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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LANA RAE RENNA, et al.,

Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Attorney General of
California; and LUIS LOPEZ, in his
official capacity as Director of the
Department of Justice Bureau of Firearms,

Defendants.

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

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS’
MOTION TO DISMISS**

This case comes before the Court on Defendants Xavier Becerra and Luis Lopez’s motion to dismiss Plaintiffs’ First Amended Complaint (“FAC”). Plaintiffs filed a response in opposition, and Defendants filed a reply. For the following reasons, the motion is granted in part and denied in part.

**I.
BACKGROUND**

California’s Unsafe Handgun Act (“UHA”) regulates the sale of firearms by maintaining a roster of handguns which have been determined to be “not unsafe” and therefore may be sold in the state. This lawsuit challenges numerous provisions of the

1 UHA, particularly those relating to the roster, as violating the Second Amendment to the
2 United States Constitution.

3 Under California Penal Code § 32000(a)(1), a person in California “who
4 manufactures or causes to be manufactured, imports into the state for sale, keeps for sale,
5 offers or exposes for sale, gives, or lends an unsafe handgun shall be punished by
6 imprisonment in a county jail not exceeding one year.” There are several exemptions to
7 this rule, including law enforcement, private party transfers, and intrafamilial transfers.
8 *See id.* §§ 32000(b); 32110.

9 The UHA defines an “unsafe handgun” in California Penal Code § 31910 and
10 requires handguns to have various features in order to be deemed not unsafe. Currently,
11 semiautomatic pistols are required to have a chamber load indicator (“CLI”), magazine
12 detachment mechanism (“MDM”), and microstamping technology. *See* Cal. Penal Code
13 § 31910(b)(4)–(6).

14 The UHA effectively presumes all handguns are unsafe unless otherwise determined
15 by the California Department of Justice (“CDOJ”), and charges CDOJ with maintaining a
16 roster of handguns determined to be “not unsafe” (“the roster”). Pursuant to California
17 Penal Code § 32015(a), CDOJ “shall compile, publish, and thereafter maintain a roster
18 listing all of the handguns that have been tested by a certified testing laboratory, have been
19 determined not to be unsafe handguns, and may be sold in this state pursuant to this part.”
20 Currently, the roster “grandfathers” handgun models on the roster which do not meet the
21 current safety requirements, meaning those handgun models may still be sold in California.
22 However, for a new model to be added, it must meet the criteria set forth in § 31910 as
23 discussed above.

24 Once a handgun is added to the roster, it is valid for one year, after which the
25 manufacturer may renew the listing by paying an annual fee. Cal. Code of Regs. § 4070;
26 *see id.* § 4071. A handgun model may be removed from the roster for any of the following
27 reasons: (1) if the annual fee is not paid; (2) if the handgun model sold after certification is
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1 modified from the model submitted for testing; or (3) if the handgun is deemed unsafe
2 based upon further testing. *Id.* § 4070(c).

3 During the 2019–2020 legislative session, the California legislature enacted
4 Assembly Bill 2847 (“AB 2847”), which added provisions for the removal of handguns
5 from the roster. (FAC ¶ 53.) Specifically, AB 2847 requires that for each new handgun
6 added to the roster, CDOJ must remove and deem unsafe three grandfathered handguns
7 which do not meet current requirements for inclusion on the roster (the “three-for-one
8 provision”). (*Id.*)

9 AB 2847 went into effect on January 1, 2021. (*Id.* ¶ 55); Cal. Penal Code
10 § 31910(b)(4). California Penal Code § 31910(b)(7) now provides: “The Department of
11 Justice shall, for each semiautomatic pistol newly added to the roster pursuant to Section
12 32015, remove from the roster exactly three semiautomatic pistols lacking one or more of
13 the applicable features [CLI, MDM, and microstamping] . . . and added to the roster before
14 July 1, 2022.” It further provides that “each semiautomatic pistol removed from the roster
15 pursuant to this subdivision shall be considered an unsafe handgun,” and that the Attorney
16 General shall remove semiautomatic pistols from the roster in reverse order of the date they
17 were added, continuing until the only handguns on the roster are those which have each of
18 the three applicable features. *Id.*

19 Plaintiffs are individuals, firearm retailers, and organizations who allege the UHA’s
20 roster scheme prevents individuals from exercising their Second Amendment rights to
21 purchase or manufacture handguns that are in common use and prevents licensed retailers
22 from selling such handguns to law-abiding adults. (FAC ¶¶ 3, 40, 41; *see* ¶¶ 83–165.)
23 Specifically, Plaintiffs allege the roster of handguns available for sale is a “small fraction
24 of the total number of handgun makes and models commercially available throughout the
25 vast majority of the United States, all of which are constitutionally protected arms” (FAC
26 ¶ 48), and that the roster continues to grow smaller. Plaintiffs allege that at the end of 2013,
27 there were 1,273 makes and models of approved handguns on the roster, and since then,
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1 that number has shrunk significantly. (*Id.* ¶ 49.) As of November 8, 2020, there were 830
2 handguns on the roster, and as of January 4, 2021, there were 779. (*Id.* ¶¶ 50–51.)

3 Based on these allegations, Plaintiffs filed the instant action in this Court on
4 November 10, 2020. (ECF No. 1.) On January 4, 2021, Plaintiffs filed the FAC, alleging
5 two claims under 42 U.S.C. § 1983—one for deprivation of their Second Amendment
6 rights, as secured by the Fourteenth Amendment, and one for violation of the Fourteenth
7 Amendment right to equal protection of the laws. (ECF No. 10.) Defendants now move
8 to dismiss the FAC. (ECF No. 12.)

9 **II.**

10 **LEGAL STANDARD**

11 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the
12 legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro*
13 *v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). In deciding a motion to dismiss, all material
14 factual allegations of the complaint are accepted as true, as well as all reasonable inferences
15 to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996).
16 A court, however, need not accept all conclusory allegations as true. Rather, it must
17 “examine whether conclusory allegations follow from the description of facts as alleged by
18 the plaintiff.” *Holden v. Hagopian*, 978 F.3d 1115, 1121 (9th Cir. 1992) (citation omitted).
19 A motion to dismiss should be granted if a plaintiff’s complaint fails to contain “enough
20 facts to state a claim to relief that is plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
21 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that
22 allows the court to draw the reasonable inference that the defendant is liable for the
23 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550
24 U.S. at 556).

25 **III.**

26 **DISCUSSION**

27 The Second Amendment provides: “A well regulated Militia, being necessary to the
28 security of a free State, the right of the people to keep and bear Arms, shall not be

1 infringed.” U.S. CONST. amend. II. “As interpreted in recent years by the Supreme Court,
2 the Second Amendment protects ‘the right of law-abiding, responsible citizens to use arms
3 in defense of hearth and home.’ ” *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 676–77 (9th
4 Cir. 2017) (en banc) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008));
5 *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (“[O]ur central holding
6 in *Heller* [was] that the Second Amendment protects a personal right to keep and bear arms
7 for lawful purposes, most notably for self-defense within the home.”).

8 Plaintiffs frame their challenge broadly, alleging the UHA and Defendants’
9 “regulations, policies, and practices enforcing the State’s regulatory scheme” are
10 unconstitutional. However, the thrust of Plaintiffs’ challenge is (1) the UHA’s roster and
11 its limitations on the sale and transfer of handguns in California—including its
12 requirements for safety features and the provisions by which handguns are removed from
13 the roster—violate their Second Amendment rights, and (2) the “Hollywood exception”
14 provided for in Cal. Penal Code § 32110(h) violates their rights to equal protection of the
15 laws.¹

16 Before determining whether Plaintiffs have successfully stated a claim for
17 infringement of their Second Amendment rights, the Court addresses two threshold issues
18 raised by Defendants: first, whether Plaintiffs’ claims are foreclosed by the Ninth Circuit’s
19 holding in *Pena v. Lindley*, 898 F.3d 969, 978 (9th Cir. 2018), and second, whether
20 Plaintiffs have standing to bring this challenge.

21 **A. *Pena v. Lindley***

22 In *Pena v. Lindley*, the Ninth Circuit held constitutional the requirement that a
23 semiautomatic handgun have three features—CLI, MDM, and microstamping—in order to
24 be deemed “not unsafe” under the UHA. 898 F.3d at 980–86. *Pena* further rejected an
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26 ¹ The “Hollywood exception” provides that the UHA’s prohibitions shall not apply to the
27 “sale, loan, or transfer of any semiautomatic pistol that is to be used solely as a prop during
28 the course of a motion picture, television, or video production” by an authorized participant
or producer of such event. Cal. Penal Code § 32110(h).

1 equal protection challenge to the so-called “Hollywood exception” functionally identical
2 to the one raised by Plaintiffs here. *Id.* at 986–87.

3 To the extent Plaintiffs challenge those provisions as unconstitutional here, their
4 arguments are foreclosed by *Pena* and therefore rejected. Although Plaintiffs contend *Pena*
5 was wrongly decided, it constitutes binding precedent on this Court. Defendants’ motion
6 to dismiss Count Two, Plaintiff’s equal protection claim, is accordingly granted. *See id.* at
7 986–87.

8 However, *Pena* did not address the issue of the removal of handguns from the roster,
9 and the enactment of AB 2847 postdates *Pena*. Plaintiffs’ challenge on these grounds is
10 thus not barred by *Pena*.

11 **B. Standing**

12 Defendants contend Plaintiffs lack Article III standing to challenge the
13 constitutionality of the three-for-one provision of AB 2847, arguing Plaintiffs allege only
14 a future injury based on speculation about the number of handguns that may be removed
15 from the roster.

16 In order to establish Article III standing, a plaintiff “must have (1) suffered an injury
17 in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that
18 is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S.
19 Ct. 1540, 1547 (2016). Injury in fact is “an invasion of a legally protected interest which
20 is (a) concrete and particularized, and (b) actual or imminent, not conjectural or
21 hypothetical.” *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) (citing *Lujan*
22 *v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). “These requirements overlap
23 significantly with constitutional ripeness, which requires that a case present issues that are
24 definite and concrete, not hypothetical or abstract.” *Skyline Wesleyan Church v. California*
25 *Dep’t of Managed Health Care*, 968 F.3d 738, 747 (9th Cir. 2020) (internal citation and
26 quotation marks omitted). Where, as here, a court sees no distinction between injury and
27 fact and constitutional ripeness, it may “proceed . . . under the same rubric to determine
28 whether both requirements are satisfied.” *Id.*

1 Plaintiffs assert injury based on the certain removal of three grandfathered handguns
2 for each new handgun added to the roster, alleging the UHA “forces and requires” the roster
3 of handguns available for sale to “shrink into oblivion.” (FAC ¶ 56.) Defendants contend
4 the alleged injury is speculative because Plaintiffs offer no supporting facts regarding when
5 or how the number of handguns on the roster will become unacceptably small. Defendants
6 further argue it is not possible that the number of handguns on the roster will shrink into
7 oblivion, because AB 2847 does not apply to revolvers and removal will only occur after
8 a new handgun has been added.

9 However, the FAC specifically alleges the number of handguns on the roster is
10 growing smaller. Over 400 handguns were removed from the roster between the end of
11 2013 and November 8, 2020. (FAC ¶¶ 49, 50.) As of November 8, 2020, there were 830
12 handguns on the roster, and as of January 4, 2021, there were 779. (*Id.* ¶¶ 50–51.)
13 Moreover, as the FAC alleges, all handguns on the roster—including revolvers and newly
14 added handguns—are subject to removal for various reasons, such as failure to pay fees or
15 minor changes to the model. (*Id.* ¶¶ 56–57); *see* Cal. Code of Regs. § 4070(c). The
16 mandatory language of AB 2847, which took effect January 1, 2021, provides CDOJ “shall
17 . . . remove from the roster exactly three semiautomatic pistols,” and “each semiautomatic
18 pistol removed from the roster pursuant to this subdivision shall be considered an unsafe
19 handgun.” Cal. Penal Code § 31910(b)(7). Plaintiffs have thus sufficiently alleged the
20 roster is growing smaller and that it will continue to do so with the operation of AB 2847.

21 “[A] plaintiff possesses Article III standing to bring a pre-enforcement challenge to
22 a state statute which regulates the exercise of a federal constitutional right and threatens a
23 criminal penalty.” *Miller v. Becerra*, 488 F. Supp. 3d 949, 953 (S.D. Cal. 2020) (finding
24 plaintiffs had standing to challenge state statutes regulating “assault weapons”) (citing
25 cases). Such challenges can proceed “only when the plaintiff faces a realistic danger of
26 sustaining a direct injury as a result of the law’s operation or enforcement.” *Id.* (citing
27 *Skyline Wesleyan Church*, 968 F.3d at 747 (internal quotation marks omitted). Here,
28 Plaintiffs face a realistic danger of sustaining injury as a result of AB 2847’s operation

1 because the three-for-one provision of § 31910(b)(7), in combination with the other
 2 provisions of the UHA which are already causing the roster to shrink, impacts their Second
 3 Amendment acquisition rights, as discussed below. At this stage of litigation, the Court
 4 therefore finds Plaintiffs have sufficiently alleged facts to establish standing and ripeness.

5 **C. Second Amendment Inquiry**

6 Having concluded that Plaintiffs' challenge to the roster's removal provisions
 7 survives the above threshold questions, the Court proceeds to the question of whether
 8 Plaintiffs have sufficiently stated a claim for violation of their Second Amendment rights.

9 A Second Amendment challenge requires the Court to conduct a two-step inquiry.
 10 First, it assesses "whether the challenged law burdens conduct protected by the Second
 11 Amendment." *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014). If the law
 12 burdens protected conduct, the Court must "apply an appropriate level of scrutiny" to
 13 determine whether it is constitutional. *Id.* As a preliminary matter, the Court notes it
 14 cannot consider *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020), *vacated*, 988 F.3d 1209
 15 (9th Cir. 2021), on which Plaintiffs rely extensively, in its determination of the issues here,
 16 because on February 25, 2021, the Ninth Circuit vacated the opinion and ordered the case
 17 be reheard en banc.²

18 1. Plaintiffs Sufficiently Plead the UHA Burdens Protected Conduct

19 "Whether a challenged law burdens conduct protected by the Second Amendment
 20 depends on 'the historical understanding of the scope of the right,' including 'whether the
 21 challenged law falls within a well-defined and narrowly limited category of prohibitions
 22 that have been historically unprotected.' " *Pena*, 898 F.3d at 975 (quoting *Jackson*, 746
 23 F.3d at 960). If the ordinance "imposes no burden on conduct falling within the scope of
 24 the Second Amendment's guarantee," then the Court's inquiry is complete, "as a law that
 25 burdens conduct that falls outside the Second Amendment's scope . . . passes constitutional
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28 ² Rehearing en banc is currently scheduled for the week of June 21, 2021.

1 muster.” *Teixeira*, 873 F.3d at 682 (citing *United States v. Marzzarella*, 614 F.3d 85, 89
2 (3d Cir. 2010) (internal quotation marks omitted).

3 Defendants argue the UHA is presumptively lawful as a regulation on the
4 commercial sale of arms and does not prohibit the possession or use of firearms in any
5 fashion. In *Heller*, the Supreme Court included “laws imposing conditions and
6 qualifications on the commercial sale of arms” in a list of “presumptively lawful regulatory
7 measures” consistent with the Second Amendment. 554 U.S. at 626–27; *see Teixeira*, 873
8 F.3d at 683 (“Nothing in the text of the Amendment, as interpreted authoritatively in
9 *Heller*, suggests the Second Amendment confers an independent right to sell or trade
10 weapons.”).

11 In *Pena*, the majority declined to “defin[e] the parameters of the Second
12 Amendment’s individual right in the context of commercial sales,” assuming without
13 deciding that the UHA burdens conduct protected by the Second Amendment. 898 F.3d at
14 976. Judge Bybee, concurring in part and dissenting in part, analyzed the meaning of
15 “presumptively lawful” and concluded that a law imposing conditions on the sale of
16 firearms “carries a presumption of lawfulness,” but “it must be a presumption that is subject
17 to rebuttal.” *Id.* at 1006 (Bybee, J., concurring in part and dissenting in part). The Court
18 agrees. “The Supreme Court in *Heller* could not have meant that anything that *could* be
19 *characterized* as a condition and qualification on the commercial sale of firearms is
20 immune from more searching Second Amendment scrutiny.” *Pena*, 898 F.3d at 1007
21 (emphasis in original); *see Marzzarella*, 614 F.3d at 92 n.8 (“[A] court necessarily must
22 examine the nature and extent of the imposed condition. If there were somehow a
23 categorical exception for these restrictions, it would follow that there would be no
24 constitutional defect in prohibiting the commercial sale of firearms. Such a result would be
25 untenable . . .”).

26 The Court thus adopts Judge Bybee’s analysis, which follows the approach taken by
27 the D.C. Circuit in *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir.
28 2011). Under this approach, a longstanding regulation of commercial sales of arms is

1 presumptively lawful, but a plaintiff may “ ‘rebut this presumption by showing the
2 regulation does have more than a de minimis effect upon his [Second Amendment] right.’ ”
3 *Pena*, 898 F.3d at 1010 (quoting *Heller II*, 670 F.3d at 1253). This “places little burden on
4 the government to show that its regulations are longstanding,” while “giv[ing] the plaintiff
5 an opportunity to show that the regulations substantially infringe Second Amendment
6 rights.” *Id.* (citing *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)). The closer
7 the regulations get to the “core” of the Second Amendment, the less willing a court should
8 be to deem them presumptively lawful. *Id.* “Where the presumption is rebutted, the
9 government would have to defend its regulation under an appropriate level of scrutiny.”
10 *Id.*

11 Accordingly, the Court considers whether Plaintiffs have made an adequate showing
12 to rebut the presumption. It concludes Plaintiffs have sufficiently pled the UHA
13 substantially impacts their Second Amendment rights and thus burdens conduct protected
14 by the Amendment.

15 The Ninth Circuit has recognized that “the Second Amendment protects ancillary
16 rights necessary to the realization of the core right to possess a firearm for self-defense.”
17 *Teixeira*, 873 F.3d at 677. Such rights include an individual’s ability to acquire firearms.
18 The court in *Teixeira* explained: “As with purchasing ammunition and maintaining
19 proficiency in firearms use, the core Second Amendment right to keep and bear arms for
20 self-defense ‘wouldn’t mean much’ without the ability to acquire arms.” *Id.* at 677–78
21 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)).

22 *Teixeira* declined to define “the precise scope of any such acquisition right under the
23 Second Amendment.” *Id.* at 678. Nevertheless, the Ninth Circuit discussed how regulatory
24 measures, such as restrictions on the sale of firearms, may impact the acquisition right. It
25 cited to an 1871 Tennessee Supreme Court case, which observed that “[t]he right to keep
26 arms, necessarily involves the right to purchase them, to keep them in a state of efficiency
27 for use, and to purchase and provide ammunition suitable for such arms, and to keep them
28 in repair.” *Id.* at 679 (quoting *Andrews v. State*, 50 Tenn. 165, 178 (1871)); see also *Ill.*

1 *Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014)
2 (emphasis in original) (“[T]he right to keep and bear arms for self-defense under the Second
3 Amendment . . . must also include the right to *acquire* a firearm, although that acquisition
4 right is far from absolute . . .”). The court further noted that the Third Circuit has “rightly
5 observed that in contemporary society, permitting an overall ban on gun sales ‘would be
6 untenable under *Heller*,’ because a total prohibition would severely limit the ability of
7 citizens to *acquire* firearms.” *Teixeira*, 873 F.3d at 688 (emphasis in original) (quoting
8 *Marzzarella*, 614 F.3d at 92 n.8).

9 Plaintiffs allege the UHA’s roster imposes a significant burden on their Second
10 Amendment rights. Specifically, the FAC alleges the number of handguns available for
11 purchase on the roster continues to decline and ultimately will “shrink into oblivion” as
12 handguns are removed from the roster, including by AB 2847’s three-for-one provision.
13 (FAC ¶ 56.) Taking Plaintiffs’ allegations as true, this limits the ability of law-abiding
14 citizens to acquire firearms, which is critical to ensuring the Second Amendment right to
15 keep arms.

16 Defendants contend there is “no constitutional right to purchase a particular
17 handgun,” *Pena*, 898 F.3d at 973, and that the UHA does not significantly impair Plaintiffs’
18 rights because Plaintiffs can still purchase any of the handguns currently listed on the roster
19 for the purpose of self-defense in the home.³ It is true that currently, Plaintiffs may still
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22 ³ Defendants argue a regulation is presumptively lawful where the right to possess firearms
23 is “not significantly impaired,” citing *Teixeira v. County of Alameda*, 873 F.3d at 688. In
24 *Teixeira*, the Ninth Circuit rejected Plaintiff’s claim that retail establishments have an
25 independent, freestanding right to sell firearms under the Second Amendment unconnected
26 to the rights of citizens to possess firearms, and noted the case presented “a situation in
27 which the right of citizens to acquire and keep arms was not significantly impaired, yet
28 commercial retailers were claiming an independent right to engage in sales.” *Id.* at 682–
83, 686–888. *Teixeira* did not hold that “significant impairment” is the test to determine
whether a regulation is presumptively lawful under *Heller*, and in any event, the Court
finds the *Teixeira* court’s statement does not conflict with the analysis it adopts today,
under which a plaintiff may rebut the presumption of lawfulness by showing a regulation

1 purchase handguns for self-defense. Nevertheless, because Plaintiffs have alleged the
2 number of handguns available for purchase on the roster has steadily declined and will
3 continue to decline, Plaintiffs sufficiently demonstrate the UHA burdens protected conduct
4 by substantially infringing Plaintiffs’ ability to acquire firearms for self-defense. This
5 acquisition right is protected as an “ancillary right[] necessary to the realization of the core
6 right to possess a firearm for self-defense.” *Teixeira*, 873 F.3d at 677. Moreover, the
7 regulations at issue are not longstanding. AB 2847’s three-for-one provision is precisely
8 the opposite, having gone into effect on January 1, 2021. (FAC ¶ 55.) The current roster
9 began on January 1, 2001. *See* Cal. Penal Code § 32015(a) (“On and after January 1, 2001,
10 [CDOJ] shall compile, publish, and therefore maintain a roster . . .”).

11 Accordingly, the Court finds Plaintiffs have rebutted the presumption of lawfulness
12 accorded to the regulation of firearm sales, and have sufficiently alleged the UHA
13 implicates Plaintiffs’ Second Amendment rights at the first step of the analysis.

14 2. Plaintiffs Sufficiently Allege the UHA Violates Their Second Amendment Rights

15 The Court thus moves to the second step of the analysis—assessing whether
16 Plaintiffs state a plausible claim under the appropriate level of scrutiny.

17 “Which level of scrutiny to apply depends on ‘how close the law comes to the core
18 of the Second Amendment right’ and ‘the severity of the law’s burden on the right.’” *Pena*,
19 898 F.3d at 977 (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)).
20 Strict scrutiny is applied if the law “implicates the core of the Second Amendment right
21 and severely burdens that right.” *Id.* (citation omitted). Intermediate scrutiny is appropriate
22 if the law “does not implicate the core Second Amendment right *or* does not place a
23 substantial burden on that right.” *Id.* (citation omitted).

24 The Ninth Circuit previously concluded in *Pena* “the UHA does not effect a
25 substantial burden” and thus “intermediate scrutiny is adequate to protect the claimed

26 _____
27 has “more than a de minimis effect” on and “substantially infringe[s]” her Second
28 Amendment rights. *Pena*, 898 F.3d at 1010 (citing *Heller II*, 670 F.3d at 1253).

1 Second Amendment rights at issue here.” *Id.* at 978–79. Particularly, it noted that “any
2 burden on the right is lessened by the UHA’s exceptions, which allow for the purchase of
3 firearms that do not have the CLI, MDM, and microstamping features,” citing the ability
4 of individuals to purchase handguns lacking those features which are grandfathered on the
5 roster, and the ability to purchase off-roster handguns in private transactions. *Id.* at 977.
6 Plaintiffs contend a higher level of scrutiny is required here, relying heavily on the vacated
7 opinion in *Duncan*.

8 The Court need not decide whether strict or intermediate scrutiny is necessary,
9 because even assuming intermediate scrutiny—the less stringent standard of review—
10 applies here, Plaintiffs sufficiently plead a claim for violation of their Second Amendment
11 rights.

12 “Intermediate scrutiny requires (1) a significant, substantial, or important
13 government objective, and (2) a “reasonable fit” between the challenged law and the
14 asserted objective.” *Pena*, 898 F.3d at 979 (citing *Jackson*, 746 F.3d at 965)). “The
15 government must show that the regulation promotes a substantial government interest that
16 would be achieved less effectively absent the regulation, but not necessarily that the chosen
17 regulation is the “least restrictive means” of achieving the government’s interest.” *Id.*
18 (internal quotation marks omitted) (citing *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir.
19 2015)).

20 Defendants argue AB 2847’s three-for-one provision satisfies intermediate scrutiny
21 because it furthers public safety. Specifically, Defendants contend that by removing
22 grandfathered models when new models complying with the applicable features are added,
23 the three-for-one provision “facilitates a transition over time toward full compliance” with
24 statutorily required features.

25 It is well established that public safety is a substantial government interest. *Pena*,
26 898 F.3d at 981–82. However, the Court is not persuaded there is a “reasonable fit”
27 between the state’s asserted objective and the three-for-one provision. Defendants offer no
28 justification for why the statute requires the removal of three handguns for each new

1 handgun added, instead of, for instance, a proportional one-to-one. Moreover, considering
2 the roster's already diminishing numbers, the three-for-one provision imposes an even
3 greater restriction on the pool of handguns available for sale in California. As Judge Bybee
4 noted in *Pena*, the *only* handguns currently commercially sold in California are those
5 grandfathered from the recent MDM, CLI, and microstamping provisions. 898 F.3d at 989.
6 These handguns are already subject to removal from the roster for nonpayment of fees or
7 minor changes to a model's materials or design, and Plaintiffs allege grandfathered
8 handguns have been steadily dropping off the roster, even before AB 2847's enactment, as
9 a result. In this respect, the roster is already transitioning toward the compliance that
10 Defendants claim as their objective. As Plaintiffs allege, application of the three-for-one
11 provision will accelerate this trend further, rendering the number of handguns available for
12 purchase unacceptably small. In light of this, the Court finds Defendants have not met
13 their burden to show the imposition of the three-to-one provision is a reasonable fit for
14 their stated objective.

15 At this stage of the proceedings, the Court "is not asked to, and does not, decide
16 whether the [challenged provision] is constitutional. Rather, the question is whether
17 Plaintiff's complaint contains 'enough facts to state a claim to relief that is plausible on its
18 face.'" *Peruta v. Cty. of San Diego*, 678 F. Supp. 2d 1046, 1056 (S.D. Cal. 2010) (denying
19 motion to dismiss cause of action for violation of Second Amendment) (quoting *Twombly*,
20 550 U.S. at 570). Taking Plaintiffs' allegations as true, Plaintiffs have sufficiently alleged
21 the UHA, particularly AB 2847's three-to-one provision, violates their Second Amendment
22 rights and thus state a plausible claim upon which relief can be granted. Defendants'
23 motion to dismiss Count One is accordingly denied.

24 **D. Leave to Amend**

25 Generally, when a court dismisses for failure to state a claim under Rule 12(b)(6),
26 leave to amend is granted "even if no request to amend the pleading was made, unless [the
27 court] determines that the pleading could not possibly be cured by the allegation of other
28 facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal citation

1 omitted). Here, to the extent Plaintiffs' claims are dismissed, it is because they are
2 foreclosed by binding Ninth Circuit precedent in *Pena*, as discussed above. Accordingly,
3 the Court finds the deficiencies in Plaintiff's claims cannot possibly be cured by the
4 allegation of other facts and denies leave to amend.

5 **IV.**

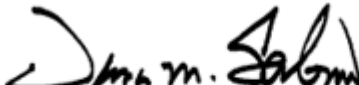
6 **CONCLUSION AND ORDER**

7 For the reasons set out above, the Court ORDERS as follows:

- 8 1. To the extent Plaintiffs' first cause of action challenges the three UHA provisions
9 upheld in *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018), Defendants' motion to
10 dismiss is GRANTED.
- 11 2. Defendants' motion to dismiss is DENIED in all other respects as to Count One of
12 the FAC.
- 13 3. Defendants' motion to dismiss is GRANTED as to Count Two of the FAC.
- 14 4. To the extent Defendants' motion is granted, dismissal is without leave to amend.

15 **IT IS SO ORDERED.**

16 Dated: April 23, 2021

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