California's ban on all new pistol models: Supreme Court amicus brief

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Since 2013, California has outlawed new semiautomatic handguns.

Can a state ban all new handguns? According to a 2-1 panel of the Ninth Circuit, the answer is yes. A pending cert. petition asks the U.S. Supreme Court to consider the question. I filed an amicus brief in support of petition, on behalf of professors (including VC's Randy Barnett) who teach Second Amendment law, and also on behalf of several civil rights organizations (the Independence Institute, where I work; the Millennial Policy Center; and Mountain States Legal Foundation).

Background: The case is *Pena v. Horan*, with Supreme Court docket number i18-843. My amicus brief is here. The Supreme Court's docket page is here. As the docket indicates, California has received an extension for its reply brief until March 6.

A California statute requires that all new models of semi-automatic handguns stamp the handgun's serial number in *two* locations on each round of ammunition. It is possible for a handgun's firing pin to stamp the serial number onto the cartridge's primer, which is a disk in the center of the back side of the ammunition. It not possible to stamp a serial number in *two* locations, as an erudite amicus brief from the Cato Institute explains. Nevertheless, California Attorney General Kamala Harris in May 2013 declared that all conditions for implementation by the statute had been met. Accordingly, all pistol models created since May 2013 are prohibited from commercial sale in California.

Cert. petition amicus briefs were also filed on behalf of 19 states, led by Texas Attorney General Ken Paxton(lower courts have been flouting *Heller* and need guidance from the Supreme Court); and by gun rights organizations led by the Firearms Policy Coalition (detailing how the microstamping law and other California laws have greatly constricted California consumer choice on handguns).

After Attorney General Harris announced the ban on all new pistol models, a suit was brought by four individual plaintiffs, plus the Second Amendment Foundation. Attorneys are Alan Gura (winner of the *Heller* and *McDonald*cases in the Supreme Court) and Don Kilmer. Before the Ninth Circuit, amicus briefs in support of the ban were filed by the Law Center to Prevent Gun Violence, the Brady Center to Prevent Gun Violence, the Los Angeles City Attorney, and Everytown for Gun Safety.

The Ninth Circuit upheld the ban 2-1, with Judge Bybee dissenting.

Amicus brief: California's unprecedented ban prevents consumers from taking advantage of all improvements in pistol safety. Since 2013, new handgun models have introduced better ergonomics, reduced recoil (especially important for people who do not have great upper body strength), durability, and accuracy. Better ergonomics, better sights, easier control, and so on, make the gun safer to use, such as by reducing stray shots.

In *Heller*, the Supreme Court expressly rejected the notion that the Second Amendment could be limited to the types of arms in existence in 1791. In the 2016 *Caetano* case, the Court *per curiam* overturned a Massachusetts decision that had upheld a stun gun ban since stun guns did not exist in 1791. Because technological freezes on constitutional rights are forbidden, California may not bar citizens from buying pistols that were created after 2012.

The Ninth Circuit attempted to blame the California government's pistol freeze on firearms manufacturers, rather than on the government. The panel majority speculated that pistol manufacturers could produce double-microstamped guns but were refusing to do so.

As our brief explains, firearms manufacturers readily comply with California mandates (no matter how foolish) when manufacturers can do so. For example, certain laws in California require that semiautomatic rifles sold in California may not have particular useful features, such as adjustable stocks. (An adjustable stock is ergonomically helpful because people have varying heights and arm lengths, so users can adjust the stock for a good personal fit.) The brief and its appendix describe the hundreds of models of semiautomatic rifles that manufacturers have produced in order to be "California legal."

According to the Supreme Court, a court applying intermediate scrutiny should consider both sides of the evidence. As detailed in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), the first step of intermediate scrutiny analysis is to see if the government has introduced evidence to "fairly support its rationale." According to the Ninth Circuit, California succeeded on the first step, because California had shown that microstamping technology does exist. So the rationale that microstamped cartridges could aid in solving crimes was sufficiently supported.

The second step, according ot *Alameda Books*, is to see if the other side can "cast direct doubt on this rationale, either by demonstrating" that the government's "evidence does not support its rationale or by furnishing evidence that disputes the [government's] factual findings." The Ninth Circuit majority skipped the second step. As Judge Bybee's dissent pointed out, the plaintiffs had introduced extensive evidence showing that double-microstamping as demanded by California is impossible.

"If plaintiffs succeed in casting doubt ... the burden shifts back" to the government "to supplement the record with evidence renewing support." So says *Alameda Books.* But the Ninth Circuit also ignored step three of intermediate scrutiny.

As Judge Bybee's dissent pointed out, "the question of technological feasibility—in the sense of whether a manufacturer can satisfy the testing protocol—is one that can be readily answered in a laboratory." California could have satisfied its step three burden by showing at a firearm exists (even one of the prototypes made by microstamping's inventor) that meets the California standards. California's failure to do so is a tacit admission that compliance is impossible.

A lower court faithfully applying *Heller* would have found the California ban categorically unconstitutional, since it a ban on an entire class of arms (as the Cato brief argues). Had the Ninth Circuit applied ordinary intermediate scrutiny, the ban still would have been stricken. But like many other courts (including the Second and Fourth Circuits) the Ninth Circuit persists in defying *Heller* and nullifying the Second Amendment.

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