

1 Alan Gura (Calif. Bar No. 178221)
Gura & Possessky, PLLC
2 101 N. Columbus St., Suite 405
Alexandria, VA 22314
3 703.835.9085/Fax 703.997.7665

4 Donald E.J. Kilmer, Jr. (Calif. Bar No. 179986)
Law Offices of Donald Kilmer, A.P.C.
5 1645 Willow Street, Suite 150
San Jose, CA 95125
6 408.264.8489/Fax 408.264.8487
Don@DKLawOffice.com

7 Jason A. Davis (Calif. Bar No. 224250)
8 Davis & Associates
27281 Las Ramblas, Suite 200
9 Mission Viejo, CA 92691
949.310.0817/Fax 949.288.6894

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA
12

13	Ivan Peña, Roy Vargas, Doña Croston,)	Case No.
14	Brett Thomas, Second Amendment)	AMENDED COMPLAINT
15	Foundation, Inc., and The Calguns)	42 U.S.C. §§ 1983, 1988
16	Foundation, Inc.,)	
17	Plaintiffs,)	
18	v.)	
19	Wilfredo Cid,)	
20	Defendant.)	

20 **COMPLAINT**

21 COME NOW the Plaintiffs, Ivan Peña, Roy Vargas, Doña Croston, Brett Thomas, the
22 Second Amendment Foundation, Inc. (“SAF”), and the Calguns Foundation, Inc. (“CGF”), by
23 and through undersigned counsel, and complain of Defendant as follows:

24 **THE PARTIES**

25 1. Plaintiff Ivan Peña is a natural person and a citizen of the United States and of the
26 State of California. Plaintiff Peña is a member of SAF. Plaintiff Peña is a board member of
27 CGF and a supporter of its activities.
28

1 2. Plaintiff Roy Vargas is a natural person and a citizen of the United States and of
2 the State of California. Plaintiff Vargas is a member of SAF and a supporter of and participant in
3 CGF activities.

4 3. Plaintiff Doña Croston is a natural person and a citizen of the United States and of
5 the State of California. Plaintiff Croston is a member of SAF and a supporter of and participant
6 in CGF activities.

7 4. Plaintiff Brett Thomas is a natural person and a citizen of the United States and of
8 the State of California. Plaintiff Thomas is a member of SAF. Plaintiff Thomas is a board
9 member of CGF and a supporter of its activities.

10 5. Plaintiff Second Amendment Foundation, Inc. is a non-profit membership
11 organization incorporated under the laws of Washington with its principal place of business in
12 Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including
13 Washington, D.C. The purposes of SAF include education, research, publishing and legal action
14 focusing on the Constitutional right to privately own and possess firearms, and the consequences
15 of gun control. SAF brings this action on behalf of itself and its members.

16 6. Plaintiff The Calguns Foundation, Inc. is a non-profit organization incorporated
17 under the laws of California with its principal place of business in Redwood City, California. The
18 purposes of CGF include supporting the California firearms community by promoting education
19 for all stakeholders about California and federal firearm laws, rights and privileges, and
20 defending and protecting the civil rights of California gun owners. CGF represents these
21 members and supporters, which include California firearm retailers and consumers. CGF brings
22 this action on behalf of itself and its supporters, who possess all the indicia of membership.

23 7. Defendant Wilfredo Cid is the Chief of the California Department of Justice
24 Bureau of Firearms, and as such is responsible for formulating, executing and administering the
25 State of California's laws, customs, practices, and policies at issue in this lawsuit; and is in fact
26 presently enforcing the challenged laws, customs and practices against plaintiffs. Defendant Cid
27 is sued in both his individual and official capacities.

1 15. A semi-automatic handgun is barred from the approved handgun roster if “[i]t
2 does not have a positive manually operated safety device, as determined by standards relating to
3 imported guns promulgated by the federal Bureau of Alcohol, Tobacco, and Firearms.”

4 California Penal Code § 12126(b)(1).

5 16. A center-fire semi-automatic handgun is barred from the approved handgun roster
6 if it is not grandfathered on the list prior to 2007, and “does not have both a chamber load
7 indicator and if it has a detachable magazine, a magazine disconnect mechanism.” California
8 Penal Code § 12126(b)(5). A handgun that fails to meet this definition is not eligible for “safety”
9 testing. California Penal Code § 12130(d)(2).

10 17. The California Department of Justice often rejects chamber load indicators which,
11 in its view, do not sufficiently meet the requirement, calling for “a device that plainly indicates
12 that a cartridge is in the firing chamber. A device satisfies this definition if it is readily visible,
13 has incorporated or adjacent explanatory text or graphics, or both, and is designed and intended
14 to indicate to a reasonably foreseeable adult user of the pistol, without requiring the user to refer
15 to a user’s manual or any other resource other than the pistol itself, whether a cartridge is in the
16 firing chamber.” California Penal Code § 12126(c).

17 18. A rimfire semi-automatic handgun is also barred from the approved handgun
18 roster if it is not grandfathered on the list prior to 2006, and “it does not have a magazine
19 disconnect mechanism, if it has a detachable magazine.” California Penal Code § 12126(b)(4). A
20 handgun that fails to meet this definition is not eligible for “safety” testing. California Penal
21 Code § 12130(d)(3).

22 19. Listings on the California “safe handgun” roster are valid for one year. 11 Calif.
23 Code of Regulations § 4070(a), (b). “A handgun model listing on the Roster of Certified
24 Handguns must be renewed prior to expiration in order to remain valid.” 11 Calif. Code of
25 Regulations § 4071. Renewal is accomplished by returning the renewal notice and a fee. 11
26 Calif. Code of Regulations § 4071(b), (c). “If the manufacturer/importer or other responsible
27 person fails to comply with these renewal requirements, the handgun model listing shall expire
28 by operation of law at midnight on the date of expiration of the listing and the model will be

1 removed from the Roster.” 11 Calif. Code of Regulations § 4071(d).

2 20. The California Department of Justice charges firearms manufacturers, importers,
3 and dealers annual fees, ostensibly to operate the handgun roster program. California Penal Code
4 § 12131(a)(1). “Any pistol, revolver, or other firearm capable of being concealed upon the person
5 that is manufactured by a manufacturer who manufactures or causes to be manufactured, imports
6 into the state for sale, keeps for sale, or offers or exposes for sale any pistol, revolver, or other
7 firearm capable of being concealed upon the person in this state, and who fails to pay any fee
8 required pursuant to paragraph (1), may be excluded from the roster.” California Penal Code §
9 12131(a)(2).

10 21. The initial and renewal annual listing fees for inclusion on the “safe handgun”
11 roster are \$200. 11 Calif. Code of Regulations § 4072(b).

12 22. “Other than the DOJ, only the manufacturer/importer of a handgun model is
13 authorized to submit that handgun model to a DOJ-Certified Laboratory for testing.” 11 Calif.
14 Code of Regulations § 4059(c).

15 23. A handgun can remain on the roster if its manufacturer/importer goes out of
16 business or discontinues the model, provided that the model is not being offered for sale to
17 licensed dealers, and “a fully licensed wholesaler, distributor, or dealer submits a written request
18 to continue the listing and agrees to pay the annual maintenance fee.” 11 Calif. Code of
19 Regulations § 4070(d). So long as a handgun is sold to dealers outside of California, the
20 handgun’s manufacturer can cause the sale of that handgun to be forbidden inside California by
21 failing to submit the gun for testing in that state or refusing to pay the annual \$200 fee.

22 24. “A manufacturer/importer or other responsible party may submit a written request
23 to list a handgun model that was voluntarily discontinued or was removed for lack of payment of
24 the annual maintenance fee.” 11 Calif. Code of Regulations § 4070(e). The request may be
25 approved, and the handgun restored to the “safe gun” roster, provided the fee is paid.

26 25. Otherwise safe handguns, that have passed California’s “safety” tests, do not
27 become “unsafe” merely because an annual fee is not paid by their manufacturer.

28 ///

1 *Narrow and Counter-Productive Nature of the “Handgun Roster” Scheme*

2 26. Handguns lacking “safety” devices are handguns of the kind in common use
3 throughout the United States for lawful purposes, including self-defense.

4 27. Semi-automatic handguns lacking chamber load indicators and/or magazine
5 disconnect mechanisms are handguns of the kind in common use throughout the United States
6 for lawful purposes, including self-defense.

7 28. Like all mechanical devices, a handgun safety mechanism may fail or be misused
8 by the user of a handgun.

9 29. A chamber load indicator is a mechanical device that may fail or be misinterpreted
10 by the user of a handgun.

11 30. A magazine disconnect mechanism is a mechanical device that may fail.

12 31. California law requires that prospective handgun purchasers successfully complete
13 at least two tests demonstrating their knowledge of gun safety: a written test pertaining to
14 handgun safety and a operational safety test for each handgun purchased. Within the knowledge
15 required for successful completion of the tests is the fundamental rule of gun safety holding that
16 all guns should be treated at all times as though they are loaded, to prevent reliance on potentially
17 faulty or misinterpreted mechanical devices and to promote safe gun handling habits. Reliance on
18 safety mechanisms, chamber load indicators, or magazine disconnect devices is not an
19 appropriate substitute for safe gun handling practices.

20 *Exemptions from the “Handgun Roster” Scheme*

21 32. California Penal Code § 12125(b)(3) exempts “curios and relics” as defined by 27
22 C.F.R. § 478.11 from the prohibition of California Penal Code § 12125(a).

23 33. California Penal Code § 12125(b)(4) provides an additional exemption for “[t]he
24 sale or purchase of any pistol, revolver or other firearm capable of being concealed upon the
25 person, if the pistol, revolver, or other firearm is sold to, or purchased by, the Department of
26 Justice, any police department, any sheriff's official, any marshal's office, the Youth and Adult
27 Correctional Agency, the California Highway Patrol, any district attorney's office, or the military
28 or naval forces of this state or of the United States for use in the discharge of their official duties.

1 Nor shall anything in this section prohibit the sale to, or purchase by, sworn members of these
2 agencies of any pistol, revolver, or other firearm capable of being concealed upon the person.”

3 34. It is not illegal in California to import a handgun not on the state’s approved
4 handgun roster when moving into the state without the intention of selling it, nor is it illegal in
5 California to possess or use an unrostered handgun that is otherwise lawful to possess or use.

6 35. California Penal Code § 12132 provides various exemptions from the approved
7 handgun roster requirements, including private party transfers, intra-familial transfers including
8 gifts and bequests, various loans, and handguns used in Olympic sports.

9 36. California Penal Code § 12133 exempts from the approved handgun roster
10 requirements single-action revolvers manufactured prior to 1900 that qualify as curios or relics,
11 single-action revolvers longer than 7 ½ inches with a minimum 5-cartridge capacity, and single-
12 shot pistols with a minimum barrel length of 6 inches and minimum overall length of 10 ½
13 inches.

14 *California’s Enforcement of the “Handgun Roster” Scheme Against Plaintiffs:*

15 *Barring Sale of a Handgun Previously Listed on the Roster*

16 37. Plaintiff Ivan Peña has sought to purchase a Para USA (Para Ordnance) P1345SR
17 / Stainless Steel .45 ACP 4.25", and has identified a willing seller who stands ready to deliver
18 said handgun to Plaintiff, but Plaintiff cannot purchase and take possession of that handgun as
19 that handgun is not, cannot, and will not be placed on the California Safe Handgun Roster by
20 Defendant.

21 38. Mr. Peña’s Para USA P1345SR was listed on California’s Handgun Roster until
22 December 31, 2005, when it was discontinued and its listing not renewed.

23 *Barring Sale of a Handgun Designed for Left-Handed Use*

24 39. Plaintiff Roy Vargas has sought to purchase a Glock 21 SF with an ambidextrous
25 magazine release, and has identified a willing seller who stands ready to deliver said handgun to
26 Plaintiff, but Plaintiff cannot purchase and take possession of that handgun as that handgun is
27 not, cannot, and will not be placed on the California Safe Handgun Roster by Defendant.

28 40. Plaintiff Vargas was born without an arm below the right elbow.

1 41. The Glock 21 SF-STD is listed on the California Handgun Roster.

2 42. The Glock-21 SF with ambidextrous magazine release is better suitable for left-
3 handed shooters such as Mr. Vargas, as opposed to the approved version of the Glock 21SF-
4 STD.

5 43. Glock's efforts to add the SF21 with ambidextrous magazine release to the
6 California Roster have failed.

7 44. However, Defendant permits Glock customers to have their SF21-STD handguns
8 fitted with an ambidextrous release at the Glock factory. In other words, California permits the
9 sale of a Glock 21SF-STD, and the alteration of that handgun by Glock to add an ambidextrous
10 magazine release, but will not allow consumers to purchase new Glock 21SF's with an
11 ambidextrous magazine release.

12 *Barring Sale of a Handgun Because It Is Not In An Approved Color*

13 45. Plaintiff Doña Croston has sought to purchase a Springfield Armory XD-45
14 Tactical 5" Bi-Tone stainless steel/black handgun in .45 ACP, model number XD9623, and has
15 identified a willing seller who stands ready to deliver said handgun to Plaintiff, but Plaintiff
16 cannot purchase and take possession of that handgun as that handgun is not, cannot, and will not
17 be placed on the California Handgun Roster by Defendant.

18 46. Other models of this identical gun – but in different colors – are listed on the
19 handgun roster and are thus available to Ms. Croston: the XD-45 Tactical 5" .45 ACP
20 in black (model XD9621), the XD-45 Tactical 5" .45 ACP in OD Green (model XD9622), and
21 the XD-45 Tactical 5" .45 ACP in Dark Earth (XD9162).

22 47. So long as Springfield Armory, the manufacturer of the XD-45, renews these
23 handguns' California registrations, they will remain available for purchase in California.

24 48. The particular Bi-Tone XD-45 that Ms. Croston would possess, however, was not
25 released until after California required newly-listed guns to have a chamber load indicator and
26 magazine disconnect device. While the identical handguns with a different finish were
27 grandfathered, Springfield Armory could not get the XD-45 in .45 ACP and Bi-Tone finish
28 registered given the new listing requirements.

1 49. The XD-45 Bi-Tone in .45 has a loaded chamber indicator, but the California
2 Department of Justice has decided it does not qualify under Penal Code § 12126(c).

3 *Barring Sale of a Handgun Held Protected Under the Second Amendment*

4 50. Plaintiff Brett Thomas has sought to purchase a High Standard Buntline style
5 revolver, and has identified a willing seller who stands ready to deliver said handgun to Plaintiff,
6 but Plaintiff cannot purchase and take possession of that handgun as that handgun is not, cannot,
7 and will not be placed on the California Handgun Roster by Defendant.

8 51. Mr. Thomas's revolver is identical to the gun defendants were ordered to register
9 by the United States Supreme Court in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008),
10 because its possession was deemed protected by the Second Amendment.

11 **FIRST CLAIM FOR RELIEF**
12 **U.S. CONST., AMEND. II, 42 U.S.C. § 1983**

13 52. Paragraphs 1 through 51 are incorporated as though fully stated herein.

14 53. Plaintiff Ivan Peña's Para USA P1345SR is an arm whose possession is protected
15 by the Second Amendment.

16 54. Plaintiff Roy Vargas's Glock 21 SF with ambidextrous magazine release is an arm
17 whose possession is protected by the Second Amendment.

18 55. Plaintiff Doña Croston's Springfield Armory XD-45 is an arm whose possession
19 is protected by the Second Amendment.

20 56. Plaintiff Brett Thomas's High Standard revolver is an arm whose possession is
21 protected by the Second Amendment.

22 57. By maintaining and enforcing a set of laws banning access to handguns whose
23 possession is protected by the Second Amendment, Defendant is propagating customs, policies,
24 and practices that violate the Second Amendment to the United States Constitution, facially and
25 as applied against the individual plaintiffs in this action, damaging plaintiffs in violation of 42
26 U.S.C. § 1983. The Second Amendment applies to the states through the Fourteenth
27 Amendment. Plaintiffs are therefore entitled to permanent injunctive relief against such customs,
28 policies, and practices.

**SECOND CLAIM FOR RELIEF
U.S. CONST., AMEND. XIV, 42 U.S.C. § 1983**

58. Paragraphs 1 through 57 are incorporated as though fully stated herein.

59. Defendant's handgun roster program violates Plaintiffs' rights to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution, in that Defendant allows some people access to handguns barred to plaintiffs, and otherwise make arbitrary, capricious, irrational, and otherwise unjustifiable distinctions among the handguns that Defendant deigns to allow Plaintiffs in their exercise of fundamental Second Amendment rights. Defendant is thereby propagating customs, policies, and practices that violate the Fourteenth Amendment to the United States Constitution, facially and as applied against the individual plaintiffs in this action, damaging plaintiffs in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to permanent injunctive relief against such customs, policies, and practices.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that judgment be entered in their favor and against Defendant as follows:

1. An order permanently enjoining defendant, his officers, agents, servants, employees, and all persons in active concert or participation with him who receive actual notice of the injunction, from enforcing Title 4, Part 2, Chapter 1.3 of the California Penal Code, §§ 12125, et seq.
2. Costs of suit, including attorney fees and costs pursuant to 42 U.S.C. § 1988;
3. Declaratory relief consistent with the injunction; and
4. Any other further relief as the Court deems just and appropriate.

Dated: May 11, 2009

Respectfully submitted,

Alan Gura (Calif. Bar No. 178221)
Gura & Possessky, PLLC
101 N. Columbus St., Suite 405
Alexandria, VA 22314
703.835.9085/Fax 703.997.7665

Jason A. Davis (Calif. Bar No. 224250)
Davis & Associates
27281 Las Ramblas, Suite 200
Mission Viejo, CA 92691
949.310.0817/Fax 949.288.6894

///

///

