet that definition. (Complaint ¶¶ 47-49, [emphasis added].) It is noteworthy that, contrary to the allegations in the Complaint, ATF has not determined that the BBS kit is a "firearm" as defined under federal law. (Complaint, Note 54.)

2. Defendants Do Not Aid and Abet Violations of Any California Law by Selling Their Products to Customers in California

The Complaint alleges that Defendants aided and abetted criminal acts in two ways. First, "by marketing, selling, and transferring all of the components, parts, materials, tools and instructional videos needed to build an unsafe handgun in the state." (Complaint ¶ 57.) Second, "by knowingly sell[ing] unfinished pistol frames that do not contain either 3.7 ounces of the type

of stainless steel embedded in it or a unique serial number engraved or permanently affixed," as California requires of pistols in order to be lawfully possessed, which allows people to build a handgun without those required features. (Complaint ¶ 60.) These arguments both fail as a matter of law on various grounds.

First, the State fails to allege any unlawful act by a third-party under Section 17200 that Defendants could aid and abet. Section 17200 is concerned only with an unlawful "*business* act or practice." (Bus. Prof. Code § 17200, [emphasis added]; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 329 [explaining that plaintiffs fail to state a UCL claim where the challenged act is not a business practice].) The State's theory is that Defendants are aiding and abetting *consumers* who manufacture firearms in violation of the California Unsafe Handgun Act (the "CUHA".) (Complaint ¶ 15:3-5.) But personal manufacturing of a firearm cannot reasonably be considered a "*business* act or practice" subject to Section 17200. Tellingly, the State does not allege that it is, which is fatal to its claim. Without a violation of *Section 17200* (not just any law) by a third-party, there can be no aiding and abetting liability for Defendants.

Second, even assuming consumers' personal activity could constitute a business act under Section 17200, the Complaint fails to allege a sufficient connection between Defendants and any unlawful act. As an initial matter, the "CUHA" does not even apply to Defendants because it only applies to a "***person in this state***." (Cal. Pen. Code § 3200, subd. (a).) All Defendants are from out of state. (Complaint ¶ 18.) As such, they cannot violate the CUHA, as a matter of law.

Even if they were subject to the CUHA, however, the Complaint is devoid of any allegation that Defendants intended that Californians violate the CUHA or had knowledge of any individual violating the CUHA. (*See Upasani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 519 ["The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation with knowledge of the object to be attained."].) Nor does the Complaint allege that Defendants provided "substantial assistance or encouragement" to any person allegedly violating the UHA, as the Complaint must to assert a proper claim for aiding and abetting. (*See Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 97 [60 Cal.Rptr.3d 810].)

The State's case is even weaker with respect to the alleged violations of the "Assembly of Firearms Law" ((Pen. Code, §§ 29180-29184.) "The UCL does not apply if the Legislature has expressly declared the challenged business practice to be lawful in other statutes." (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505-1506.) Those laws expressly sanction the making of personal firearms from parts that initially lack a serial number. (Pen. Code, § 29180.) That alone is fatal to the State's cause of action for aiding and abetting liability.

* * * *

For the above reasons, the Complaint fails to allege any UCL violation under the "unlawful" prong of section 17200.

B. The Complaint Fails to Adequately Plead "Fraudulent" Conduct.

A business practice is "fraudulent" under Section 17200 if "members of the public are likely to be deceived". (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197.) "No published California decision has defined what "likely" means, but the identical language used in the federal Lanham Act requires that the confusion be "probable" and not just "likely." (Stern, Cal. Practice Guide: Bus. & Prof.C. §17200 Practice (The Rutter Group 2020) ¶ 3:154, p. 3-55, citing *Murray v. Cable NBC* (9th Cir. 1996) 86 F.3d 858, 861.) In order to be deceived, members of the public must have had an expectation or assumption about the subject addressed by the allegedly misleading statement. (*Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1275.) The likelihood of deception is tested by the reasonable person standard. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 506-507.)

The Complaint alleges Defendants "knowingly engaged in fraudulent and deceptive acts and practices by falsely advertising to consumers, either expressly or by implicated, that its kit products were legal to purchase and possess." (Complaint ¶¶ 88-89.) The only supposedly "misleading statement" the Complaint alleges is that Defendants stated on their website that ATF has determined that unfinished blanks that Defendants sell are not considered "firearms" under federal law. (Complaint ¶ 71.) Yet, the Complaint concedes that ATF previously determined that those unfinished blanks are not firearms. (Complaint ¶ 72.) The State still alleges the statement is misleading because ATF has not made any determination about whether the *kits* are firearms. (*Id.*)

That allegation assumes that the sale of those kits violates either state or federal law. As explained above in Section I, the Complaint has failed to adequately explain how they are "firearms." If a practice or advertisement is not likely to mislead anyone, then there is no deception. (*Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1160.) Here, the kits have not been adequately alleged to be "firearms" so it cannot be said that anyone was misled. What's more, while the presence of consumer complaints is not a necessary element of the fraudulent prong of section 17200 claims, the absence of such complaints and returns of the product is "highly relevant" to show that no consumer was likely to have been deceived. (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1361.) The Complaint does not allege any actual examples of consumers who complain they were deceived.

C. The Complaint Fails to Adequately Plead "Unfair" Conduct.

1. Because Defendants' conduct is not adequately alleged to be illegal, there is no unfair competition with licensed firearm vendors

The Complaint alleges that Defendants' sale of its "kits *in contravention of state and federal gun law requirements* constitutes unfair competition to licensed gun dealers in California who abide by the applicable state and federal laws and regulations . . .." (Complaint ¶ 90, [emphasis added].) That allegation assumes that the sale of those kits violates either state or federal law. As explained above in Section I, the Complaint has failed to adequately allege any such violation. There is, therefore, no unfair competition, as licensed vendors have the option of selling the same type of products as Defendants, if they so choose.

2. The Complaint fails to allege any *consumer* injury

"The UCL does not precisely define the term 'unfair' and 'courts have struggled to come up with a workable definition." (*Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 593-594.) As a result, Courts "have applied three different tests for unfairness in consumer cases." (*Drum*, supra, 182 Cal. App. 4th at 256.) The trend appears towards following the three-part standard that federal courts use to interpret the analogous Federal Trade Commission Act. (Stern, Cal. Practice Guide: Bus. & Prof.C. §17200 Practice (The Rutter Group 2020) ¶ 3:121.1, p. 3-35.) The Second District Court of Appeal articulated that test as follows: (a) the *consumer*

injury must be substantial; (b) it must not be outweighed by any countervailing benefits to consumers or competition; and (c) it must be an injury that *consumers* themselves could not reasonably have avoided. (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 838-839 [emphasis added].)

First, the Complaint fails to allege that any consumer has been injured, let alone substantially. Rather, it is filled with political rhetoric about how Defendants' products supposedly harm society at large. The focus of the analysis for a UCL violation is on consumers, not others who may be affected by those consumers. (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 986 ["The purpose of the UCL 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'"].) Perhaps most importantly, the Complaint says nothing about the essential element that the injury alleged be "one that consumers themselves could not reasonably avoid." (*Id*; see also *In re Firearm Cases*, 126 Cal.App.4th at 981.) California residents are presumed to know the law. (*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1506-1507.) Consumers could easily discover with a simple internet search how to lawfully make a personal firearm using Defendants' products. (*See* Request for Judicial Notice in support of Defendant's Demurrer, Exhibit A.) That some failed to do so does not make Defendants liable. (See *Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 598-599, citing *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394 [holding that the plaintiff "could have avoided any and all action taken by defendants by obtaining and carrying insurance, as the law requires."].)

The Complaint seems to suggest that this Court apply a test that asks "whether the alleged business practice 'is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.'" (Complaint ¶ 77, subd. (b).) This Court should reject that test, as it has been described as "amorphous," (*In re Firearm Cases*, 126 Cal. App. 4th 959, 977-978), and is applied less regularly than the Second District's test articulated above. But even if this Court adopts that test here, the Complaint still fails to meet that standard. Indeed, the State has not specifically alleged how Defendants' conduct meets that standard. Rather, the State

merely makes the conclusory statement that by selling their kits, Defendants meet that standard. (*See* Complaint ¶¶ 79-91.) That is insufficient to plead an injury. What's more, to Defendants' knowledge, there are "no cases finding a manufacturer has engaged in an unfair practice solely by legally selling a nondefective product based on actions taken by entities further along the chain of distribution." (*In re Firearm Cases* 126 Cal. App. 4th 959, 985.)

Finally, if this Court adopts the third and final test, the State's claim likewise fails. That test requires that the unfair claim "must be tethered to specific constitutional, statutory, or regulatory provisions." (*Drum*, supra, 182 Cal. App. 4th at 256.) The State's claim fails because, as explained above in Section I, the State has "failed to allege any violation or incipient violation of any statutory or regulatory provision, or any significant harm to competition." (*Id*.)

In sum, the Complaint fails to allege any UCL violation under the "unfair" prong of section 17200.

III. The Complaint Fails to State a Valid Public Nuisance Cause of Action

The Complaint alleges that Defendants "created a public nuisance by marketing, selling and distributing ghost gun kits to California residents without serial numbers, without background checks, and without appropriate safety features." (Complaint ¶ 81.) Based on those allegations, the State asks this Court to order Defendants to cease selling the "Ghost Gun kits, frames, and receivers to California consumers unless and until they are in compliance with state and federal laws." (Complaint, Prayer for Relief, ¶ 2.) The State fails to state a valid nuisance cause of action.

Because the Complaint has failed to adequately allege that the kits are "firearms," the Complaint likewise necessarily fails to adequately allege that Defendants have a duty to serialize or include "safety features" on the parts in their kits or require background checks for their purchase.

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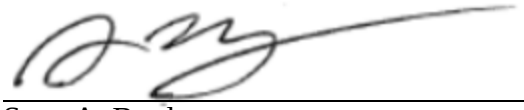
CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court sustain their demurrer to both causes of action in the Complaint.

Dated: April 20, 2021

MICHEL & ASSOCIATES, P.C.



Sean A. Brady
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On April 20, 2021, I served the foregoing document(s) described as

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF DEFENDANTS POLYMER80, INC., DAVID BORGES, AND LORAN KELLEY TO COMPLAINT

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy

thereof by the following means, addressed as follows:

Michael N. Feuer
Michael J. Bostrom
Office of the Los Angeles City Attorney
200 North Spring Street, 14th Floor
Los Angeles, CA 90012
Email: michael.bostrom@lacity.org
Attorneys for Plaintiff

X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission through One Legal. Said transmission was reported and completed without error.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 20, 2021, at Long Beach, California.

Laura Palmerin

EXHIBIT G

Superior Court of California

County of Los Angeles

Department 32

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

POLMYER80, INC., a Nevada corporation; DAVID BORGES, an individual; LORAN KELLEY, an individual,

Defendants.

Case No.: 21STCV06257

Hearing Date: June 7, 2021

~~[TENTATIVE]~~ **ORDER RE:**

DEMURRER TO COMPLAINT

Background

The People of the State of California ("Plaintiff") commenced this action against Polmyer80, Loran L Kelley ("Kelley"), and David L. Borges ("Borges") (collectively, Defendants) on February 17, 2021. Plaintiffs allege these Defendants sell into California the vast majority of the kits and parts used to assemble the Polymer90 firearms. The operative pleading is the Complaint ("Complaint"). The Complaint asserts causes of action for (1) Violation of Unfair Competition Law, and (2) Public Nuisance.

Legal Standard

A demurrer for sufficiency tests whether the complaint states a cause of action. (*Hahn v. Mirda* (2007) 147 Cal. App. 4th 740, 747.) When considering demurrers, courts read the allegations liberally and in context. (*Taylor v. City of Los Angeles Dept. of Water and Power* (2006) 144 Cal. App. 4th 1216, 1228.) In a demurrer proceeding, the defects must be apparent on

the face of the pleading or by proper judicial notice. (CCP § 430.30(a).) A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. (*SKF Farms v. Superior Court* (1984) 153 Cal. App. 3d 902, 905.) Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed. (*Id.*) The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Hahn,* 147 Cal.App.4th at 747.)

Request for Judicial Notice

Plaintiff's request for judicial notice is granted.

Discussion

Defendants Polymer80, Inc., David Borges, and Loran Kelley demur to each of the Complaint's causes of action.

A. Meet and Confer Requirement

Before filing a demurrer or a motion to strike, the demurring or moving party is required to meet and confer with the party who filed the pleading demurred to or the pleading that is subject to the motion to strike for the purposes of determining whether an agreement can be reached through a filing of an amended pleading that would resolve the objections to be raised in the demurrer. (CCP §§ 430.41 and 435.5.) The Court notes that the Moving Party has complied with the meet and confer requirement.

B. First Cause of Action: Violation of Unfair Competition Law (Defendants collectively)

Defendants assert that Plaintiff's first cause of action for violations of the Business and Professions Code section 17200 fails because Plaintiff has insufficiently plead facts to show a cause of action against Defendants. Defendants note that the Complaint alleges that "because these

products are in fact 'firearms' under federal law, Polymer80's business practice of selling them without serial numbers, without conducting background checks, and to purchasers residing in a different state is illegal." (Complaint ¶ 13.) Defendants argue that the Complaint fails to adequately allege that Defendants' products are "firearms" or "handguns" under the GCA. Further, Defendants argue that there is no UCL violation for selling the products under the "unlawful" prong of section 17200 as Plaintiffs have not adequately alleged that the products at issue are "firearms" under federal law.

Defendants next argue that the Complaint is inaccurate in alleging that Defendants "knowingly engaged in fraudulent deceptive acts and practices by falsely advertising to consumers, either expressly or by implicated, that its kit products were legal to purchase and possess." ((Complaint ¶ 88-89.)

Plaintiffs argue that they have identified that specific products that Polymer80 sells, including Buy Build Shoot kits, frame kits, and lower receiver kits. Plaintiffs further argue that "by selling all the component parts together with the means to readily convert the parts into firearms, [Polymer80] effectively puts firearms into hands of the consumers and subverts regulations that apply to the sale of firearms." (Complaint ¶ 38.) Plaintiffs also allege in Paragraph 40 of the Complaint that Polymer80's Buy Build Shoot kits are "firearms," because the kits include "all component parts of a firearm" and are "designed to be and 'may readily be converted' into an operable weapon."

Plaintiffs further argue that the sale of Defendants' products violates two federal statutes: the Gun Control Act (Complaint ¶ 39-42) and the 2005 Child Safety Lock Act. (Complaint ¶ 44-49.) Plaintiffs argue that the sale of precursors products to a consumer when the retailer knows and intends that the consumer will use those products to assemble a firearm in violation of the law

constitutes unlawful activity. The Complaint alleges that Defendants advertise their products as providing everything a customer needs to complete a fully functional firearm. Plaintiffs argue that the element of fraud has been met as a "reasonable person" standard is a fact-based inquiry. The Complaint allege that Polymer80's advertising was misleading. Plaintiffs allege that the advertising on Polymer80's website stated that the ATF had determined that its unfinished frames and receivers, sold as part of fire-arm building kits, had "not yet reached a stage of manufacture that meets the definition of firearm frame or receiver found in the Gun Control Act of 1968." (Complaint ¶ 71) Plaintiffs argue that ATF's determination only applied to certain unfinished frames and receivers, overgeneralizing their claim.

Plaintiffs additionally allege that Defendants' acts violate the "unfair" act because "Polymer80's sales of unserialized firearm kits in violation of state and federal law constitutes unfair competition to licensed gun dealers in California who abide by the applicable state and federal laws and regulations." (Complaint ¶ 78)

The Business and Professions Code section 17200 states: "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising..."

The Court finds that Plaintiffs have alleged sufficient facts to state a cause of action for Violation of Unfair Competition Law.

C. Second Cause of Action: Public Nuisance (Defendant Polymer80)

Polymer80 contends that Plaintiff's second causes of action for public nuisance fails because Plaintiff has insufficiently pled facts to constitute a cause of action against Defendant. Polymer80 notes that the Complaint alleges that Polymer80 "created a public nuisance by marketing, selling and distributing ghost gun kits to California residents without serial numbers,

without background checks, and without appropriate safety features." (Complaint ¶ 81.) Polymer80 argues that the Complaint fails to adequately allege that the kits are "firearms" and therefore, fails to properly allege that Polymer80 has a duty to serialize or include "safety features" on the parts in their kits or require background checks for their purchase.

Plaintiffs argue that Polymer80 is creating a public nuisance by selling "Ghost Gun kits, frames, and receivers to California consumers" that are not in compliance with state and federal laws." In response to the Defendant's demurrer, Plaintiffs argue that they have been clear in alleging which products constitute firearms and handguns and their reasons for classifying them as such. Plaintiffs argue that since Polymer80 is selling ghost guns kits without serial numbers, background checks and appropriate safety features, they have created a public nuisance. (Complaint ¶ 99.) Plaintiffs argue that Defendants' sale of ghost gun kits and components without serial numbers outweighs the social utility of their actions (Complaint ¶ 100.)

In *People ex. rel. Busch v. Projection Room Theatre,* the Supreme Court of California stated, "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons; although the extent of the annoyance or damage inflicted upon individuals may be unequal." Cal. Civ. Code § 3480. (*People ex. rel. Busch v. Projection Room Theatre*, (1976) 17 Cal.3d. 42)

The Court finds that Plaintiffs have alleged sufficient facts to state a cause of action for Public Nuisance.

Conclusion

Defendants' demurrer to the Complaint is OVERRULED.

DATED: June 7, 2020

Honorable Daniel S. Murphy
Judge, Los Angeles Superior Court

06/09/2021