No. 23-55276

In the
United States Court of Appeals for the Ninth Circuit

LANCE BOLAND; MARIO SANTELLAN; RENO MAY; JEROME SCHAMMEL; AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC.,
Plaintiffs-Appellees,
v.
ROB BONTA, in his official capacity as
Attorney General of the State of California,
Defendant-Appellant.

On Appeal from the
United States District Court for
the Central District of California

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, America's Future, DownsizeDC.org, Downsize DC Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Plaintiffs-Appellees and Affirmance

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DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, America's Future, DownsizeDC.org, Downsize DC Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

s/Jeremiah L. Morgan
Jeremiah L. Morgan

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INTEREST OF *AMICI CURIAE*[1]

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STATEMENT OF THE CASE

California's "Unsafe Handgun Act" ("UHA") was first enacted in 1999, and subsequently amended in 2007 to require "magazine disconnect systems" and "chamber load indicators," and again amended in 2013 to require "microstamping" capability on all new handguns. In its current version, the Act prohibits the commercial sale (while allowing certain private and out-of-state sales) of any semi-automatic handguns not currently appearing on California's

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

approved list. To be added to this list, semiautomatic handguns must now have three specified 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). [*Boland v. Bonta*, 2023 U.S. Dist. LEXIS 51031, at *2-3 (C.D. Cal. 2023) (emphasis added).]

Over 95 percent of the handguns now appearing on the approved list were grandfathered onto the list and do not actually possess the three required features. California's expert witness, Special Agent Salvador Gonzalez, testified that, since the list first became operational during the period when the law required only the CLI and MDM features, and before the microscopic imprint requirement, only 32 new semiautomatic handguns were added to that list, and those 32 handguns have only the first two safety features, but not the microscopic imprint feature which is not now available. *Id*. at *13. Since the microstamping requirement was added to the law effective May 2013, "[n]ot a single new semiautomatic handgun has been added." *Id*. Moreover, the district court found that even the figure of 32

new handguns is "misleadingly high, as the Roster treats handguns that are the same except for small details like color or coating as different handguns." *Id.* at *6, n.2. The district court found that, "a decade after the requirement took effect, no firearm manufacturer in the world makes a firearm with this [microstamping] capability." *Id.* at *7. Accordingly, "under the UHA, Californians must rely for self-defense on handguns brought to market more than a decade ago." *Id.* at *13.

Four individual plaintiffs and the California Rifle & Pistol Association filed suit in the Central District of California seeking to have the UHA's "safety features" declared an infringement on the Second Amendment and therefore temporarily enjoined from enforcement.

Noting that "[n]o handgun available in the world has all three of these features" (CLI, MDM, and microstamping capability) (*id.* at *3), the district court granted injunction against enforcement of all three features, finding that the plaintiffs were likely to prevail at trial. *Id.* at *26. On appeal, the Ninth Circuit stayed the injunction as to the CLI and MDM components pending a hearing on the injunction, while allowing the injunction against the microstamping requirement to remain in place.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS MORE THAN A RIGHT TO KEEP AND BEAR THOSE DATED HANDGUNS APPROVED BY CALIFORNIA.

A. California's Ban on Unapproved Handguns Clearly Implicates the Text of the Second Amendment.

California argues that "[t]he Second Amendment's plain text does not **encompass** a right, let alone some '**attendant right**' (1-ER-14), to 'purchase a **particular handgun**' that does not satisfy consumer safety requirements." Appellant's Brief at 2 (emphasis added) (citing *Pena v. Lindley*, 898 F.3d 969, 973 (9th Cir. 2018)). California argues that "the district court's textual analysis strayed from the Second Amendment's text by identifying a purported right to acquire so-called 'state-of-the-art handguns' (without meeting safety requirements) based on an 'attendant right' to purchase firearms." *Id*. at 15. Thus, California takes the position that, so long as a citizen has the right to purchase some handguns **of California's choice**, the Second Amendment has no application whatsoever to Appellees' claim of right to purchase a modern ("state-of-the-art") handgun **of the citizen's choice**. Appellants' Brief at 3.

California's position is foreclosed by *Heller*, which denied to the District of Columbia government the power to pick and choose which category of

bearable arms fall under the protection of the Second Amendment: "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." *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). The district court correctly relied on this language, concluding that the Constitution protects much more than the bare right to keep and bear just some firearm for self-defense. *See Boland* at *14. Thus, both the Second Amendment and *Heller* preclude government from deciding which bearable arms in common use may be purchased and owned. As *Heller* stated, the Second Amendment is not for judges to fine tune to achieve governmental objectives — as "it is the very *product* of an interest balancing by the people." *Heller* at 635.

The not even "implicated" argument California makes here is a legacy of the first part of the *Bruen*-repudiated two-step test. If California is correct that the Second Amendment is not even "implicated" by prohibiting the purchase of all modern handguns, then what is its purpose? Governments which assert the not even "implicated" argument are making an effort to derail a court's analysis from considering exactly which arms the Second Amendment protects. As stated above, *Heller* resolved this issue. California's brief never argues that *N.Y. State*

Rifle & Pistol Association v. Bruen, 142 S. Ct. 2111 (2022), somehow changed this *Heller* rule somehow to empower California to mandate such choices, and California certainly cites to no court decision since *Bruen* to support its position.

Consider how California's not even "implicated" argument sounds when applied in a different context. If California passed a law forbidding downloading of social media apps that were not on a California-approved list because they had not been tested to include prescribed safety features, would anyone take seriously an assertion that the First Amendment was not "implicated?" As the Supreme Court stated in *Heller*, "We do not interpret constitutional rights that way." *Heller* at 582. The not even "implicated" argument should be rejected, once and for all.

B. Second Amendment Attendant Rights Are Real and Robust.

California appears to deny or at least minimize the notion of "attendant" rights, ignoring the district court's having made it clear that such rights have been repeatedly recognized by federal courts.

> 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) [ammunition]; *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) [firing ranges]…. [*Boland* at *14-15 (emphasis added).]

The district court also relied on *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.'" Here, California describes its statutory prohibition on the manufacture and sale of handguns which it dislikes as a simple regulation of commerce, even though it takes the decision of which arms may be made or sold away from both the manufacturer and the consumer. From these authorities, the district court correctly concluded that "UHA provisions **implicate** conduct protected by the Second Amendment." *Boland* at *16 (emphasis added). And "[t]hose attendant rights include the right to acquire state-of-the-art handguns for self-defense." *Id.* at *15 (footnote omitted).

The district court's list of decisions that recognize ancillary or attendant rights was not exhaustive. In addition, the Seventh Circuit has recognized the Second Amendment as extending to "corollar[ies] to the meaningful exercise of the core right to possess firearms for self-defense." *See Wilson v. Cook County*, 937 F.3d 1028, 1032 (7th Cir. 2019) (quoting *Ezell*, 651 F.3d at 708). In *Lynchburg Range & Training, LLC v. Northam*, 105 Va. Cir. 159, 162

(Lynchburg Cir. Ct. 2020), a circuit court in Virginia recognized the right to access firearm ranges for training, similar to that recognized in *Ezell*. The Virginia court noted that "the right to keep and bear arms 'includ[es] the otherwise lawful possession, carrying, transportation, sale, or transfer of firearms....'" The right to acquire firearms recognized in *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) includes the right to acquire parts to assemble firearms. *See Bezet v. United States*, 276 F. Supp. 3d 576, 605 (E.D. La. 2017) (restrictions on "the use of imported parts to assemble a firearm … likely impinge on the rights of law-abiding, responsible citizens … to acquire" firearms), aff'd, 714 F. App'x 336 (5th Cir. 2017). Also, in a case recently decided, *United States v. Hicks*, 2023 U.S. Dist. LEXIS 35485, at *6 (W.D. Tex. 2023), the district court found that "[t]he clear answer is that 'keep and bear arms' includes receipt."

California failed to discuss or even reference any of the three cases on ancillary or attendant rights cited by the district court, or any of the additional cases cited here, rather solely relying on this Court's decision in *Pena* which "reject[ed] Purchasers' claim that they have a constitutional right to purchase **a particular handgun**." *Pena* at 973 (emphasis added). But the *Pena* decision

first only "assume[d] without deciding that the challenged UHA provisions burden conduct protected by the Second Amendment because we conclude that the statute is constitutional irrespective of that determination." *Id*. at 976. *Pena* asserted that UHA "does not restrict possession of handguns" and is only a limitation of "commercial sale of new models…." *Id*. at 977. This argument lacks common sense. But for the possibility of an acquisition by private purchase or an out-of-state sale, a ban on sale is tantamount to a restriction on possession. Then, the *Pena* court applied intermediate scrutiny, finding a "reasonable fit," using a method of analysis rejected by *Bruen*, and even if such an approach was once permissible, it is no longer.

II. CALIFORNIA'S UNSAFE HANDGUN ACT SHOULD BE EVALUATED IN THE CONTEXT OF THE STATE'S OVERALL ANTI-GUN AGENDA, NOT BASED ON REPUDIATED BALANCING TESTS.

A. A Claim to Advance Public Safety Does Not Negate Enumerated Rights.

While making an effort to demonstrate that the Unsafe Handgun Act meets the *Bruen* test by asserting that it neither "implicates" the Second Amendment nor violates any attendant right (*see* Section I, *infra*), California continues to make the same type of balancing arguments that it had made before *Bruen* to

justify gun restrictions under the two-step interest-balancing test employed in cases in this Circuit such as *Duncan v. Bonta*, 19 F.4th 1087 (2021) (*en banc*).

In essence, California posits the issue before the court as a conflict between "public safety" and "gun rights" and, given those choices, California appears to believe that public safety interests should always triumph over Second Amendment protections. Public safety measures are repeatedly described as "reasonable" and "commonsense."

- **Commonsense public safety** requirements, which leave hundreds of handguns available for retail purchase, do not interfere with the Second Amendment's textual right to "keep" or "bear" arms." [Appellant's Brief at 3 (emphasis added).]

- The Second Amendment does not inhibit States from imposing **reasonable safety** requirements before firearms may be mass produced and made commercially available for retail sale. [*Id*. at 15 (emphasis added).]

- The Second Amendment does not insulate firearm manufacturers from **commonsense public safety** requirements. [*Id*. at 17 (emphasis added).]

- [T]he Second Amendment does not prevent States from imposing the firearm **safety** and **public safety** regulations at issue here. [*Id*. at 19 (emphasis added).]

- [T]he Supreme Court's repeated recognition that the Second Amendment is subject to **reasonable** limits…. *Bruen* does not prohibit States from imposing **reasonable** firearm **safety** regulations. [*Id*. at 21 (emphasis added).]

First, the test of constitutionality under the Second Amendment, under *Heller* and certainly confirmed under *Bruen*, can never be some type of free-standing appeal to "reasonableness" or "commonsense" — even the commonsense of judges. The question to be answered is not how modern judges feel about the need for a challenged law, but the right protected by the Second Amendment as written by the Framers. As Justice Scalia explained the matter: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller* at 634.

California relies on this Court's decision in *Pena*: "The Second Amendment's plain text does not encompass a right, let alone some 'attendant right' (1-ER-14), to 'purchase a particular handgun' that does not satisfy consumer safety requirements. *Pena*, 898 F.3d at 873." Appellant's Brief at 2-3. California summarizes the *Pena* decision, that the court first "assume[d] without deciding that the challenged UHA provisions burden conduct protected by the Second Amendment." *Pena* at 976. This Court then applied intermediate scrutiny to favor the government's interest in public safety, conclusively assuming that the three required features "place almost no burden on the physical exercise of Second Amendment rights…." *Id*. at 978.

The *Pena* Court viewed the restrictions to be valid as they were imposed only on commercial sales, where *Heller* had determined that regulations were "presumptively lawful." *Heller* at 627, n.26. This Court posited two possible meanings for *Heller*'s "presumptively lawful" terminology: First, the law is "outside the scope of the Second Amendment," and second, it would "'pass muster under any standard of scrutiny.'" *Pena* at 976. Yet, there was another more natural way to interpret that language in context never considered by the court in *Pena*. With its "presumptively lawful" language, the *Heller* Court was making the **scope of its ruling** clear, so that it would not be read to invalidate wholesale all existing regulations on commercial sales. This reading makes the most sense, in that the passage is preceded by the statement "[a]lthough **we do not undertake** an exhaustive historical analysis today of the full scope of the Second Amendment" and is followed by the statement: "**there will be time enough** to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Heller* at 626, 635 (emphasis added). In clarifying that such regulations were not then being struck down, they would continue to have the status that all laws have; that is, they are "presumptively lawful." However, such restrictions were never said to be

"conclusively lawful" and therefore immune from constitutional challenge, but that is exactly how the *Pena* court treated them.

The *Pena* court asserted that, "being unable to purchase a subset of semiautomatic weapons, without more, does not significantly burden the right to self-defense in the home." *Pena* at 978. That decision was written in 2018, when no guns had been added to the approved list for five years. Now it is 10 years since the list has been supplemented. What happens when no new guns are added to the list for 20 or 50 years? All laws that restrict access to modern arms violate the Second Amendment.

Indeed, California's reliance on public safety arguments to justify the exclusion of handguns from the market employs the interest balancing approach urged by Justice Breyer's dissent in *Heller*, where he explained that "the Court has [previously] found such **public-safety** concerns sufficiently forceful to **justify restrictions on individual liberties** …" if the law "impermissibly burdens" the interest protected by the Second Amendment, "in the course of advancing" the government public safety concerns. *Heller* at 689 (Breyer, J., dissenting) (emphasis added). Justice Breyer's dissent in *Heller*, and now California in their Opening Brief, are of one mind, believing that advancing "public safety" is so

inherently compelling that its invocation automatically overrides the very clear Second Amendment prohibition of "shall not be infringed." Neither Justice Breyer nor California grappled with the issue that the Framers understood firearms were dangerous, but protected them nevertheless. As Justice Alito made clear, the Second Amendment is not the only constitutional right which has "controversial public safety implications." *McDonald v. Chicago*, 561 U.S. 742, 783 (2010).

Additionally, no court should assume that "public safety" considerations support limitations on handgun choice. There are about 21,000 firearm homicides per year nationwide,[2] but many more defensive gun uses annually which prevent assaults and homicides. The results of a CDC survey in the mid-1990s suggested there are some 2.4 million defensive uses of guns yearly.[3] As researcher Dr. John Lott notes, official statistics are likely significantly under-reported, because almost no police departments even compile statistics on defensive gun use.[4] Dr. Lott cited 17 national surveys indicating "between

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[2] CDC, National Center for Health Statistics, "Assault or Homicide."

[3] R. Saavedra, "Narrative Fail: Newly Discovered CDC Surveys Demolish Anti-Gun Talking Points," *Daily Wire* (Apr. 21, 2018).

[4] J.R. Lott, "There are Far More Defensive Gun Uses Than Murders. Here's Why You Rarely Hear of Them," *RealClear Investigations* (Sept. 22,

760,000 defensive handgun uses and 3.6 million defensive uses of any type of gun per year." *Id*. In 95 percent of the survey responses, the gun owner had only to brandish the weapon to defuse the attempted crime.[5] Thus, increased gun possession generally enhances public safety by deterring and preventing crime.

As Justice Thomas explains: it is a mistake to ask judges to "'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions," especially given their "'lack [of] expertise' in the field." Rather, "reliance on history to inform the meaning of constitutional text — especially text meant to codify a *pre-existing right* — is, in our view, more legitimate, and more administrable." *Bruen* at 2130.

B. California's UHA Should Be Viewed in the Context of California's Sweeping Anti-Gun Agenda.

California defends its UHA as a free-standing, commonsense gun safety and tracking law. On the contrary, the UHA should be viewed in the context of an ever-expanding web of laws restricting gun rights. *See* California Firearms Laws Summary (2021). California twice cites to an *amicus* brief filed by Giffords Law Center to Prevent Gun Violence (Appellant's Brief at 34-35).

2021).

[5] *See id.; see also* J.R. Lott, The Bias Against Guns (Regnery: 2003).

Interestingly, the Attorney General of California is described as "a steadfast partner of Giffords Law Center" on his own website. Press Release, "Attorney General Bonta Launches Office of Gun Violence Prevention," Rob Bonta, Attorney General (Sept. 21, 2022). The Giffords Law Center apparently has never seen a restriction on gun rights that it did not support, as its website contains a review of "Gun Safety Laws in the States," where each and every restriction on gun rights known to man is characterized as a "Gun Safety" problem needing a legislative solution:

BACKGROUND CHECKS
- Universal Background Checks
- NICS & Reporting Procedures
- Background Check Procedures
- Mental Health Reporting
- Interstate & Online Gun Sales

CHILD & CONSUMER SAFETY
- Child Access & Safe Storage
- Smart Guns
- Design Safety Standards
- Non-powder & Toy Guns

CRIME GUNS
- Trafficking & Straw Purchasing
- Bulk Gun Purchases
- Microstamping & Ballistics

GUNS IN PUBLIC
- Concealed Carry
- Open Carry
- Stand Your Ground
- Guns in Schools

- Location Restrictions

GUN SALES
- Gun Dealers
- Maintaining Records
- Waiting Periods
- Gun Shows

HARDWARE & AMMUNITION
- Assault Weapons
- Large Capacity Magazines
- Ammunition Regulation
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- Machine Guns & 50 Caliber
- Silencers

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WHO CAN HAVE A GUN
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- Minimum Age
- Firearm Relinquishment
- Hate Crimes

OTHER LAWS & POLICIES
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- Intervention Strategies
- Federal Powers
- Key Federal Regulation Acts
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C. Neither Unprecedented Societal Concerns nor Dramatic Technological Changes Justify Wholesale Limitations on a Right which "Shall Not be Infringed."

California appears to try to justify its statute without the need to demonstrate relevant historic analogues based on the one passage of *Bruen* on which it relies more than any other:

> While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating **unprecedented societal concerns** or **dramatic technological changes** may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution — and a Second Amendment — "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 415, 4 L. Ed. 579 (1819) (emphasis deleted). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated. [*Bruen* at 2132.]

California argues: "When the Second Amendment was adopted, 'over 90% of the weapons owned by Americans were long guns, not pistols' … muzzle-loading and not semiautomatic [without] a modern-day ammunition cartridge … [when] gun violence and homicides were not a nationwide problem…." Appellant's Brief at 32-33. None of these factors justifies extinguishing Second Amendment protections for modern handguns. The District

Court correctly distinguished the analogues offered by California, concluding that "[t]he 'modern-day regulation[s]' of CLI and MDM requirements are not 'analogous enough' to 'historical precursors' of proving laws 'to pass constitutional muster.'" *Boland* at *17-19. The same was true of "gunpowder storage laws" and "serial numbers." *Id*. at *22-23.

Although not making this argument here, in a recent *amicus* brief filed in the U.S. Supreme Court in support of a petition for certiorari, Governor Newsom asserted that the Second Amendment must be narrowly applied because: "**The Second Amendment is not a suicide pact**."[6] Those words are usually uttered in connection with a government assuming extraordinary powers that invade constitutional liberties, claiming to defend the nation at a time of national emergency or a terrorist attack. *See, e.g.,* R.A. Posner, Not a Suicide Pact: The Constitution in a Time of National Emergency (Oxford Univ. Pr.: 2006).

Governor Newsom's use of "suicide pact" terminology to justify stronger gun laws is very much like Judge Posner's approach to elevating state powers over individual rights. There, Judge Posner posed and addressed the question:

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[6] Brief for California Governor Gavin Newsom as *Amicus Curiae* Supporting Petitioner, *United States v. Rahimi*, U.S. Supreme Court, No. 22-915, at 3 (April 20, 2023) (emphasis added).

"how far civil liberties based on the Constitution should be permitted to vary with the threat level" where the threat arises from terrorism that has the potential to create a national emergency. *Id*. at 7. Judge Posner's disturbing answer is that constitutional liberties must be weighed against the felt exigencies of the moment, and may be sacrificed if required based on an atextual pragmatic balancing of individual rights and state interests. But at least Judge Posner was addressing that question in the context of terrorism. Governor Newsom would appear to share the Posner approach based not on any genuine national emergency, but on a quixotic desire to end all violent crime in California.

Judge Posner's book ends with a quotation from Hume's An Enquiry Concerning the Principles of Morals, which states: "The safety of the people is the supreme law: All other particular laws are subordinate to it, and dependent on it…." *Id*. at 158. Judge Posner and, apparently, Governor Newsom, embrace Hume's view. However, such an approach to interpreting the constitutional text eventually leads to the destruction of not just the Second Amendment, but also all constitutional rights. As one commentator described the consequences of the Hume method of constitutional interpretation:

> Is there a right to habeas corpus? Not really. How about a right against unlimited powers of search and seizure? Well, sometimes.

> Do we have security against the possibility of being tortured by the government? Not if a judge doesn't 'feel' like granting any. And a right to free speech? Well, yes – *unless* your speech has 'low social value' by an unspecified standard of value. If the 'safety of the people' is the 'supreme law,' it is hard to see how that safety can be preserved in a regime of the sort that Posner envisions, where in fact nothing is *ever* safe. [Irfan Khawaja, "Review – Not a Suicide Pact: The Constitution in a Time of National Emergency," *Dissent Magazine*, Democratiya 8, Univ. of Pa. Press at 106 (Spring 2007).]

Adopting the position urged by California would lead down the path of extinguishing the one protection in the Bill of Rights which contains a preamble which explains why its preservation is so important. The "right to keep and bear arms" was deemed by the Framers to be "necessary to the security of a free State." It is helpful to refocus on why the Framers took that absolutist position, as discussed in Section III, *infra*.

III. CALIFORNIA TREATS THE ACQUISITION AND POSSESSION OF FIREARMS AS A GOVERNMENT-GRANTED PRIVILEGE, RATHER THAN A PRE-EXISTING GOD-GIVEN RIGHT.

A. The Saturday Night Special Rationale.

California's Opening Brief asserts that the genesis of the Unsafe Handgun Act was a "public safety and quality assurance" requirement enacted due to "the proliferation of poorly made, cheap handguns known as Saturday Night Specials, which could explode in the user's hand or fire without pulling the trigger."

Appellant's Brief at 1. Thus, California presents itself as a defender of the gun owner, seeking to protect gun owners from the risk of a catastrophic failure. The subsequently imposed amendments to that law imposing restrictions on the sale of modern handguns are then to be viewed as logical extensions of California's passionate concern for protecting and defending gun owners.

Indeed, at the time that the Unsafe Handgun Act was enacted, groups such as the National Coalition to Ban Handguns were aggressively pushing a ban on Saturday Night Specials, not because they somehow exploded, but as a first step toward total handgun confiscation. Considering the onrush of anti-gun laws emanating from the California legislature every year, this "first step" justification for the law seems more historically accurate. Indeed, the entire Saturday Night Special argument posited by California is a fabrication, more correctly described in this analysis by firearms scholar Professor David B. Kopel:

> There is no question that **laws against Saturday night specials are leveled at blacks**. The first such law came in 1870 when Tennessee attempted to disarm freedmen by prohibiting the sale of all but "Army and Navy" handguns. Ex-confederate soldiers already had their military handguns, but ex-slaves could not afford high-quality weapons.
>
> The situation today is not very different. As the federal district court in Washington, D.C., has noted,[7] laws aimed at

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[7] *See Delahanty v. Hinckley*, 686 F. Supp. 920, 928-30 (D.D.C. 1986).

> Saturday night specials have the effect of **selectively disarming minorities**, who, because of their poverty, must live in crime-ridden areas…. Little wonder that the Congress on Racial Equality filed an amicus curiae brief in a 1985 suit challenging the Maryland Court of Appeals' virtual ban on low-caliber handguns. [D.B. Kopel, "Trust the People: The Case Against Gun Control" at 31, *CATO Policy Analysis* (July 11, 1988) (emphasis added).]

So-called Saturday Night Specials were attacked not because they blew up, but because they were inexpensive and thus affordable to persons of lesser means.[8] Every supposed safety requirement adds to the cost of a firearm. Roy Innis of Congress on Racial Equality ("CORE") (later a board member of the NRA) asserted: "[t]o make inexpensive guns impossible to get is to say that you're putting a money test on getting a gun. It's racism in its worst form."[9]

California's brief treats handguns as if they were just any consumer product, where the right to purchase and own is a matter of legislative grace and where the government has broad police power to protect the consumer. This approach deliberately ignores the rich history of and purpose of gun rights — a right that was not conferred by government, and thus which may not be taken away by government. California ignores that, in *Heller*, the Supreme Court

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[8] *See generally* "Top 10 Things You Didn't Know About the Saturday Night Special," God Family and Guns, YouTube.

[9] https://www.quotemaster.org/q998ce55c2c491a9c25b8ebe49ae35081.

recognized "the historical reality that the Second Amendment was not intended to lay down a novel principl[e] but rather codified a right inherited from our English ancestors…." *Id.* at 599 (internal quotations omitted). The history of the right demonstrates that the Second Amendment was not viewed as a property right to just any product, but at the core of the Framers' understanding, it was a God-given natural right of self-defense which is entirely ignored by California, requiring this brief historical review.

B. The Bible Posits Self-defense as a Natural, God-given Right.

When the Framers crafted the Declaration and the Constitution, they did so as part of a culture steeped in an understanding of the Bible. As one commentator wrote in 1907, "A volume would not contain all the politico-theological discourses … wherein the Hebrew commonwealth was held up as a model, and its history as a guide for the American people in their mighty struggle for the blessings of civil and religious liberty."[10] John Dickinson clearly espoused the concept of natural rights as coming from the Bible: "Kings or parliaments could not give the rights essential to happiness…. We claim them from a higher source: from the King of kings, and Lord of all the earth. They

[10] Oscar S. Strus, The Origin of Republican Form of Government in the United States of America at 131 (G.P. Putnam's Sons: 1901).

are created in us by the decrees of Providence, which establish the laws of our nature."[11]

The ancient Mosaic law in that "civil polity" clearly recognized the right of self-defense. "If the thief is found breaking in, and he is struck so that he dies, *there shall be* no guilt for his bloodshed." *Exodus* 22:2 (NKJV). The Jews in the Book of Esther saved their entire nation from extermination by resisting a Persian law requiring their disarmament and extermination. *See Esther* 8:11.

Nehemiah led the reconstruction of the defensive wall around Jerusalem after the Babylonian captivity by requiring his builders to carry tools in one hand and weapons in the other. "And I looked, and arose and said to the nobles, to the leaders, and to the rest of the people, 'Do not be afraid of them. Remember the Lord, great and awesome, and fight for your brethren, your sons, your daughters, your wives, and your houses.'" *Nehemiah* 4:14. The psalmist wrote in *Psalm* 144:1 (KJV), "Blessed be the Lord my strength which teacheth my hands to war, and my fingers to fight."

Jesus Himself sanctioned self-defense. "When a strong man, fully armed, guards his own palace, his goods are in peace." *Luke* 11:21 (NKJV). He even

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[11] John Dickinson, The Political Writings of John Dickinson (Bonsal and Niles: 1801), Vol. I, pp. 111-112.

advised His disciples to arm themselves for self-protection. "Then He said to them, 'But now, he who has a money bag, let him take *it*, and likewise a knapsack; and he who has no sword, let him sell his garment and buy one.'" *Luke* 22:36 (NKJV).

C. Western Philosophical, Legal, and Historical Tradition Supports the Right of Self-Defense.

St. Thomas Aquinas continued to build on the doctrine of self-defense as a natural right. Since "one is bound to take more care of one's own life than of another's," Aquinas argued, even lethal force in self-defense is justified: "Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in 'being,' as far as possible."[12]

As the common law of England developed, the "right inherited from our English ancestors" that *Heller* recognized continued to be acknowledged as a natural right, given by God and beyond the power of civil government. Blackstone called this the "primary law of nature." "Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact,

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[12] Saint Thomas Aquinas, Summa Theologica, pt. II.2.64, art. 7, quoted in Thomas Aquinas, Treatise on Law: The Complete Text (St. Augustine's Press: 2009).

taken away by the law of society. In the English law particularly, it is held as an excuse for breaches of the peace, nay even for homicide itself."[13]

In his classic work Lex Rex (The Law and the Prince), Scottish Presbyterian political theorist Samuel Rutherford stated, "by the law of God and nature, we are to use violent re-offending for self-preservation…."[14] Rutherford spoke not only of self-defense against individuals, but against tyrannical governments. "The law of nature excepteth no violence, whether inflicted by a magistrate or any other. Unjust violence from a ruler is double injustice…. [I]t is absurd to say we may lawfully defend ourselves from smaller injuries, by the law of nature, and not from the greater." *Id.*

John Locke, too, espoused the natural right of self-defense. "[I]t being reasonable and just, I should have a right to destroy that which threatens me with destruction…. By the fundamental law of nature … when all cannot be preserved, the safety of the innocent is to be preferred." II The Works of John Locke, Esq. at 163 (3d ed.) (Bettesworth: 1727).

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[13] II W. Blackstone Commentaries on the Laws of England, ch. I, p. 3. Philadelphia: J.B. Lippincott (1893) (hereinafter "Blackstone").

[14] S. Rutherford, Lex Rex (1644), Question XXXI "Whether or no self-defence against any unjust violence offered to the life, be warranted by God's Law, and the Law of Nature and Nations?" (spelling modernized in quotation).

D. Founding-Era Preachers Advocated for the God-Given Right of Self-Defense.

The Revolutionary-era cultural environment from which the Second Amendment sprang was steeped in an understanding of the common-law natural right of self-defense. As colonial preachers advocated for independence from Britain, they made frequent references to biblical passages sanctioning self-defense. In his article "The Bible, Guns and the Second Amendment," Erich Pratt details voluminous examples of Founding-era sermons defending the God-given right of self-defense.[15] For example, in 1770, the Rev. Samuel Stillman argued:

> SELF-DEFENCE is an established law of our nature, and first dictate of common sense; which has never been superseded by any written law of God, or by the religion of Jesus.... During the old testament dispensation ... some of the best of men were the greatest soldiers, as Abraham, Joshua, David.... THE same thing is taught us by Christ himself ... [t]herein teaching us, that to defend ourselves is lawful.[16]

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[15] E. Pratt, "The Bible, Guns and the Second Amendment," *Gunowners.org* (Aug. 8, 2022).

[16] Samuel Stillman, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston, New England at 21-22. Boston: Edes and Gill (1770).

E. The Framers Recognized Self-Defense as a God-Given Right.

In Federalist No. 28, Hamilton wrote, "If the representatives of the people betray their constituents, there is then no resource left but in the exertion of **that original right of self-defense**, which is paramount to all positive forms of government…." (Emphasis added.) James Monroe stated, "The right of self-defense never ceases. It is among the most sacred, and alike necessary to nations and to individuals…"[17] John Adams defended the British soldiers charged for the "Boston Massacre" incident, citing self-defense as "the primary Canon of the Law of Nature."[18] Connecticut's Roger Sherman "conceived it to be **the privilege of every citizen, and one of his most essential rights**, **to bear arms**, and to resist every attack upon his liberty or property, by whomsoever made" (emphasis added).[19] Jefferson wrote in 1824, "The Constitutions of most of our states assert that **all power is inherent in the people** [and] that **it is their right**

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[17] James Monroe, "Second Annual Message to Congress" (Nov. 16, 1818), reprinted in VI The Writings of James Monroe 78 (S. Hamilton, ed.), New York: G.P. Putnam's Sons (1902).

[18] N. Lund, "The Right to Arms and the American Philosophy of Freedom," Heritage Foundation (Oct. 17, 2016).

[19] Quoted in S. Halbrook, The Founders' Second Amendment at 305 (Ivan R. Dee: 2008).

and duty to be at all times armed…." (emphasis added).[20] The nation's guiding figures thus trusted the people and feared the government.

F. Early Constitutional Commentators Espoused Self-Defense as a God-Given Right.

In his seminal work "Commentaries on the Constitution of the United States," Justice Joseph Story wrote, "The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally … enable the people to resist, and triumph over them."[21] Founding-era jurist and commentator St. George Tucker used the same language, explaining the natural tendency of governments to erode gun rights:

> This may be considered as the true palladium of liberty…. The right of self-defense is the first law of nature; in most governments it has been the study of rulers to confine this right within the **narrowest limits** possible. Whenever … the right of the people to keep and bear arms is, **under any** color or **pretext** whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.[22]

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[20] T. Jefferson, "Letter to John Cartwright" (June 5, 1824), reprinted in Thomas Jefferson: Writings (Merrill D. Peterson, ed.), Library of America at 17 (Viking: 1984).

[21] III J. Story, Commentaries on the Constitution of the United States, Ch. XIV, p. 708 (Hilliard, Gray & Co: 1833).

[22] I St. George Tucker, Blackstone's Commentaries: with Notes of Reference to the Constitution and Laws, of the Federal Government of the United

As the Supreme Court has recognized, the right to use force, even lethal force, in self-defense, is a natural right that predates our Constitution, and was only codified there, and not created there.

> [I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." … "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." [*Heller* at 592.]

Often, where an analysis ends is determined by where it begins. If California assumes that a firearm is like any consumer good, and that a ban on the sale of modern handguns does not even "implicate" the Second Amendment, then the state will assume it has broad police powers to further health and safety as it sees fit. However, a firearm is a constitutionally protected item and, more than that, it enables Californians to exercise their God-given right to self-defense without state interference. Since that right does not come from government, it cannot be taken away by government. Particularly when states like California

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States, and of the Commonwealth of Virginia at 300 (William Young Birch & Abraham Small: 1803) (emphasis added).

seek to shackle police and limit prosecutions to the most heinous crimes,[23] Californians are forced to live in a state where they have an increasing need for firearms. Without "the great equalizer" of firearms, the strong and aggressive are enabled to prey on the weak and gentle; some men are enabled to prey on women; and chaos will rule.

CONCLUSION

The district court's opinion should be affirmed.

Respectfully submitted,

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[23] *See* "New California laws for 2022 include easing criminal penalties, restrictions on police," *KTLA* (Dec. 29, 2021).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiffs-Appellees and Affirmance, was made, this 2nd day of June 2023, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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