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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
 12 CIVIL DIVISION

13
 14 **LANA RAE RENNA, et al.,**
 15 Plaintiffs,
 16 v.
 17 **XAVIER BECERRA, in his official
 18 capacity as Attorney General of
 California; and LUIS LOPEZ, in his
 19 official capacity as Director of the
 Department of Justice Bureau of
 20 Firearms,**
 21 Defendants.

Case No. 3:20-cv-02190-DMS-DEB
**REPLY IN SUPPORT OF MOTION
 TO DISMISS**
 Date/Time: To Be Set By Court
 Dept: 13A
 Judge: Hon. Dana M. Sabraw
 Trial Date: None set
 Action Filed: 11/10/2020

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1 **INTRODUCTION**

2 In *Pena v. Lindley*, the Ninth Circuit recognized that while the Second
 3 Amendment protects individuals’ right to “possess a lawful firearm in the home
 4 operable for the purpose of immediate self-defense,” individuals have no
 5 “constitutional right to purchase a particular handgun.” 898 F.3d 969, 973, 975
 6 (9th Cir. 2018). Accordingly, the Court rejected Second Amendment and equal
 7 protection challenges to California’s Unsafe Handgun Act (UHA), which
 8 merely requires that certain new handgun models sold in California include three
 9 safety features, each of which the Ninth Circuit upheld in *Pena*. The UHA also
 10 currently permits the sale of approximately 800 handgun models. It therefore does
 11 not inhibit Plaintiff’s ability to keep and bear arms for self-defense in the home,
 12 even if there are other handgun models that Plaintiffs would prefer. The Court
 13 should grant Defendants’ motion and dismiss Plaintiffs’ Complaint.

14 **ARGUMENT**

15 **I. THE ROSTER REMOVAL PROVISION IS NONJUSTICIABLE BECAUSE NO**
 16 **IMMINENT, NON-SPECULATIVE HARM IS ALLEGED**

17 Plaintiffs’ challenges to the roster removal provisions should be dismissed as
 18 nonjusticiable, because Plaintiffs have alleged no injury that is “actual or imminent,
 19 not conjectural or hypothetical.” *Friends of the Earth, Inc. v. Laidlaw*
 20 *Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *see also Safer*
 21 *Chems., Healthy Fams. v. EPA*, 943 F.3d 397, 411 (9th Cir. 2019).

22 Plaintiffs’ only alleged injury resulting from the roster is that the number of
 23 handguns on the roster will eventually become unacceptably small. Compl., ¶ 56.
 24 This conclusion is hypothetical and speculative. Plaintiffs offer no supporting facts
 25 regarding when or how this is likely to happen. Moreover, it is simply not possible
 26 that the number of handguns on the roster will “shrink into oblivion,” as Plaintiffs
 27 allege. *See id.*, ¶ 56. This is so for at least three reasons. First, the removal
 28 provision—section 31910(b)(7)—applies only to “semiautomatic pistols.” It does

1 not apply to revolvers or any other types of handguns. Second, the provision
2 applies only when a semiautomatic pistol is “newly added” to the roster.
3 § 31910(b)(7). Thus, if a handgun is subject to removal under § 31910(b)(7), that
4 occurs only after some other new handgun has been *added* to the roster. Third, the
5 removal provision does not apply to these newly added handguns, which will
6 necessarily contain the relevant safety features. § 31910(b)(7). In other words, once
7 a handgun with those three features is added to roster, it is not subject to removal
8 under section 31910(b)(7).

9 For similar reasons, Plaintiffs’ challenge should be dismissed as prudentially
10 unripe. Prudential ripeness requires the Court “to first consider the fitness of the
11 issues for judicial review, followed by the hardship to the parties of withholding
12 court consideration.” *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676
13 F.3d 829, 837 (9th Cir. 2012). Plaintiff’s challenge to section 31910(b)(7) is not fit
14 for review because, as discussed above, Plaintiffs cannot meaningfully allege that
15 the number of handguns on the roster will, as Plaintiffs essentially allege, shrink to
16 zero. If for some reason that drastic development does occur, it may qualify as
17 “further factual development” that amounts to a concrete dispute. But there is no
18 such dispute now. *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 737
19 (1998). Moreover, Plaintiffs would experience no hardship if the courts delay
20 consideration of the constitutionality of the roster removal provision. The
21 allegations of the Complaint indicate that Plaintiffs remain able to purchase and
22 possess firearms as a general matter.

23 Plaintiffs argue that, under the terms of the roster removal provision, it is a
24 certainty that each time a handgun model is added to the roster, three grandfathered
25 models will be removed. *Opp.* at 23. They assert that this alone constitutes an
26 “actual or imminent injury.” *Id.* at 24. Plaintiffs do not even attempt to speculate
27 how many times this will occur. They therefore appear to suggest that the addition
28 of even one new model—and the corresponding removal of three other models—

1 would cause them injury. In other words, Plaintiffs suggest that the diminution of
2 the roster from even 779 to 777 models, for example, would cause them concrete
3 harm. *See also* Opp. at 22. In other words, Plaintiffs appear to argue that they have
4 a constitutional right to purchase those handguns that are numbers 779 and 778 on
5 the roster. But the Ninth Circuit has already rejected this argument, expressly
6 holding in *Pena* that purchasers do not have a “constitutional right to purchase a
7 particular handgun.” *Pena*, 898 F.3d at 973.

8 Plaintiff have failed to show that the roster removal provision will cause them
9 any actual, non-speculative injuries. Their constitutional challenges to the
10 provision should be dismissed on the grounds that Plaintiffs lack standing and the
11 challenges lack both constitutional and prudential ripeness.

12 **II. THE UNSAFE HANDGUN ACT DOES NOT VIOLATE THE SECOND** 13 **AMENDMENT**

14 The two-step Second Amendment inquiry “(1) asks whether the challenged
15 law burdens conduct protected by the Second Amendment and (2) if so, directs
16 courts to apply an appropriate level of scrutiny.” Here, the UHA does not burden
17 protected conduct, because the Second Amendment does not confer a right to
18 purchase any handgun of one’s choice. Even if it did, however, the UHA would
19 survive intermediate scrutiny because, as the Ninth Circuit recognized in *Pena*,
20 there is a reasonable fit between its provisions and the important public interests of
21 promoting public safety and reducing crime.

22 **A. The Unsafe Handgun Act Does Not Burden Conduct Protected** 23 **by the Second Amendment**

24 The UHA does not burden conduct protected by the Second Amendment. As
25 the Ninth Circuit expressly stated in *Pena*, the Second Amendment does not
26 provide a “constitutional right to purchase a particular handgun.” *Pena*, 898 F.3d at
27 973. Rather, it protects individuals’ right to “possess a ‘lawful firearm in the home
28 operable for the purpose of immediate self-defense.’” *Id.* at 975 (quoting *District of*

1 *Columbia v. Heller*, 554 U.S. 570, 635 (2008)). Thus, in *Heller*, the Second
2 Amendment protected against a law that “totally bann[ed] handgun possession in
3 the home.” *Heller*, 554 U.S. at 628. The Court explained however, that, “the right
4 secured by the Second Amendment . . . [is] not a right to keep and carry any
5 weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*,
6 554 U.S. at 627. It then provided an expressly non-exhaustive list of
7 “presumptively lawful regulatory measures,” that the Constitution leaves for
8 combating the problem of firearm violence in the United States. *Id.* at 627; *id.* at
9 627 n.26, 636. These include “laws imposing conditions and qualifications on the
10 commercial sale of arms.” *Id.* at 626.

11 The UHA is a law “imposing conditions and qualifications on the commercial
12 sale of arms,” and therefore not within the scope of the Second Amendment. The
13 law merely regulates the safety features of certain handguns manufactured and
14 commercially sold in California. As the Ninth Circuit emphasized in *Pena*, unlike
15 in *Heller*, the UHA “does not restrict *possession* of handguns in the home or
16 elsewhere.” *Pena*, 898 F.3d at 977 (emphasis in original). It also allows Plaintiffs
17 to purchase in California an unlimited number of the 805 handguns currently on the
18 roster.¹ The UHA therefore does not limit Plaintiffs’ “inherent right to self-
19 defense,” *Heller*, 554 U.S. at 628.

20 Plaintiffs argue that the UHA burdens conduct protected under the Second
21 Amendment because the Act implicates firearms that are in “common use.” *Opp.*
22 at 5. On this point, Plaintiffs rely heavily on a Ninth Circuit panel opinion that—
23 since the filing of Plaintiffs’ opposition—has been vacated, with the Ninth Circuit
24 agreeing to rehear the case en banc. For the few months that it was operative, the
25 relevant panel opinion acknowledged only that “common use” of a firearm is

26 _____
27 ¹ Plaintiffs assert this in their opposition brief as the current number of roster
28 handguns. *Opp.* at 7. Notably, this number is *higher* than the number of handgun
models that Plaintiffs alleged were on the roster when they filed their complaint in
January 2021 (779). *Compl.* at 17.

1 *necessary* in order to establish Second Amendment protection—it did not establish
2 that common use alone is *sufficient* for the protection. *See Duncan v. Becerra*, 970
3 F.3d 1133, 1145-51 (9th Cir. 2020), *vacated and en banc review granted*, 2021 WL
4 728825 (9th Cir. Feb. 25, 2021). In any event, the panel opinion having been
5 vacated in its entirety, this Court need not consider *Duncan* at all.

6 The district court decision in *Rhode* also does not establish that the “common
7 use” factor is dispositive of Second Amendment burden question. Indeed, there,
8 the court stated that a regulation falls outside the Second Amendment if it is “one of
9 the presumptively lawful regulatory measures identified in *Heller*.” *Rhode v.*
10 *Becerra*, 445 F.Supp.3d 902, 931 (quoting *Jackson v. City & Cty. of San Francisco*,
11 746 F.3d 953, 960 (9th Cir. 2014)). As stated above, the UHA is one of those
12 regulatory measures.

13 Plaintiffs argue that not all “laws imposing conditions and qualifications on
14 the commercial sale of arms” should be considered outside the scope of the Second
15 Amendment. *Opp.* at 8-9. They argue that the Second Amendment should apply to
16 any such regulation if the law creates anything more than a “de minimis effect” on
17 the core right to keep and bear arms, citing only the dissenting opinion in *Pena*.
18 *Opp.* at 9. However, in *Teixera v. Cty. of Alameda*, the Ninth Circuit considered
19 the scope of the *Heller* exception for regulations of firearms sales and determined
20 that the exception applies at least where the right to possess firearms is “not
21 significantly impaired.” 873 F.3d 670, 688 (9th Cir. 2017) (en banc). The UHA
22 does not significantly impair Plaintiffs’ Second Amendment rights. *Pena*, 898 F.3d
23 at 978 (“being unable to purchase a subset of semiautomatic weapons, without
24 more, does not significantly burden the right to self-defense in the home”); *see also*
25 section II(B)(1), *infra*.

26 Finally, Plaintiffs argue that the Second Amendment applies to the UHA
27 because regulations of handgun manufacturers are not “presumptively lawful”
28 under *Heller*. However, the *Heller* exceptions “does not purport to be exhaustive.”

1 *Heller*, 554 U.S. at 627, n.26. Indeed, “*Heller* said nothing about extending Second
2 Amendment protection to firearm manufacturers or dealers.” *Teixeira*, 873 F.3d at
3 690 n.24 (quoting *Mont. Shooting Sports Ass’n v. Holder*, No. CV-09-147-DWM-
4 JCL, 2010 WL 3926029, at *21 (D. Mont. Aug. 31, 2010). “Consistent with *Heller*,
5 a number of lower courts have previously determined or assumed that there is no
6 Second Amendment right to be a firearm manufacturer or dealer.” *Mont. Shooting*
7 *Sports Ass’n*, 2010 WL 3926029, at *21 n.17 (quotation omitted) (collecting cases);
8 *see also Pena*, 898 F.3d at 986 (“The microstamping restrictions on commercial
9 *manufacture* and sale implicate the rights of gun owners far less than laws directly
10 punishing the possession of handguns” (emphasis added)).

11 **B. Even if the Second Amendment Applied, the Unsafe Handgun**
12 **Act Withstands Constitutional Scrutiny**

13 **1. The UHA Is Subject Only to Intermediate Scrutiny**

14 As the Ninth Circuit determined in *Pena*, the UHA is subject only to
15 intermediate scrutiny, assuming the Second Amendment even applies. Strict
16 scrutiny applies only when a law “implicates the core of the Second Amendment
17 right and severely burdens that right.” *Silvester v. Harris*, 843 F.3d 816, 821 (9th
18 Cir. 2016). If both requirements are not met, intermediate scrutiny applies. *Fyock*
19 *v. Sunnyvale*, 779 F.3d 991, 998-99 (9th Cir. 2015); *see also Pena*, 898 F.3d at 977.
20 There is “near unanimity in the post-*Heller* case law that when considering
21 regulations that fall within the scope of the Second Amendment, intermediate
22 scrutiny is appropriate.” *Silvester*, 843 F.3d at 823.

23 Neither of the strict scrutiny requirements are met here. First, the UHA does
24 not implicate the core of the Second Amendment because it does not concern
25 anyone’s possession and use of firearms generally, much less in the home. *See*
26 *Heller*, 554 U.S. at 635 (core of Second Amendment is “the right of law-abiding,
27 responsible citizens to use arms in defense of hearth and home”). The UHA
28 regulates only the manufacture and sale of certain handguns.

1 Second, as this Court already determined in *Pena*, even if the UHA burdened
2 any Second Amendment right, it is not a severe burden. *Pena*, 898 F.3d at 978-79
3 (“being unable to purchase a subset of semiautomatic weapons, without more, does
4 not significantly burden the right to self-defense in the home”); *see also*
5 *Jackson*, 746 F.3d at at 964 (no severe burden where, unlike in *Heller*, law did not
6 “substantially prevent law-abiding citizens from using firearms to defend
7 themselves in the home”). Unlike in *Heller*, the UHA does not ban the possession
8 of any handguns or the possession (or purchase) of “an entire class” of arms.
9 *Heller*, 554 U.S. at 629. The UHA simply requires firearms sold and manufactured
10 in California to include three safety features. Further, “[a]ny burden on the right is
11 lessened by the UHA’s exceptions” to the safety feature requirements, including
12 those “grandfathered on the roster,” and transferred through private transactions.
13 *Pena*, 898 F.3d at 979.

14 **2. The UHA Satisfies Intermediate Scrutiny**

15 As the Ninth Circuit properly concluded in *Pena*, the UHA satisfies
16 intermediate scrutiny. *Pena*, 898 F.3d at 979. Intermediate scrutiny requires (1) a
17 significant, substantial, or important government objective, and (2) a reasonable fit
18 between the challenged law and the asserted objective. *Id.* The law need not be the
19 “least restrictive means” of achieving the interest. *Fyock*, 779 F.3d at 1000.

20 The Ninth Circuit properly determined in *Pena* that the three challenged safety
21 provisions—the chamber load indicator, magazine disconnect mechanism, and
22 microstamping—satisfy both requirements of intermediate scrutiny. *Pena*, 898
23 F.3d at 979; *id.* 979-986.

24 For the first requirement of an important government objective, the court
25 determined that the state’s interests in public safety and crime prevention were
26 “undoubtedly adequate.” *Id.* at 980, 981-82. In particular, the laws’ objectives are
27 to prevent accidental shootings from loaded guns and to aid law enforcement’s
28 investigations of shootings. *Id.* at 979-986. The importance of these objectives has

1 not diminished since *Pena*, and Plaintiffs do not appear to argue otherwise here.
2 *See also Jackson*, 746 F.3d 965-66 (“reducing the number of gun-related injuries
3 and deaths” is significant government interest).

4 For the second intermediate scrutiny requirement, the Ninth Circuit
5 determined in *Pena* that there is a “reasonable fit” between the government’s
6 identified interests and the three challenged safety requirements. Courts have often
7 characterized this requirement whether the law and the government objective are
8 “substantially related.” *See e.g., Silvester*, 843 F.3d at 827; *Jackson*, 746 F.3d at
9 966; *United States v. Chovan*, 735 F.3d 1127, 1140-41 (9th Cir. 2013). “When
10 reviewing the reasonable fit between the government’s stated objective and the
11 regulation at issue, the court may consider ‘the legislative history of the enactment
12 as well as studies in the record or cited in pertinent case law’” *Fyock*, 779 F.3d at
13 1000 (quoting *Jackson*, 746 F.3d at 966) *Chovan*, 735 F.3d at 1140; *Silvester*, 843
14 F.3d at 827-28.

15 In *Pena*, the legislative history, studies, and case law supported the Ninth
16 Circuit’s determination of reasonable fit. *See Pena*, 898 F.3d at 980-86. They
17 demonstrated to the court that chamber load indicators and magazine disconnect
18 mechanisms reasonably promote safety by helping to prevent the accidental
19 discharge of firearms. *Id.* at 980 (“The legislative history cites studies confirming
20 this common-sense conclusion”). The Court also determined, in a lengthy
21 discussion, that legislative history, studies, and case law support the conclusion that
22 the microstamping requirement is a reasonable fit. *Id.* at 981-86. For each of the
23 safety features, the Court considered the plaintiffs’ rebuttal argument and evidence,
24 but found it unpersuasive. *Id.* at 980-86. Thus, under the “reasonable fit” standard,
25 the Ninth Circuit’s conclusions in *Pena* govern here.

26 Plaintiffs argue that the fit here is not reasonable because the roster excludes
27 many handguns that are “distributed by highly reputable manufacturers widely
28 known and respected for consistently producing high quality, safe firearms.” *Opp.*

1 at 16. However, even if some off-roster handguns possess other safety features, the
2 purpose and effect of the UHA’s required safety features is to make handguns safer,
3 by requiring certain features as determined by Legislature, not Plaintiffs or
4 manufacturers. *See Pena*, 898 F.3d at 980-86. And, like in *Pena*, Plaintiffs here do
5 not allege that the safety features themselves “clearly thwart, rather than advance,
6 California’s goal of saving lives by preventing accidental discharges.” *Id.* at 980.

7 The UHA safety features also reasonably promote safety even if, as Plaintiffs
8 allege, some off-roster handgun models include features that may increase safety
9 only for particular individuals. *Opp.* at 17. The Second Amendment generally
10 protects an individual’s right to possess a firearm in the home for self-defense.
11 *Heller*, 554 U.S. at 635. It does not confer on each individual a right to possess the
12 “safest” handgun based on their individual characteristics. Plaintiffs notably have
13 not alleged that the UHA prevents any of them from possessing (or even
14 purchasing) a handgun that he or she can operate for self-defense.

15 Finally, the new roster removal provision in section 31910(b)(7) also
16 reasonably fits the purpose of public safety. By including handgun models on the
17 roster that existed before the challenged safety requirements were enacted, the
18 roster grandfathers in non-complying models. By removing these grandfathered
19 models from the roster when new models are added that do include all mandatory
20 safety features, section 31910(b)(7) facilitates a gradual transition over time
21 towards full compliance. Although Plaintiffs argue that the removal of even one
22 handgun from the roster violates their Second Amendment rights, *Opp.* at 22, again,
23 individuals have no “constitutional right to purchase a particular handgun.” *Pena*,
24 898 F.3d at 973.

25 **III. THE UNSAFE HANDGUN ACT DOES NOT VIOLATE EQUAL PROTECTION**

26 Plaintiff’s equal protection claim challenging the UHA’s exception for
27 handguns used solely as props in film productions also fails as a matter of law.
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Dated: March 1, 2021

Respectfully Submitted,
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CERTIFICATE OF SERVICE

Case Name: **Renna, Lana Rae, et al. v.
Xavier Becerra, et al.**

No. **20-cv-2190**

I hereby certify that on March 1, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

REPLY IN SUPPORT OF MOTION TO DISMISS

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 March 1, 2021, at Sacramento, California.

Ritta Mashriqi

Declarant

/s/Ritta Mashriqi

Signature