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

18 Ivan Peña, et al.,)
19)
20 Plaintiffs,)
21)
22 v.)
23)
24 Stephen Lindley)
25)
26 Defendant.)

Case No. 2:09-CV-01185-KJM-CKD
PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
REPLY TO DEFENDANT'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT

Date: December 16, 2013
Time: 10 a.m.
Dept: Courtroom 3, 15th Floor
Judge: The Hon. Kimberly J. Mueller
Trial Date: None
Action Filed: May 1, 2009

27 Come now Plaintiffs Ivan Peña, Roy Vargas, Doña Croston, Brett Thomas, the
28 Second Amendment Foundation, Inc., and the Calguns Foundation, Inc., by and
through undersigned counsel, and submit their Memorandum of Points and
Authorities in Reply to Defendant's Opposition to Plaintiffs' Motion for Summary
Judgment.

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Dated: December 9, 2013

Respectfully submitted,

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1 MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO
2 DEFENDANT’S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

3 INTRODUCTION

4 Defendant correctly states that “plaintiffs are arguing that they have a
5 constitutional right to purchase a handgun without [the alleged] safety features.”

6 Def. Opp. Br. 6-7. Since:

- 7
- 8 • handguns, as a class of arms, are protected by the Second Amendment;
District of Columbia v. Heller, 554 U.S. 570 (2008);
 - 9 • 100% of handguns lack microstamping, SUF 31;
 - 10 • 89% of semiautomatic handguns lack chamber loaded indicators, SUF
11 14; and
 - 12 • 86% of semiautomatic handguns lack magazine disconnect devices, *id.*;

13 Plaintiffs obviously have a constitutional right to purchase handguns lacking these
14 alleged “safety” features—and that is before considering the undisputed fact that the
15 State admonishes people not to rely on chamber loaded indicators and magazine
16 disconnect devices because doing so provides a dangerously false sense of security.
17

18 Defendant has no answer for why Plaintiffs cannot purchase guns, such as the
19 one Ivan Peña seeks, that have already been “proven” safe to the state, but fell off
20 the roster for administrative reasons; or handguns such as the High Standard
21 revolver at issue in *Heller*, which might be perfectly safe under the roster’s rules but
22 are ineligible for testing. Nor can Defendant explain why so many people, for no
23 sensible reason, are exempted from the roster and allowed to have, for private
24 purposes, these supposedly “dangerous” handguns.

25
26 Indeed, Defendant’s brief does not explain—and offers zero evidence—as to
27 how it can possibly be that Dick Heller’s handgun, 100% of the handguns lacking
28

1 microstamping, and the overwhelming majority of semiautomatic handguns lacking
2 chamber loaded indicators and magazine disconnect devices, are “dangerous and
3 unusual,” rather than handguns of the kind in common use for traditional lawful
4 purposes. Defendant amply demonstrates the legislative preference for guns to be
5 different—but that only helps establish the current reality.
6

7 Preferring to avoid the Supreme Court’s common use test altogether,
8 Defendant offers that “no court has recognized a constitutional right to purchase any
9 handgun of one’s choice regardless of its features.” Def. Opp. Br. 7 (footnote omitted).
10 That much is true as far as it goes. But the Supreme Court is a court. It held, like
11 the D.C. Circuit before it, that people enjoy a right to purchase handguns
12 notwithstanding the fact that several forests were pulped advancing the proposition
13 that handguns, owing to their design and characteristics, were simply too dangerous
14 to permit ordinary people to have, whatever the constitution provides.
15

16 Defendant thus only perfunctorily asserts various objections to the undeniable
17 facts that handguns, including revolvers and semi-automatics lacking the state’s
18 desired features, are in common use for lawful purposes. Unmentioned in
19 Defendant’s brief, these objections do not withstand examination. Instead,
20 Defendant knocks down two additional straw-men arguments Plaintiffs do not make:
21 that the Second Amendment protects all firearms regardless of features, or only the
22 characteristics of firearms as they existed in 1791.
23

24 ARGUMENT

25 I. Not Every Second Amendment Case Requires A Means-Ends 26 Standard of Review. This Case Does Not.

27 Defendant claims that “[w]e now have certainty that [Plaintiff’s first]
28

1 analytical approach,” dispensing with means-ends scrutiny, “is wrong.” Def. Opp. Br.
2 1 (citing *United States v. Chovan*, No. 11-50107, U.S. App. LEXIS 23199 (9th Cir.
3 Nov. 18, 2013)).

4
5 *Chovan* indeed brings “certainty” that someone is “wrong,” but that someone
6 is the Defendant, who has apparently abandoned his “substantial burden” theory of
7 the case. Compare Defendant’s SJ Br. (filed Oct. 25, 2013) with Defendant’s Opp. Br.
8 (filed Dec. 2, 2013). What *Chovan* did *not* do is overrule the Supreme Court’s
9 analytical approach in *Heller*, which declined to use means-ends scrutiny to resolve
10 the constitutional question surrounding a handgun ban. Nor did *Chovan* overrule
11 *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), which used no standard of
12 review to uphold the federal felon in possession ban, 18 U.S.C. § 922(g)(1), as
13 presumptively lawful. See also *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (total
14 handgun carry ban unconstitutional without reference to standards of review).

15
16 *Heller* and *Vongxay* represent two sides of the same coin: as with many laws
17 implicating constitutional rights, some gun restrictions are (un)constitutional simply
18 by reference to historical practice. Suppose that California were to allow individuals
19 to purchase any handgun they wished, but maintained, for various alleged safety
20 reasons, that handguns kept at home be rendered inoperable. This Court would not
21 apply *Chovan*’s two-step review to shoehorn such a blatantly unconstitutional law
22 into some means-ends standard of review, when binding precedent simply declares
23 such laws “unconstitutional.” *Heller*, 554 U.S. at 630.

24
25
26 Were Defendant correct, and the Court were required to apply means-ends
27 scrutiny in every Second Amendment case, then *Heller* and *Vongxay* were wrongly
28 decided. Means-ends scrutiny is useful in many constitutional contexts, but it has

1 never been made exclusively mandatory—not with respect to the Second
2 Amendment, or to any other aspect of fundamental rights. The Sixth Amendment
3 requires that the accused be provided counsel—not because of “intermediate” or
4 “strict” scrutiny, but because that is the Supreme Court’s considered interpretation
5 of the Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Abortion regulations
6 may be subjected to means-ends review, but abortion prohibitions are not. *Roe v.*
7 *Wade*, 410 U.S. 113 (1973). Myriad cases balance First Amendment and regulatory
8 interests, but precedent involving arbitrary prohibitions of protected speech are
9 more direct. *See, e.g. Butler v. Michigan*, 352 U.S. 380 (1957).

11 *Heller* supplies the analytical framework here. Neither the Supreme Court,
12 nor the D.C. Circuit before it, required a means-ends standard of review to measure
13 Washington, D.C.’s handgun ban against the Second Amendment. This case, if
14 anything, presents a handgun ban. It does not matter that Defendant believes that
15 whatever the state bans is, by virtue of that legislative opinion, unacceptably
16 dangerous.¹ Nor does it matter that other arms are available. The Supreme Court
17 rejected both arguments in *Heller*. If the arms are protected, then however they
18 might be regulated, they cannot be banned; the judicial inquiry ends.

21 II. Defendant Fails to Rebut the Fact that the Handguns Plaintiffs Seek Are of
22 the Kind in Common Use for Traditional Lawful Purposes.

23 Because Defendant does not brief his objections to Plaintiffs’ “common use”
24 claims, the extent of his issues with Plaintiffs’ evidence is unclear. Defendant’s

25 _____
26 ¹Surely, California cannot legislate guns into and out of constitutional
27 protection, any more than a legislative declaration determines which books, movies,
28 and video games fall outside the realm of traditional First Amendment protection.
Defendant’s argument, that the *legislature* determines what is or is not within
constitutional protection, renders the Constitution meaningless.

1 brevity on this point—and desire to avoid the common use test—is understandable;
2 there is something odd about the Chief of the state’s Bureau of Firearms being
3 unable to agree that handguns, including those lacking features that the legislature
4 found absent from 89% and 86% of semiautomatic handguns, and a feature
5 (microstamping) that does not actually exist, are arms of the kind in common use for
6 traditional lawful purposes. The question of whether handguns lacking chamber
7 loaded indicators, magazine disconnect devices, and microstamping are in common
8 use for traditional lawful purposes, to say nothing of guns ineligible for testing or
9 otherwise administratively barred, is hardly a matter of expert opinion. Rather, it is
10 a matter of judicial notice and, in any event, the evidence on these points is
11 conclusive.
12

13
14 It bears repeating that in neither *Heller* nor *McDonald v. City of Chicago*, 130
15 S. Ct. 3020 (2010), not one judge or justice, on the District Courts, the Courts of
16 Appeals, or the Supreme Court, struggled with whether the plaintiffs’ handguns
17 were of the kind in common use for lawful purposes. Brett Thomas’s desired High
18 Standard revolver is the very make and model at issue in *Heller*. If the Supreme
19 Court did not know that revolvers are handguns of the type in common use for
20 lawful purposes, it would have remanded on that issue. *See United States v. Miller*,
21 307 U.S. 174 (1939).² Nor is there any doubt that semi-automatic firearms anything
22 but common. Well before *Heller*, the Supreme Court invoked the “long tradition of
23 widespread lawful gun ownership by private individuals in this country” to hold that
24
25

26
27 ²Otis McDonald’s handgun was a semi-automatic Beretta 950. *See McDonald*
28 *v. City of Chicago*, N.D. Ill. No. 08-3645, Dkt. 34-3 (Exhibit A to summary judgment
motion). That handgun does not appear on Defendant’s roster.

1 possession of an apparent semi-automatic rifle does not create a duty to inquire
2 whether the firearm happens to be an illegal machine gun. *Staples v. United States*,
3 511 U.S. 600, 610 (1994).

4
5 The very fact that the Supreme Court announced a “common use” test for
6 arms inherently requires that at least *some* understanding of which sort of guns are
7 “common” would be within judicial notice—either “generally known within the trial
8 court’s territorial jurisdiction” or which “can be accurately and readily determined
9 from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).
10 The Supreme Court was not guessing when it assumed that revolvers and semi-
11 automatic firearms are within common use. The facts contained in the ATF
12 manufacturing report, a simple government survey, are plainly within judicial
13 notice. *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010)
14 (judicial notice of facts reported on government websites). Contrary to Defendant’s
15 suggestion, the report supplies ample proof that revolvers and semiautomatic
16 handguns are common enough. The relevant words are “pistols” and “revolvers,”
17 which, as both are used to distinguish each other, cannot mean the same thing.

18
19
20 No special expertise is needed to decipher these words. A dictionary will
21 suffice. The first full definition for “pistol” is “a handgun whose chamber is integral
22 with the barrel; broadly : handgun.” See Merriam-Webster Dictionary, available at
23 <http://www.merriam-webster.com/dictionary/pistol> (last visited Dec. 9, 2013). A
24 “revolver” is “a handgun with a cylinder of several chambers brought successively
25 into line with the barrel and discharged with the same hammer.” See Merriam-
26 Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/>
27 revolver (last visited Dec. 9, 2013). Helpfully, the ATF defines these terms in
28

1 substantially the same way that Merriam-Webster does, referring, in the form that
2 elicits the reported information, to “pistol” as a handgun with “a chamber(s) as an
3 integral part(s) of, or permanently aligned with, the bore(s),” and “revolver” as “[a]
4 projectile weapon, of the pistol type, having a breechloading chamber cylinder so
5 arranged that the cocking of the hammer or movement of the trigger rotates it and
6 brings the next cartridge in line with the barrel for firing.” See Instructions, ATF
7 Form 5300.11, available at <http://www.atf.gov/files/forms/download/atf-f-5300-11.pdf>
8 (last visited Dec. 9, 2013).

10 Modern non-revolver “pistols” utilize magazines, which are nearly always
11 detachable, to feed bullets into the chamber. This, again, is not a scientific opinion
12 beyond the ken of lay understanding, but a matter of judicial notice. Anyone who has
13 seen a movie or television show in the last fifty years might have seen semi-
14 automatic handguns with detachable magazines used for traditional lawful
15 purposes—which is precisely why Defendant exempts the entertainment industry
16 from the roster. This knowledge is similar to the knowledge possessed by any
17 teenager that modern cars lacking a manual transmission utilize an automatic
18 transmission. And one need not be a naval or locomotive engineer to know that
19 modern warships do not employ sails, and that Amtrak does not run steam engines
20 billowing smoke and ash from coal-fired boilers in regular service.

23 Beyond the ATF report, dictionaries, and common knowledge, Plaintiffs’
24 declarations plainly suffice to explain these points under Fed. R. Evid. 701, as their
25 testimony is “(a) rationally based on [their] perception; (b) helpful to . . . determining
26 a fact in issue; and (c) not based on scientific, technical, or other specialized
27 knowledge within the scope of Rule 702.” Plaintiffs are merely describing what
28

1 firearms are in common use based on their observations. The Ninth Circuit has
2 always allowed this type of information, relating to firearms, to be admitted. *See*,
3 *e.g.*, *United States v. Von Willie*, 59 F.3d 922, 929 (9th Cir. 1995) (allowing officer to
4 testify that “the MK-11 . . . was a particularly intimidating gun and he knew of drug
5 dealers who used that specific weapon . . . These observations are common enough
6 and require such a limited amount of expertise, if any, that they can, indeed, be
7 deemed lay witness opinion”); *United States v. Liles*, 432 F.2d 18, 20 (9th Cir. 1970)
8 (“The manager of the sporting goods section, a man who sold a wide variety of
9 firearms, identified the weapon as common variety of revolver.”); *cf. Range Road*
10 *Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012). It cannot
11 be that lay witnesses may testify that drug dealers use MK-11s for their
12 “particularly intimidating” features, but gun owners and the heads of Second
13 Amendment groups cannot establish that revolvers and semi-automatic handguns
14 are used for lawful purposes by the American public.

15
16
17 Given the background facts that handguns, revolvers and semi-automatic
18 pistols, are in common use for traditional lawful purposes, non-rostered handguns
19 are plainly within that set. Defendant admitted that no microstamping compliant
20 handguns exist, and he does not know whether they ever will exist. SUF 31; Exh. P.,
21 RFA Responses 7 & 8. The Act’s legislative history establishes that chamber loaded
22 indicators and magazine disconnect devices are absent from 89% and 86%,
23 respectively, of all semi-automatic handguns. SUF 14. And this is before Plaintiffs
24 testified as to the broad impact of California’s handgun rostering law.

25
26
27 Sidestepping the issue, Defendant offers various arguments taking issue with
28 (and misconstruing) the common use test itself. Defendant should raise these issues

1 with the Supreme Court, which handed down the test in *Heller*. Defendant's
2 assertion that Plaintiffs could just as easily claim a right to "any firearm that might
3 be called a 'handgun,'" Def. SJ Opp. 7 n.3, is simply incorrect. If Plaintiffs claimed a
4 right to a handgun whose function meant that it were *not* the sort of handgun that
5 would be in common use for traditional lawful purposes, they would lose.
6

7 Nor does Defendant find support in the Third Circuit's rejection of a claim to
8 unserialized handguns. *United States v. Marzarella*, 614 F.3d 85 (3d Cir. 2010). To
9 begin, *Marzarella* did not and could not overrule *Heller*'s common use test.

10 Plaintiffs do *not* make *Marzarella*'s argument that their desired handguns are
11 protected "because they were 'in common use' at the time of ratification." Def. SJ
12 Opp. 7. "[T]he Second Amendment extends, prima facie, to all instruments that
13 constitute bearable arms, even those that were not in existence at the time of the
14 founding." *Heller*, 554 U.S. at 582.
15

16 But *Marzarella* hardly helps Defendant, as it offered that the common use test
17 references a firearm's "utility:" "Heller distinguished handguns from other classes of
18 firearms, such as long guns, by looking to their functionality . . . unmarked firearms
19 are functionally no different from marked firearms." *Marzarella*, 614 F.3d at 94.
20

21 "Because unmarked weapons are functionally no different from marked weapons, [18
22 U.S.C.] § 922(k) does not limit the possession of any class of firearms." *Id.* at 98-99.

23 But handguns containing the state's desired features *are* functionally different than
24 those that do not. And Defendant does not address the fact that the rostering
25 scheme bars access to many handguns of the kind in common use for administrative
26 reasons bearing no relationship to particular features.
27
28

1 III. The Handgun Rostering Requirements Fail Heightened Scrutiny and
2 Violate Plaintiffs' Rights to Equal Protection.

3 Defendant's heightened scrutiny and equal protection arguments may now be
4 primary rather than secondary, given *Chovan's* foreclosure of his "substantial
5 burden" claims. But his opposition to Plaintiffs' summary judgment motion offers
6 nothing new in this regard. Plaintiffs have already addressed these claims in detail,
7 in their opposition to Defendant's motion. That discussion, incorporated here by
8 reference, remains before the Court without need of reiteration here. Suffice it to say
9 that when the state teaches people that certain features are dangerous, it is
10 irrational to require them in the name of safety. Nor does it make sense to allow the
11 acquisition for private use of allegedly "unsafe" handguns to privileged individuals.
12

13 CONCLUSION

14 Plaintiffs' motion for summary judgment should be granted.

15 Dated: December 9, 2013

16 Respectfully submitted,

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