

S239397

In the Supreme Court of the State of California

NATIONAL SHOOTING SPORTS FOUNDATION, INC.,

and

SPORTING ARMS AND AMMUNITION MANUFACTURERS'

INSTITUTE, INC.,

Plaintiffs and Appellants,

vs.

STATE OF CALIFORNIA,

Defendant and Respondent.

SUPREME COURT
FILED

AUG 21 2017

Jorge Navarrete Clerk

Deputy

APPELLANTS' ANSWER BRIEF ON THE MERITS

On Review From the Court of Appeal for the Fifth Appellate District
5th Civil No. F072310

After Appeal From the Superior Court of the State of California
for the County of Fresno, Case Number 14CECG00068
Honorable Donald S. Black

LEWIS BRISBOIS BISGAARD & SMITH LLP

Daniel C. DeCarlo, State Bar No. 160307

*Lance A. Selfridge, State Bar No. 101940

633 West 5th Street, Suite 4000

Los Angeles, California 90071

Telephone: 213.250.1800 • Facsimile: 213.250.7900

Dan.DeCarlo@lewisbrisbois.com • Lance.Selfridge@lewisbrisbois.com

*Attorneys for Plaintiffs and Appellants National Shooting Sports Foundation,
Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.*

S239397

In the Supreme Court of the State of California

NATIONAL SHOOTING SPORTS FOUNDATION, INC.,

and

SPORTING ARMS AND AMMUNITION MANUFACTURERS'

INSTITUTE, INC.,

Plaintiffs and Appellants,

vs.

STATE OF CALIFORNIA,

Defendant and Respondent.

APPELLANTS' ANSWER BRIEF ON THE MERITS

On Review From the Court of Appeal for the Fifth Appellate District
5th Civil No. F072310

After Appeal From the Superior Court of the State of California
for the County of Fresno, Case Number 14CECG00068
Honorable Donald S. Black

LEWIS BRISBOIS BISGAARD & SMITH LLP

Daniel C. DeCarlo, State Bar No. 160307

*Lance A. Selfridge, State Bar No. 101940

633 West 5th Street, Suite 4000

Los Angeles, California 90071

Telephone: 213.250.1800 • Facsimile: 213.250.7900

Dan.DeCarlo@lewisbrisbois.com • Lance.Selfridge@lewisbrisbois.com

*Attorneys for Plaintiffs and Appellants National Shooting Sports Foundation,
Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.*

TABLE OF CONTENTS

	<u>Page</u>
I. ISSUE PRESENTED.....	8
II. INTRODUCTION.....	8
III. STATEMENT OF THE CASE.....	11
A. The Parties.....	11
B. The Enactment of Penal Code Section 31910, Subdivision (b)(7)(A).....	11
C. The Impossibility of Dual Placement Microstamping.....	16
D. The Loss to Appellants Caused by Penal Code Section 31910, Subdivision (b)(7)(A).....	18
IV. PROCEDURAL POSTURE.....	20
A. Relief Sought in the Trial Court.....	20
B. Judgment from which Appellants Appeal.....	21
C. Reversal by the Court of Appeal.....	23
D. Review by the Supreme Court.....	25
V. ARGUMENT.....	25
A. The Court of Appeal Correctly Determined that Appellants’ Action to Enjoin the Enforcement of Penal Code Section 31910, Subdivision (b)(7)(A), Does Not Violate the Separation of Powers Doctrine.....	25
1. Appellants’ Action Does Not Interfere with the Core Powers of the Legislature Because the Legislature May Not Enact Legislation that Is Palpably Arbitrary, Such as Appellants Allege Penal Code Section 31910, Subdivision (b)(7)(A), To Be.....	26

2.	By Seeking to Enjoin Penal Code Section 31910, Subdivision (b)(7)(A), on the Ground that it Requires Impossible Compliance, Appellants Are Not Challenging the Wisdom of the Legislature’s Underlying Goal of Crime Reduction.	29
3.	No Authority Permits the Enactment of Legislation that Requires the Development of Technology that Is Completely Impossible to Implement.	32
B.	THE MAXIM OF JURISPRUDENCE ON WHICH APPELLANTS RELY, CIVIL CODE SECTION 3531, PROVIDING THAT THE LAW NEVER REQUIRES IMPOSSIBILITIES, ALLOWS APPELLANTS TO SEEK AN INJUNCTION AGAINST PENAL CODE SECTION 31910, SUBDIVISION (b)(7)(A), ON THE GROUND OF IMPOSSIBLE COMPLIANCE.	36
1.	The Separation of Powers Doctrine Requires the Judiciary to Accord Civil Code Section 3531 the Same Operative Force as Any Other Legislative Enactment.....	37
(a)	Maxims of Jurisprudence Have Historically Carried the Force of Law.	38
(b)	California’s Sister Jurisdictions Recognize that the Enforcement of a Statute Requiring Impossible Compliance May Be Enjoined Based on the Impossibility Maxim.....	42
(c)	In the Absence of Any Overriding Constitutional, Statutory or Charter Proscription to Civil Code Section 3531, the Judiciary Must Acknowledge the Operative Force of the Maxim of Jurisprudence Codified Therein.....	45

2.	Civil Code Section 3509 Does Not Bar Appellants from Relying on Civil Code Section 3531 in Support of Their Claim that the Enforcement of Penal Code Section 31910, Subdivision (b)(7)(A), Should Be Enjoined.	47
3.	The Court of Appeal Properly Relied on <i>Board of Supervisors v. McMahon</i> in Ruling that Appellants Have the Right to Present Evidence that It Is Impossible to Comply with Penal Code Section 31910, Subdivision (b)(7)(A).	53
VI.	CONCLUSION.....	62

TABLE OF AUTHORITIES

Page

Federal Court Cases

<i>Buck v. Harton</i> (M.D. Tenn. 1940) 33 F.Supp. 1014	36, 42, 43, 46, 58
<i>District of Columbia v. Heller</i> (2008) 554 U.S. 570	19
<i>MacDonald v. City of Chicago</i> (2010) 561 U.S. 742	19
<i>Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency</i> (D.C. Cir. 1981) 655 F.2d 318	34, 35
<i>Peña v. Lindley</i> (E.D. Cal. 2015) 2015 U.S. Dist. LEXIS 23575	20
<i>Union Electric Co. v. Environmental Protection Agency</i> (1976) 427 U.S. 246	34

State Court Cases

<i>Agricultural Labor Relations Board v. Superior Court</i> (1976) 16 Cal.3d 392.....	61
<i>American Coatings Association v. South Coast Air Quality Management District</i> (2012) 54 Cal.4th 446	32, 33, 34, 35
<i>Board of Supervisors v. McMahon</i> (1990) 219 Cal.App.3d 286.....	22, 53, 55, 56, 57, 58, 59, 60
<i>Booksa v. Patel</i> (1994) 24 Cal.App.4th 1786.....	48
<i>Carmel Valley Fire Protection District v. State of California</i> (2001) 25 Cal.4th 287	26
<i>City & County of San Francisco v. Cooper</i> (1975) 13 Cal.3d 898.....	45, 46, 53
<i>Coleman v. Department of Personnel Administration</i> (1991) 52 Cal.3d 1102.....	63
<i>Conover v. Hall</i> (1974) 11 Cal.3d 842.....	61
<i>Dunn v. County of Santa Barbara</i> (2006) 135 Cal.App.4th 1281.....	9, 23, 51
<i>Financial Indemnity Co. v. Superior Court</i> (1955) 45 Cal.2d 395.....	61

<i>Gigliotti v. New York, Chicago & St. Louis Railroad Co.</i> (1958) 107 Ohio App. 174	36, 43, 44, 46, 58
<i>In re Jenkins</i> (2010) 50 Cal.4th 1167	63
<i>Ivaran Lines, Inc. v. Farovi Shipping Corp.</i> (Fla.App. 1984) 461 So.2d 123	36, 44, 46, 59
<i>Jacobs v. State Board of Optometry</i> (1978) 81 Cal.App.3d 1022.....	48
<i>LaFranchi v. Santa Rosa</i> (1937) 8 Cal.2d 331.....	21
<i>Levine v. Superior Court</i> (2005) 35 Cal.4 th 935.....	14
<i>Lockard v. City of Los Angeles</i> (1949) 33 Cal.2d 453.....	26, 27, 28, 46, 51, 52
<i>Martinez v. Coombs</i> (2010) 561 U.S. 742	38
<i>McMackin v. Ehrheart</i> (2011) 194 Cal.App.4th 128.....	47, 52
<i>Moore v. California State Board of Accountancy</i> (1992) 2 Cal.4th 999	51
<i>National Shooting Sports Foundation, Inc. v. State of California</i> (2016) 6 Cal.App.5th 298.....	10, 14, 23, 24, 36, 53, 55
<i>People v. Bunn</i> (2002) 27 Cal.4th 1	26, 27
<i>People v. One 1940 Ford V-8 Coupe</i> (1950) 36 Cal.2d 471.....	49, 50, 51, 52
<i>Portnoy v. Superior Court</i> (1942) 20 Cal.2d 375.....	21
<i>Sherwin-Williams Co. v. South Coast Air Quality Management District</i> (2001) 86 Cal.App.4th 1258.....	35
<i>Smith v. Workers' Compensation Appeals Board</i> (2009) 46 Cal.4 th 272.....	14
<i>Superior Court v. County of Mendocino</i> (1996) 46 Cal.4th 272	29, 230, 31
<i>Sutro Heights Land Co. v. Merced Irrigation District</i> (1931) 211 Cal. 670.....	58, 59, 60
<i>Werner v. Southern California Associated Newspapers</i> (1950) 35 Cal.2d 121.....	31

State Constitutional Provisions

Cal. Const., art. III, § 3.....	26
---------------------------------	----

Cal. Const., art. IV, § 1.....	26
--------------------------------	----

State Statutory Authorities

Civ. Code, § 1859.....	54
Civ. Code, § 1861.....	54
Civ. Code, § 3423, subd. (d)	61
Civ. Code, § 3509.....	37, 47, 48
Civ. Code, § 3514.....	48
Civ. Code, § 3531.....	10, 23, 36, 37, 38, 39, 40, 41, 42, 45, 46, 47, 48, 49, 51, 53, 54, 55, 56, 58, 60
Civ. Code, § 3532.....	48, 50
Code Civ. Proc., § 526, subd. (b)(4)	61
Code Civ. Proc., § 1060	21
Evid. Code, § 801, subd. (b).....	17
Evid. Code, § 1200.....	17, 18
Evid. Code, § 1400	18
Pen. Code, § 12126	13
Pen. Code, § 31910, subd. (b)(7)(A).....	8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 24, 25, 26, 28, 29,, 32 33, 34, 35, 36, 37, 47,, 49, 51, 52, 53, 54, 55, 59, 61, 62, 63
Pen. Code, § 32000 subd. (a)	18
Pen. Code, § 32015, subd. (a)	11, 18

State Court Rules

Cal. Rules of Court, rule 8.204(c)(1)	65
Cal. Rules of Court, rule 8.204(c)(3)	65

Additional Authorities

Bouvier, Law Dict. Adapted to the Constitution & Laws of the United States of America & the Several States of the American Union (6 th ed. 1856)	39, 40
Eisenberg, <i>Expression Rules in Contract Law and Problems of Offer and Acceptance</i> (1994) 82 Cal. L. Rev. 1127.....	39
Plater, <i>Statutory Violations and Equitable Discretion</i> (1982) 70 Cal. L. Rev. 524	41, 42
Rush (1980) "Freewill"	49
Scott, <i>Codified Canons and the Common Law of Interpretation</i> (2010) 98 Geo. L.J. 341	40, 41

I. ISSUE PRESENTED.

This Court accepted this case for review of the following issue, as presented by the petition for review filed by respondent, State of California: 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 it? Specifically, this Court is being asked to decide whether appellants may seek to enjoin the enforceability of a statute that impacts only the firearms industry, on the ground that the statute requires compliance that is physically impossible to achieve.

II. INTRODUCTION.

Appellants, National Shooting Sports Foundation, Inc. (“NSSF”), and Shooting Arms and Ammunition Manufacturers’ Institute, Inc. (“SAAMI”), challenge the enforceability of Penal Code section 31910, subdivision (b)(7)(A). That statute requires that all semi-automatic pistols manufactured, imported or sold in California be

equipped with a microscopic array of characters [a “microstamp”] that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired.

The process described by section 31910, subdivision (b)(7)(A), is known as “dual placement microstamping.”

In a single cause of action for declaratory and injunctive relief, appellants allege that dual placement microstamping technology is impossible to implement. Specifically, while appellants acknowledge that a microstamp imprinted on the firing pin of a semi-automatic pistol will occasionally transfer to the primer located at the rear of a cartridge case upon firing, the record contains uncontroverted expert testimony that it is impossible to imprint a microstamp on any other surface or part of a semi-automatic pistol that will transfer to the cartridge case when the pistol is fired. (JA 45, 48, 772.) Respondent implicitly admits the truth of appellants’ allegations, by acknowledging that “the relevant technology could fairly be described as emerging.” (Op. Brief 8-9.) Respondent also implicitly admits that only one of the two microstamps required by section 31910, subdivision (b)(7)(A), may be placed on a pistol’s firing pin, by not seeking review of that issue. (Op. Brief 20.) Nevertheless, the trial court granted respondent’s motion for judgment on the pleadings without leave to amend, despite the fact that appellants’ allegations must be taken as true at this stage of the litigation. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) The Court of Appeal reversed, and found as a matter of statutory construction, based on the legislative history, that section 31910, subdivision (b)(7)(A), does not allow both microstamps to

be placed on the same part of the pistol. (*National Shooting Sports Foundation, Inc. v. State of California* (2016) 6 Cal.App.5th 298, 307-308, review granted March 22, 2017, S239397; hereinafter, “*NSSF v. California.*”).

This case therefore squarely presents an issue of fundamental fairness as to whether the Legislature may require the performance of a plainly impossible act as a condition to the exercise of an otherwise lawful right. Respondent argues that the separation of powers doctrine absolutely prevents this Court from reviewing the Legislature’s decision to enact Penal Code section 31910, subdivision (b)(7)(A), but the core legislative function of passing laws does not deprive the judiciary of its own constitutional power to set aside laws that are palpably arbitrary. Respondent also argues that appellants may not assert a cause of action based on the maxim of jurisprudence contained in Civil Code section 3531 that “[t]he law never requires impossibilities,” but it is actually the separation of powers doctrine itself that invests section 3531 with the same operative force as any other statute. Appellants therefore request that this Court affirm the decision of the Court of Appeal, and allow this action to be resolved on its factual merits, either through summary judgment or trial, as the case may be.

III. STATEMENT OF THE CASE.

A. The Parties.

Respondent is the State of California. (JA 11.) Appellant NSSF is a nonprofit trade association for members of the firearms, ammunition, hunting and shooting sports industries whose mission is to promote, protect and preserve hunting and the shooting sports. (JA 10, 778.) Appellant SAAMI is a non-profit trade association of domestic firearms, ammunition and propellant manufacturers whose mission is to develop and publish industry recommended practices and voluntary standards pertaining to the safety, interchangeability, reliability and quality of semi-automatic pistols, other firearms and ammunition. (JA 10-11, 775.) Both NSSF and SAAMI therefore have a natural interest in laws such as Penal Code section 31910, subdivision (b)(7)(A), which affect the design and operation of firearms.

B. The Enactment of Penal Code Section 31910, Subdivision (b)(7)(A).

The issue of microstamping semi-automatic pistols first arose in the California Legislature on February 10, 2005, when Assembly Member Paul Koretz introduced Assembly Bill No. 352. (JA 847-851.) Assembly Bill No. 352 proposed that a semi-automatic pistol that was not already listed on the Roster of Handguns Certified for Sale (the “Roster”), that Penal Code section 32015, subdivision (a), requires respondent’s Department of Justice

to maintain, would be deemed to be “an unsafe handgun” if “it is not designed with a microscopic array of characters, that identify the make, model, and serial number of the pistol, etched into the interior surface or internal working parts of the pistol, and which are transferred by imprinting on each cartridge case when the pistol is fired.” (JA 849.) Assembly Bill No. 352 thus would have required that a semi-automatic pistol contain only one microstamp (“single placement microstamping”). Assembly Bill No. 352 ultimately died in conference on November 30, 2006. (JA 854.)

The issue of microstamping semi-automatic pistols arose in the Legislature again on February 23, 2007, when Assembly Member Michael Feuer introduced Assembly Bill No. 1471. (JA 856-858.) As originally introduced, Assembly Bill No. 1471 contained the same single placement microstamping provision as Assembly Bill No. 352. (JA 858.) However, concerns were raised in the Legislature over the ability that criminals would have to defeat a pistol’s microstamping features by defacing a microstamp placed on the firing pin. For example, as an April 10, 2007 report of the Senate Republican Office of Policy succinctly stated, “Criminals could easily defeat the intended identification purpose of this bill by filing off the microstamping on a firing pin. They could also switch the firing pin from one pistol to another pistol.” (JA 606.)

To address this concern, Assembly Bill No. 1471 was amended, coincidentally also on April 10, 2007, to incorporate the dual placement

microstamping provisions that now appear in Penal Code section 31910, subdivision (b)(7)(A). (JA 867.)¹ Legislative history subsequent to the amendment plainly reveals the Legislature’s intention that the second microstamp required under section 31910, subdivision (b)(7)(A), must be placed elsewhere than on a pistol’s firing pin, because a microstamp on the firing pin can be easily defaced, and because the firing pin itself can simply be replaced with another firing pin bearing a different microstamp or no microstamp at all. For example, the September 11, 2007 analysis of the Senate Rules Committee upon the third reading of Assembly Bill 1471 states that “Bill 1471 would require newly designated semi-automatic handguns sold after January 1, 2010, be equipped with ‘micro-stamping’ technology. This technology consists of engraving microscopic characters onto the firing pin and other interior surfaces, which would be transferred onto the cartridge casing when the handgun is fired.” (JA 633-634.)

In addition, the September 19, 2007 analysis of Assembly Bill 1471 that was prepared by the Governor’s Office of Planning and Research stated that “[p]roponents of the bill argue that countermeasures can be taken by the manufacturer to prevent circumvention of the technology. Specifically,

¹ The microstamping statute enacted by virtue of Assembly Bill No. 1471 was denominated Penal Code section 12126. As noted by the Law Revision Commission Comment to section 31910, section 12126 was later redenominated as Penal Code section 31910 without substantive change. (Senate Bill No. 1080, 2010 Regular Session.)

they suggest that parts of the gun that come into contact with the bullet casing, other than the firing pin, can be similarly microengraved to make filing the engraving away more difficult.” (JA 618.)² The legislative history reveals no contrary intention whatsoever by the Legislature to permit both microstamps to be placed on the pistol’s firing pin. The Court of Appeal therefore found that “the only logical interpretation of the statute is that the Legislature intended the microstamping to be on two different internal parts of the pistol. If one microstamp on the firing pin can be easily defeated, the same is true for two.” (*NSSF v. California, supra*, 6 Cal.App.5th at p. 308.)³

As ultimately enacted, Penal Code section 31910, subdivision (b)(7)(A), incorporated the dual placement microstamping provisions of

² Both of those analyses are proper sources of legislative history. (*Levine v. Superior Court* (2005) 35 Cal.4th 935, 948 [Senate floor analysis]; *Smith v. Workers’ Compensation Appeals Board* (2009) 46 Cal.4th 272, 280 [Legislative Counsel’s analysis].)

³ While initially taking a contrary view, respondent now admits that a microstamp placed on the firing pin of a semi-automatic pistol can be easily defeated (Op. Brief 11), and that the Legislature adopted dual placement microstamping as part of Assembly Bill No. 1471 to address that defect in Assembly Bill No. 352, by requiring that a second microstamp be imprinted on some surface or part of a semi-automatic pistol other than the pistol’s firing pin (Op. Brief 12). Accordingly, respondent no longer contends that the placement of two microstamps on the firing pin would comply with the statute. (Op. Brief 20.)

Assembly Bill No. 1471. Section 31910, subdivision (b)(7)(A), provides as follows:

As used in this part, “unsafe handgun” means any pistol, revolver, or other firearm capable of being concealed upon the person, for which any of the following is true:

* * *

(b) For a pistol:

* * *

(7)(A) Commencing January 1, 2010, for all semi-automatic pistols that are not already listed on the roster pursuant to Section 32015, it is not designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired, provided that the Department of Justice certifies that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions.

On May 13, 2013, the California Department of Justice certified that the technology used to create the imprint of the microscopic array of characters required by the provisions of Penal Code section 31910, subdivision (b)(7)(A), is available to more than one manufacturer unencumbered by any patent restrictions, thereby allowing the statute to take effect. (JA 781, 787-788, 839.) The Department of Justice did not, however, certify that dual placement microstamping is possible to implement in semi-automatic pistols, nor did section 31910, subdivision (b)(7)(A), require it to do so.

C. The Impossibility of Dual Placement Microstamping.

Microstamped characters that identify the make, model, and serial number of a semi-automatic pistol (a “microstamped alpha numeric code”) can be etched or imprinted on the tip of the pistol’s firing pin, and such a microstamped alpha numeric code will sometimes transfer onto the primer contained within the cartridge case, which the firing pin strikes during the pistol’s firing process. (JA 45.)⁴ However, a microstamped alpha numeric code that is etched or imprinted on the breech face, chamber wall, extractor, ejector or magazine of a semi-automatic pistol cannot be imprinted or transferred to the cartridge case during the pistol’s firing process. (JA 46-48, 772.) There are no interior surfaces or internal working parts of a semi-automatic pistol on which a microstamped alpha numeric code could be etched or imprinted other than the firing pin, breech face, chamber wall extractor, ejector and magazine. (JA 45, 772.) The record below is uncontroverted with respect to this point.⁵ The foregoing facts appear in

⁴ Even when it does imprint, a microstamped alpha numeric code does not satisfy the requirements of Penal Code section 31910, subdivision (b)(7)(A), because it does not by itself identify the make, model and serial number of the pistol. A database must still be consulted to convert the markings of the microstamped alpha numeric code into the information required by the statute.

⁵ Although this appeal arises from the entry of judgment following the granting of respondent’s motion for judgment on the pleadings without leave to amend, much of the factual record is already developed because of the unusual procedural posture of the case. Specifically, respondent did not bring its motion for judgment on the pleadings until late in the course of

the declarations of Frederick Tulleners, who has been a forensic scientist specializing in forensic firearms identification since 1971, and who has been employed by respondent's Department of Justice as the supervising criminalist in both its Riverside and Sacramento laboratories. (JA 37.)

Respondent submitted no expert testimony in the trial court to contradict Mr. Tulleners, and instead relies for purposes of this appeal on statements made in the Legislature by the author of Assembly Bill No. 1471, who in turn relied on a photograph purporting to show that the breech face of a semi-automatic pistol transferred a microstamp to a cartridge case fired by that pistol. (Op. Brief, 13-15.) The comments in the Legislature by the author of Assembly Bill No. 1471 are inadmissible hearsay for purposes of this action, because they concern a statement made other than by a witness while testifying that respondent now offers as proof of the matter stated (Evid. Code, § 1200), and the record contains no evidence to show that the author even possesses the technical expertise to comment regarding the effectiveness of breech face microstamping, which deprives his comments of any evidentiary value (Evid. Code, § 801, subd. (b).) Likewise, the photograph on which the author relied is unauthenticated hearsay for purposes of this appeal. There is no evidence in the record that

this litigation, long after appellants' evidentiary motion for a preliminary injunction had already been decided. (JA 1210-1211.)

the photograph is what respondent claims it to be, as required by Evidence Code section 1400, and the photograph also concerns a statement made other than by a witness while testifying that respondent now offers as proof of the matter stated, rendering it inadmissible hearsay under Evidence Code section 1200.⁶ Respondent's reliance on such material underscores the need to conduct a trial in this case to establish through admissible evidence the truth of appellants' allegations that dual placement microstamping is in fact impossible to implement.

D. The Loss to Appellants Caused by Penal Code Section 31910, Subdivision (b)(7)(A).

On January 9, 2014, the date this case was filed in Fresno County Superior Court (JA 9), there were 867 semi-automatic pistols listed on the Roster. A pistol that is not listed on the Roster is a handgun that has not been determined not to be unsafe. (Pen. Code, § 32015, subd. (a).) It is a crime in the State of California to manufacture, import or sell any such unsafe handgun. (Pen. Code § 32000 subd. (a).)

As of July 31, 2017, there were only 504 semi-automatic pistols listed on the Roster, representing a decrease of approximately 42% over a

⁶ Indeed, if respondent attempts to introduce evidence of this breech face photograph at trial, appellants intend to introduce rebuttal evidence that the photograph does not depict what it purports to depict.

period of slightly more than three and one-half years.⁷ If appellants have correctly alleged that dual placement microstamping is impossible to implement, the number of semi-automatic pistols listed on the Roster will continue to decrease, because older pistol models that are no longer manufactured due to obsolescence will continue to be removed from the Roster, and because newer pistol models will not be added to the Roster since they cannot comply with the dual placement microstamping requirements of Penal Code section 31910, subdivision (b)(7)(A). This represents an annual loss to appellants' manufacturing members of approximately \$183 million, unadjusted for inflation since 2014. (JA 69.)⁸

⁷ The Roster, which appears on the internet at <http://certguns.doj.ca.gov/safeguns_resp.asp>, listed 504 semi-automatic pistols as of July 31, 2017. As of that same date, the list of de-certified handgun models maintained by the Bureau of Firearms of respondent's Department of Justice, which appears on the internet at <<https://oag.ca.gov/sites/oag.ca.gov/files/pdfs/firearms/removed.pdf>>, listed 363 semi-automatic pistols that have been de-certified from the Roster since January 9, 2014, the date on which appellants filed their complaint. Thus, as of January 9, 2014, there were 867 semi-automatic pistols on the Roster.

⁸ As the Roster continues to shrink, Second Amendment issues will obviously arise, because semi-automatic pistols are protected firearms under the decision of the United States Supreme Court in *District of Columbia v. Heller* (2008) 554 U.S. 570, 628-629, and because the protection for semi-automatic pistols recognized in *Heller* extends to the States. (*MacDonald v. City of Chicago* (2010) 561 U.S. 742, 791.) However, appellants do not raise any such Second Amendment issues in this litigation, because they are trade association plaintiffs which concern themselves with issues of economic importance to the firearms industry. (JA 10-11, 13, 15.) The Second Amendment issues are being presented by

IV. PROCEDURAL POSTURE.

A. Relief Sought in the Trial Court.

On January 9, 2014, appellants filed their complaint against respondent, asserting a single cause of action for declaratory and injunctive relief. (JA 9-18.) Appellants allege that “[a]n actual controversy has arisen and now exists between [themselves] and the manufacturer, distributor and retailer members they represent, on the one hand, and [respondent], on the other hand, concerning their respective rights and duties pursuant to the provisions of California Penal Code section 31910, subdivision (b)(7)(A).”

(JA 13.) Specifically, appellants contend that

the provisions of California Penal Code section 31910, subdivision (b)(7)(A), are invalid as a matter of law and cannot be enforced because it is impossible for a firearm manufacturer to implement microstamping technology in compliance therewith, since 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 on the interior surface or internal working parts of the pistol, and that can be legibly, reliably, repeatedly, consistently and effectively transferred from both such places to a cartridge case when the firearm is fired.

(*Ibid.*) The complaint then alleges that respondent contends to the contrary and that a judicial declaration is accordingly appropriate, before concluding

other, unrelated litigants in *Peña v. Lindley* (E.D. Cal. 2015) 2015 U.S. Dist. LEXIS 23575, which is currently on appeal in the United States Court of Appeals for the Ninth Circuit as Case No. 15-15449.

by requesting that the enforcement of Penal Code section 31910, subdivision (b)(7)(A), be enjoined. (JA 13, 15-16.)⁹

B. Judgment from which Appellants Appeal.

On February 18, 2015, nearly a year after respondent's demurrer to appellant's complaint had been overruled, respondent moved for judgment on the pleadings with respect to that complaint. (JA 113-116, 124-126.) Prior to the hearing of that motion on April 29, 2015, the trial court issued a tentative ruling to deny the motion, finding in appellants' favor with respect to all of the issues presented by the motion, including the separation of powers issue that is one of the primary issues on this appeal. (JA 733-736.) In particular, after noting respondent's citation to authority stating, "[T]he separation of powers doctrine [holds] that in the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation," the trial court

⁹ Code of Civil Procedure section 1060 provides in pertinent part that "[a]ny person ... who desires a declaration of his or her rights or duties with respect to another ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action ... in the superior court for a declaration of his or her rights and duties in the premises...." Numerous cases hold that such declaratory relief actions are an appropriate procedural vehicle for challenging invalid legislative enactments. (*E.g.*, *Portnoy v. Superior Court* (1942) 20 Cal.2d 375, 378; *LaFranchi v. Santa Rosa* (1937) 8 Cal.2d 331, 332, 335-336.) Respondent does not contend that appellants' have failed to allege the existence of an actual controversy sufficient to satisfy the pleading requirements of section 1060.

acknowledged that “impossibility of compliance with a state law is ground for enjoining enforcement of a statute.” (JA 733.) The trial court did so in reliance on *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 299-300, which appellants cited in opposition to respondent’s motion. (JA 733.)

However, on July 6, 2015, while cross-motions for summary judgment were pending (JA 738-740, 899-902), the trial court mistakenly reversed itself and issued an order granting respondent’s motion for judgment on the pleadings without leave to amend (JA 1139-1147). Although the trial court acknowledged that the *McMahon* court “found that the impossibility doctrine did not apply in that case,” and thereby presumed the existence of the doctrine, the trial court nevertheless incorrectly assumed that impossibility is not a ground for enjoining the enforcement of a statute, cryptically noting that the *McMahon* court “did not directly address [that] issue.” (JA 1143-1144.) The trial court also incorrectly stated that the *McMahon* court “did not ‘reach any separation-of-power issues,’” without addressing whether the provision of the Civil Code on which the *McMahon* court relied is itself a statutory proscription on which a court could rely to invalidate another statute on the ground of impossibility of compliance. (JA 1144.) Then, based on its order granting respondent’s motion for judgment on the pleadings without leave to amend, the trial