

In the Supreme Court of the State of California

**NATIONAL SHOOTING SPORTS
FOUNDATION, INC., et al.,**

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA,

Defendant and Respondent.

Case No. S239397

Fifth Appellate District, Case No. F072310
Fresno County Superior Court, Case No. 14CECG00068
The Honorable Donald S. Black, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

**SUPREME COURT
FILED**

JUN 21 2017

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ISSUE PRESENTED

May a court hold a trial to determine the practical feasibility of compliance with a technical standard imposed by the Legislature as a condition on the sale of a new product in California, based on a non-constitutional claim that the statutory standard is facially invalid if a trier of fact concludes it would be “impossible” to comply with?

INTRODUCTION

Over the last ten years, handguns have been used to commit over 10,000 homicides in California.¹ In 2015 alone, handguns were used in roughly 50 percent of homicides, where the type of weapon was identified.² A recurrent problem in addressing these and other crimes involving handguns is that it is often difficult or impossible to reliably link a crime to a particular gun.

In 2007, the Legislature decided to try a new approach to the problem by adding “microstamping” to the list of state handgun standards. (Stats. 2007, ch. 572.) After the law’s effective date, new models of a particular type of handgun, semiautomatic pistols, cannot be added to the State’s roster of guns certified for sale in California unless they are equipped with a technology that stamps a microscopic array of identifying characters unique to the gun on each fired cartridge—or with some equally effective alternative technology that allows law enforcement to connect a spent cartridge with a particular gun. (Pen. Code, § 31910, subd. (b)(7).)³ At the time of the law’s enactment, and perhaps even today, the relevant

¹ See California Department of Justice, Homicide in California (2015) p. 28, Table 21 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/homicide/hm15/hm15.pdf>> [as of June 16, 2017].

² *Ibid.*

³ All further undesignated statutory references are to the Penal Code.

technology could be fairly described as emerging. Indeed, the trade group plaintiffs in this case argued strenuously before the Legislature that microstamping was untested and unproven. But the Legislature determined that the industry should bring the new technology—or some equally effective alternative—to market, or be limited to selling the many models of semiautomatic pistols already on the State’s roster.

Plaintiffs seek a court order declaring the microstamping law invalid and enjoining the State from enforcing it. They do not, however, assert that the law violates the state or federal Constitutions. Instead, they argue that microstamping is not technically feasible, and rely on Civil Code section 3531—a maxim of jurisprudence, embodied in the Code in 1872, declaring that “[t]he law never requires impossibilities.” The Court of Appeal agreed, concluding that plaintiffs are entitled to have a trial court assess the feasibility of microstamping, and enjoin enforcement of the law if it concludes that there is no workable technology currently available that complies with the statutory standard.

That decision should be reversed. Maxims of jurisprudence can help courts ascertain and effectuate the Legislature’s intent when construing statutes. They do not give rise to substantive rights or causes of action, or empower courts to rewrite or invalidate later-enacted laws. The “impossibility” maxim does not authorize courts to create a “feasibility” exemption to the technical standard for new-model semiautomatic pistols clearly set out by the Legislature in the microstamping law.

Allowing any such claim would also violate the constitutional separation of powers. (Cal. Const., art. III, § 3.) Courts have no authority to strike down state laws unless they violate the state or federal Constitution. Recognizing plaintiffs’ non-constitutional claim would invade the Legislature’s core lawmaking function, inviting parties unhappy with a legislative outcome to continue factual or policy disputes in the

courts. If plaintiffs believe they cannot, or should not be forced to, implement or develop microstamping or equivalent technology as a condition of bringing new models of semiautomatic pistols to market in California, they must continue to make that argument to the Legislature—not to the courts.

BACKGROUND

California adopted the Unsafe Handgun Act in 1999 in an effort to bring uniformity to the State's rules governing the sale of handguns. (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 912.)⁴ Among other things, the Act establishes a set of standards that all models of handguns sold in the State must meet. (*Ibid.*; § 31910.) For example, handguns must fire repeatedly without malfunction, and must not discharge when dropped. (§§ 31900, 31905, 31910, subd. (b).) The Act charges the California Department of Justice with testing new models of handguns for compliance with the Act's standards. (§§ 31905, 32000, 32015; Cal. Code Regs., tit. 11, §§ 4046-4075.) Handguns that meet the criteria and pass the required tests are placed on DOJ's roster of handguns certified for sale. (§ 32015; Cal. Code Regs., tit. 11, § 4070.) There are over 730 models of handguns, including hundreds of semiautomatic pistols, currently on the roster that may be sold in the State. (See California Department of Justice, *Roster of Handguns Certified for Sale* <<http://certguns.doj.ca.gov/>> [as of June 16, 2017].)⁵ Manufacturers may

⁴ A "handgun" is a firearm that can be concealed on a person and includes pistols, revolvers, and Derringers. (§ 16640, subd. (a).)

⁵ A "semiautomatic pistol" is a pistol that can fire a fixed cartridge, extract and eject the fired cartridge, and load a fresh cartridge into the chamber, each time the trigger is pulled. (§ 17140; see also RA 63 [diagram of a semiautomatic pistol].)

keep their handguns on the approved roster by paying a \$200 annual fee. (Cal. Code Regs., tit. 11, §§ 4071-4072.) Models not listed on the roster may not be imported into, manufactured, or sold in the State. (§ 32000.)

The Crime Gun Identification Act of 2007 (Stats. 2007, ch. 572) added a further criterion that new models of semiautomatic pistols must meet before they can be listed on the roster of handguns certified for sale. (See § 31910, subd. (b)(7).)⁶ Specifically, the pistol must have a unique array of microscopic characters—letters, numbers, graphics, or symbols—etched or imprinted in “two or more places on the interior surface or internal working parts of the pistol.” (§ 31910, subd. (b)(7)(A).) And the pistol must transfer that unique character set onto a cartridge when fired. (*Ibid.*) This is commonly referred to as “microstamping.” Alternatively, the statute allows a pistol to be added to the State’s roster if it is equipped with some other method of connecting a spent cartridge to the gun from which it was fired, provided that the alternative is of “equal or greater reliability” to microstamping and has been approved by the Attorney General. (§ 31910, subd. (b)(7)(B).)

The “two or more places” requirement was added to address concerns that criminals would attempt to alter microstamped pistols to avoid detection. Microstamping was first tested by etching characters onto a gun’s firing pin. (See, e.g., RA 64.) But those engravings can be defaced (by filing the characters off) or removed altogether (by replacing the firing pin). (See Sen. Com. on Pub. Safety, Rep. on Bill No. 1471 (2007-2008

⁶ This new requirement applies only to models proffered for certification after the Act’s effective date. (§ 31910, subd. (b)(7)(A).) It does not prohibit the manufacture or sale of semiautomatic pistols that were “already listed on the [State’s] roster” at the time the microstamping requirement took effect. (*Ibid.*)

Reg. Sess.) June 26, 2007, p. 8 (Sen. Pub. Safety Rep.).⁷ The Legislature responded to those possibilities by adopting the dual-microstamping mandate. (§ 31910, subd. (b)(7)(A).)

At the time that the microstamping bill became law, one form of microstamping technology was patented. (See Sen. Pub. Safety Rep. at pp. 9-10.) Accordingly, the Legislature provided that the law would not take effect until the Department of Justice certified, based on its examination of existing patents, “that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions.” (§ 31910, subd. (b)(7)(A); see also Sen. Pub. Safety Rep. at pp. 9-11.)

The Legislature adopted the microstamping requirement after considering evidence of this new technology’s crime-solving potential. (Sen. Pub. Safety Rep. at p. 6.) The Legislature was especially interested in microstamping’s ability to help police investigate unsolved murders. (*Ibid.*) In the years before the microstamping law was adopted, no arrest had been made in about 45 percent of all homicides in California. (*Ibid.*) During that time, handguns were the most common weapon used to commit homicides, and semiautomatic pistols were the most commonly sold handgun. (*Ibid.*)

The Legislature was also interested in microstamping’s crime-prevention potential. Microstamping promised to give police leads that would allow them to apprehend dangerous individuals who committed one crime before they went on to commit others. (Sen. Pub. Safety Rep. at p. 6.) It could be especially useful in crimes where cartridges were the only evidence left at the scene, such as drive-by shootings. (*Ibid.*)

⁷ This report is available online at <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200720080AB1471> [as of June 16, 2017]. It is also contained in the record at 3 JA 544-564.

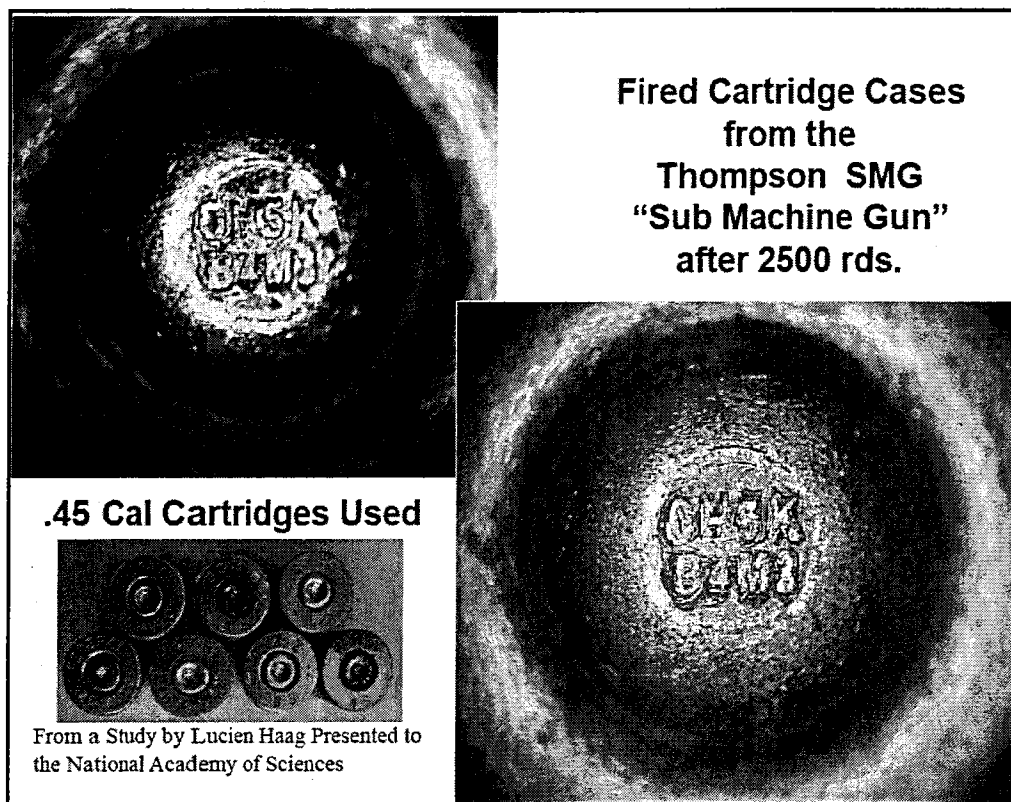
Microstamping also promised to discourage trafficking of new semiautomatic pistols by deterring legal buyers from making straw purchases on behalf of felons and other people who may not lawfully possess firearms. (*Id.* at p. 12.)

When it was introduced, the microstamping bill generated intense interest from both advocates and opponents. A wide range of stakeholders—including law enforcement groups, the chiefs of over 60 police departments, and political leaders—supported the bill. (Sen. Rules Com., Office of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1471 (2007-2008 Reg. Sess.) Aug. 28, 2007, pp. 3-5.)⁸ Several organizations—including plaintiffs National Shooting Sports Foundation, Inc. (NSSF) and Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI)—opposed it. (*Id.* at pp. 5-6.)

As the bill made its way through the legislative process, concern arose over whether microstamping could be effectively implemented. As a report prepared by the Senate Public Safety Committee noted, the “most significant question regarding the efficacy of the technology is whether the stamp would actually work the way the manufacturer claims; that is, would the stamp be legible under most real-life circumstances?” (Sen. Pub. Safety Rep. at p. 8.) The Legislature received evidence demonstrating that the answer to that question was yes. The bill’s author, for example, distributed a presentation to the Senate Public Safety Committee that depicted microstamped cartridges. (RA 57-73.) He specifically drew the committee’s attention to a slide (reprinted below) that “depict[ed] the 2501st round that was fired from a weapon to test the efficacy of this

⁸ This report is available online at <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200720080AB1471> [as of June 16, 2017]. It is also contained in the record at 4 JA 627-636.

technology,” and that showed “very clearly ... [that] anyone can determine the make, model, and serial number of the weapon” by examining an expelled cartridge. (Testimony of Assemblymember Mike Feuer, Senate Public Safety Committee – Part 1, June 26, 2007, at 55:30-56:10 (Feuer Testimony).)⁹

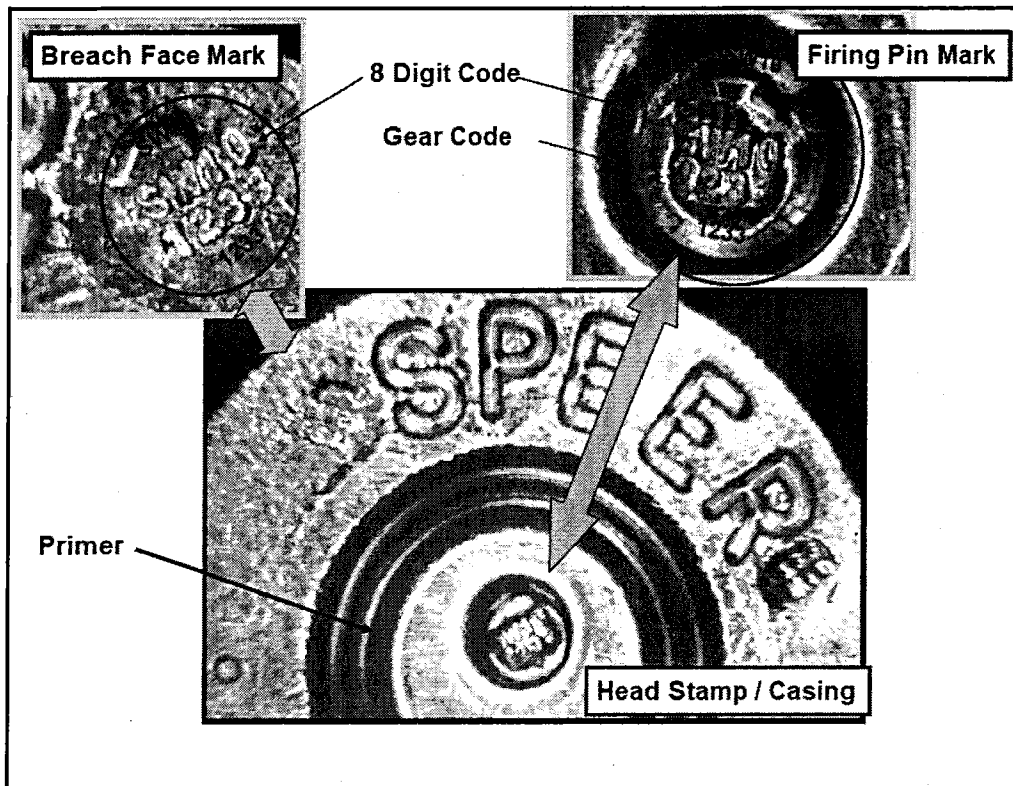


(RA 67.)¹⁰ That presentation also included a slide (reprinted below) featuring a photograph of a cartridge that had been fired from a pistol

⁹ Available at <<http://senate.ca.gov/media-archive?title=&startdate=06%2F26%2F2007&enddate=06%2F26%2F2007>> [as of June 16, 2017].

¹⁰ The images reproduced in this brief were copied from a version of the presentation distributed to the Senate Public Safety Committee that was downloaded from the internet. The same slides are in the record. (RA 65, 67.) The internet version appears in this brief because it is clearer, and can be found at <<http://documentslide.com/documents/cracking-the-case-microstamping-joshua-horwitz-educational-fund-to-stop-gun-violence-jhorwitzcsgvorg.html>> [as of June 16, 2017].

equipped with characters etched onto the gun's breech face—that is, a part *other* than the gun's firing pin.



(RA 65.) The bill's author argued that these slides and other studies “show [that microstamping] works.” (Feuer Testimony at 55:30; see also *id.* at 53:00-56:00; 1:24:30-1:26:30.) In addition, the Legislature considered a study that summarized the results of several tests that evaluated microstamping's efficacy. (Sen. Pub. Safety Rep. at pp. 8-9, citing Krivosta, *NanoTag™ Markings from Another Perspective* (Winter 2006) vol. 38, No. 1, AFTE Journal 41 (the Krivosta study).) One of those tests found that the entire array of microscopic characters could be discerned on 54 of the 100 cartridges expelled from pistols whose firing pins had been etched with a “large[] font” microstamp. (Krivosta, *supra*, at pp. 42-43.)

The Legislature also received evidence that cast doubt on whether this new technology was ready for implementation. The Krivosta study concluded that microstamps could not be read on the “vast majority” of

cartridges expelled from a pistol whose firing pins had been etched with a smaller microstamp. (Krivosta, *supra*, at p. 42.) The Governor's Office of Planning and Research expressed concern that the technology had been "insufficiently developed and tested," and that some studies had concluded that microstamped pistols "fail[ed] to strike with enough force to leave a complete imprint" on cartridges. (4 JA 616-618.)

Trade groups, including plaintiffs NSSF and SAAMI, also wrote letters to the Governor and the bill's sponsor, urging them to reject the proposal because microstamping technology was unreliable. (See RA 18-23; see also RA 24-28, 50-55, 90-99.) They argued that the Krivosta study demonstrated that microstamps could not be legibly imprinted onto cartridges ejected from pistols featuring etched firing pins. (RA 19-20.) They also argued that the bill should not become law because of "serious question[s] about whether manufacturers can satisfy" the law's "two or more places" mandate. (RA 96.) While they agreed that it was possible to etch microstamps onto a pistol's firing pin, NSSF and SAAMI contended that it was unclear where a second set of markings could be placed. (RA 96.) The bill should not become law, they argued, because "no independent research ha[d] been done" to test whether microstamps etched on parts other than the firing pin would reliably "reproduce legible markings" onto cartridges. (RA 97.)

After weighing the evidence and arguments concerning the state of the technology, the Legislature adopted the microstamping law. (Stats. 2007, ch. 572.) On May 17, 2013, the Department of Justice certified the absence of patent restrictions (1 JA 18), which caused the microstamping requirement to take effect (§ 31910, subd. (b)(7)(A)).

STATEMENT OF THE CASE

Shortly after the microstamping requirement took effect, NSSF and SAAMI (collectively, NSSF) filed a complaint in Fresno County Superior

Court. (1 JA 9-18.) NSSF did not allege that the microstamping law violated any provision of the state or federal Constitutions. (*Ibid.*) Instead, it asked for a “judicial declaration” that the microstamping law was “invalid as a matter of law and cannot be enforced because it is impossible for a firearm manufacturer to implement microstamping technology.” (1 JA 16.) NSSF alleged that it was entitled to relief because “no semi-automatic pistol can be designed or equipped with a microscopic array of characters identifying the make, model and serial number of the pistol that are etched or otherwise imprinted in two or more places ... and that can be legibly ... transferred from both such places to a cartridge case when the firearm is fired.” (1 JA 16-17.) NSSF asked the trial court to enjoin the State from “taking any action to enforce” the microstamping law and from “taking any action to prosecute any person or entity” that failed to comply with its requirements. (1 JA 17.)

The State demurred, arguing that NSSF’s assertion of “impossibility” failed to state a cognizable claim. (1 JA 28-32.) In its opposition, NSSF confirmed that it was not raising a constitutional challenge—stating, for example, that it was “not advancing any claims premised on the Second Amendment.” (1 JA 95.)¹¹ It argued that the demurrer should be overruled, because a statute “that is otherwise void need not also be unconstitutional to be subject to challenge.” (1 JA 93.) NSSF contended that the trial court could enjoin the microstamping law under Civil Code section 3531, a maxim of jurisprudence that provides that the “law never

¹¹ California’s Unsafe Handgun Act, including the microstamping requirement, has been challenged under the Second Amendment in another suit. (See *Peña v. Lindley* (E.D. Cal. Feb. 26, 2015) No. 09-cv-1185, 2015 WL 854684.) The Ninth Circuit heard oral argument in that case on March 16, 2017, but has yet to issue its decision. (See *Peña v. Lindley*, Ninth Circuit Case No. 15-15449, ECF No. 10359372.)