Case No. S239397

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL SHOOTING SPORTS FOUNDATION, INC., AND SPORTING ARMS AMMUNITION MANUFACTURERS' INSTITUTE, INC.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA,

Defendant and Respondent.

On Review from the Court Of Appeal for the Fifth Appellate District, Division One, 5th Civil No. F072310

After an Appeal from the Superior Court of Fresno County Honorable Donald S. Black, Judge, Case Number 14CEGC00068

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE OFFICE OF THE LOS ANGELES CITY ATTORNEY IN SUPPORT OF RESPONDENT STATE OF CALIFORNIA

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The Office of the Los Angeles City Attorney, through its attorneys and pursuant to California Rule of Court, rule 8.520(f), respectfully applies for leave to file the following amicus curiae brief in support of the Respondent State of California.

INTEREST OF AMICUS CURIAE

Amicus Curiae Office of the Los Angeles City Attorney ("City Attorney") has a direct and immediate interest in defending the microstamping requirement set forth in Penal Code section 31910(b)(7)(A). The animating purpose of the statute—solving and deterring gun-related crimes—speaks to the City Attorney's mandate to enforce the law and to prosecute crimes in the city of Los Angeles. Because a substantial amount of gun violence occurs in Los Angeles, enforcement of the law directly affects the City Attorney's interests in ensuring the safety of Los Angeles residents and improving law enforcement's ability to solve gun-related crimes. Specifically, the City Attorney's Gun Violence Prevention Unit ("GVPU") is responsible for prosecuting the unlawful possession, use, and criminal storage of firearms. In addition, the GVPU prosecutes transactional violations such as illegal transfers of firearms and attempted firearm purchase by prohibited persons. The recovery of microstamped casings would enable law enforcement to identify the original firearm purchaser, and greatly increase the likelihood of solving and bringing charges for those crimes prosecuted by the GVPU. Were Appellants to succeed in overturning the statute, local law enforcement would be denied a valuable crime-fighting tool developed by the California Legislature after due consideration, and the City Attorney's efforts at preventing gun violence would be impeded.

STATEMENT IN COMPLIANCE WITH CALIFORNIA RULE OF COURT, RULE 8.520(f)(4)

Amicus curiae states that (a) no party's counsel authored this brief in whole or in part; (b) no party, nor counsel for either party, contributed money that was intended to fund preparing or submitting this brief; and (c) no person other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

DATED: November 13, 2017 BOIES SCHILLER FLEXNER LLP
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[PROPOSED] BRIEF OF AMICUS CURIAE OFFICE OF THE LOS ANGELES CITY ATTORNEY IN SUPPORT OF RESPONDENT STATE OF CALIFORNIA

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SUMMARY OF ARGUMENT

Courts should not be in the business of second-guessing the prudence of legislation duly enacted by the California Legislature to address serious societal problems. Yet that is exactly what Appellants National Shooting Sports Foundation, Inc. and Sporting Arms Ammunition Manufacturers' Institute, Inc. (collectively, "NSSF") seek with respect to the microstamping provision of California's Unsafe Handgun Act ("UHA").[1] NSSF asks this Court to affirm the Court of Appeal's decision, which would grant NSSF a prospective evidentiary hearing on the question of whether it is possible to comply with this provision, even though the record shows that no gun manufacturer has yet attempted to comply with the statute. Moreover, it would permit the State to be enjoined from enforcing the law in any manner if a fact-finder decides compliance is not currently possible. To do so would unduly restrict the Legislature in its proper function, and transform the courts into the arena for policy challenges from every party unsuccessful in the legislative process. Such an outcome would violate the separation of powers and subvert the role of both the legislative and judicial systems.

As amicus curiae supporting a reversal of the Court of Appeal's decision, the Office of the Los Angeles City Attorney submits this brief for two reasons. First, by elaborating on the nexus between the UHA's microstamping provision and the important public interest of solving and deterring gun crimes, amicus refutes NSSF's misguided supposition that enforcement of the statute is somehow inequitable. Respondent State of

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[1] As of October 2007, the California Legislature defined "unsafe handguns" to include all new handguns that are not designed or equipped with microstamping—"a microscopic array of characters that identify the make, model, and serial number of the pistol"—in two or more places. (Cal. Pen. Code, § 31910(b)(7)(A).)

California has explained that, as a threshold matter, NSSF improperly relies upon an equitable maxim of jurisprudence to frustrate the intent of the UHA. In addition, NSSF disregards the inequity that would result if a single judge could frustrate the desire of Californians for innovative solutions to public health and safety problems through the facial invalidation of a law *even before* compliance or enforcement has been attempted.

Second, amicus reaffirms that it is the Legislature's prerogative to enact laws that encourage such innovation, as long as those laws are within constitutional constraints. Notwithstanding NSSF's new focus on a purported "palpably arbitrary" standard before this Court, NSSF has expressly disavowed any constitutional due process claim, or any other constitutional claim, and seeks to enjoin enforcement of this legislation on the sole ground that compliance is, they claim, "impossible."[2] As the State has explained—and as the trial court correctly concluded in granting the State's motion for judgment on the pleadings—the separation of powers doctrine precludes courts from acting as super-legislatures invalidating duly enacted laws based solely on a party's self-professed inability to comply.[3]

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[2] Appellants confirm that they are not raising a Second Amendment or due process challenge in this case. (Answer Brief on the Merits at 19, fn. 8 and 63, fn. 23.) There is a pending action in federal court challenging the microstamping provision of the UHA on grounds that it violates the Second Amendment. The district court in that case, however, squarely—and correctly—rejected this claim. (See *Pena v. Lindley* (E.D. Cal., Feb. 26, 2015, No. 2:09-CV-01185-KJM-CKD) 2015 WL 854684.) The matter is currently pending before the Ninth Circuit Court of Appeals, *Pena v. Lindley,* Case No. 15-15449.

[3] The judicial impracticability of NSSF's "impossibility" theory reveals the separation of powers problem. It cannot be the case that any person who disagrees with legislation as a matter of policy may compel a court to adjudicate the feasibility of compliance as a categorical matter. The courts

The separation of powers doctrine presents an insurmountable legal hurdle to NSSF's claim, which seeks to enjoin enforcement of a statute that NSSF concedes was motivated by the goal of reducing crime. (Answer Brief on the Merits ("Answer Brief") at 29.) NSSF acknowledges this goal is not only wise, but one which they support. (*Ibid.*) Nonetheless, NSSF's argument would vastly diminish the Legislature's vital ability to enact technology-forcing legislation to address such pressing societal problems.

The stakes of this Court's decision are high. Acceptance of NSSF's misguided position would have dangerous real-world consequences for all Californians. It would deny law enforcement an invaluable tool for apprehending criminals and reducing gun violence. Further, it would put courts in the position of adjudicating the feasibility of legislation before the public has an opportunity to attempt compliance. Not only does this pose a separation of powers problem, as the State has explained, but this infringement of legislative power would undermine a critical catalyst for new technologies that serve the public interest. Thus, for the reasons set forth below, as well as in the State's briefs, this Court should reject NSSF's flawed legal arguments, and reverse the decision of the Court of Appeal.

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are not the proper forum for this sort of nonconstitutional facial challenge. While impossibility may serve as a shield—providing a defense for a specific entity or individual charged with violating a law with which it is unable to comply—it may not be used as a sword to attack enforcement of the law under all circumstances.

ARGUMENT

I. The UHA's Microstamping Requirement Furthers an Important Public Interest in Solving Gun Crimes and Deterring Gun Violence

Appellants allege no violation of their or their members' constitutional rights, nor any infirmity in the microstamping law's passage as would be required to properly bring a facial challenge. Rather, NSSF's entire argument to enjoin enforcement of the microstamping law is based on a codified equitable maxim. But as the State has explained in detail, this equitable maxim is not a viable basis for enjoining enforcement of duly enacted legislation. The separation of powers doctrine precludes NSSF's nonconstitutional facial "impossibility" challenge to the microstamping law, and prohibits courts from reevaluating the Legislature's assessment of how to address societal problems.

Nevertheless, if the legislative history were to be examined, it amply demonstrates that there was good reason for enacting the microstamping provision. In addressing NSSF's challenge and how it would impair the Legislature's proper role, it is crucial to understand the strong public policy interests which gave rise to Penal Code section 31910(b)(7)(A) and the equities at stake beyond NSSF's interests. NSSF's equity-based argument should be considered from the standpoint of *all* citizens of California—not merely firearms manufacturers and gun enthusiasts.

The California Legislature's express purpose in enacting Assembly Bill No. 1471 (2007–2008 Reg. Session) was to resolve the endemic problem of unsolved gun crimes.[4] As stated in the legislative record:

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[4] Upon enactment, this bill became Penal Code section 31910(b)(7)(A).

> California has an enormous and diverse problem of unsolved homicides committed with handguns. No arrest is made in approximately 45% of all homicides in California because police lack the evidence they need. Of the approximately 2400 homicides in California per year over 60% are committed with handguns (2004 DOJ data). Approximately 70% of new handguns sold in California are semiautomatics.

(Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1471 (2007–2008 Reg. Sess.) as amended Apr. 10, 2007, p. H.)[5]

In many cases, the only evidence left at a crime scene is a spent cartridge casing. This often results in a dead end. However, if a microstamped cartridge were recovered at the scene of a crime, law enforcement would be able to identify a specific firearm as the source of the cartridge without needing to recover that firearm. Further, microstamping enhances law enforcement's ability to link a firearm to multiple crimes, and determine patterns and potentially common perpetrators. Microstamping technology thus provides an important piece of trace evidence for forensic investigators by allowing them to track a firearm without having to recover it. As the microstamping bill's author put it:

> This bill is about catching criminals. This bill will allow law enforcement to positively link used cartridge casings recovered at crime scenes to the crime gun. This bill will: (a) help law enforcement solve handgun crimes; (b) help reduce gang violence; and, (c) help reduce gun trafficking of new semi-automatic handguns.

(Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 1471 (2007–2008 Reg. Sess.) as amended Apr. 10, 2007, p. 2.)[6]

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[5] Available at ftp://leginfo.ca.gov/pub/07-08/bill/asm/ab_1451-1500/ab_1471_cfa_20070625_130933_sen_comm.html.

[6] Available at http://leginfo.ca.gov/pub/07-08/bill/asm/ab_1451-1500/ab_1471_cfa_20070423_101911_asm_comm.html.

Not surprisingly, AB 1471 received broad support from the law enforcement community. Indeed, the bill passed with support of more than sixty California police chiefs and sheriffs and five law enforcement organizations.[7] (*See* Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analyses of Assem. Bill No. 1471 (2007–2008 Reg. Sess.) July 18, 2007, pp. 3-6.)[8] For example, the Stockton Police Department stated on the record:

> The Stockton Police Department believes that AB 1471 would allow law enforcement to positively link used cartridge casings recovered at crime scenes to the crime gun. Further, AB 1471 would help law enforcement solve handgun crimes, reduce gang violence, and reduce gun trafficking of new semiautomatic handguns.

(Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1471 (2007–2008 Reg. Sess.) as amended Apr. 10, 2007, p. S.)

NSSF agrees that crime reduction was the motivation for the enactment of Penal Code section 31910, and agrees that this is a wise and proper goal for the Legislature's enactment of laws. (Answer Brief at 29.)

Despite basing their entire claim on an equitable maxim, NSSF ignores these broader equities. Their glib dismissal of the important public interests served by the statute reflects a dangerously myopic view.

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[7] Such support was not unique to California law enforcement; microstamping received broad support from police officers across the country. For instance, as former Baltimore Police Commissioner Frederick Bealefeld III put it: microstamping "is one of these things in law enforcement that would just take us from the Stone Age to the jet age in an instant. . . . I just can't comprehend the opposition to it." (Goode, "Method to Track Firearm Use is Stalled by Foes," *New York Times* (June 12, 2012), http://nyti.ms/1FyxNbq.)

[8] Available at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200720080AB1471.

Moreover, NSSF fails to provide the Court with any indication of how or why it would be equitable to thwart the will of the people of California through their elected representatives in order to allow NSSF to continue to flood the state with handguns the Legislature has reasonably determined to be unsafe.

II. The Legislature May Enact Technology-Forcing Legislation to Protect Public Safety

Not only does the separation of powers doctrine preclude courts from invalidating a validly passed statute based solely on a purported conflict with a maxim of jurisprudence, the enactment of technology-forcing legislation to advance public safety goals is squarely within the Legislature's police power.

This Court has recognized that the Legislature may exercise its police power to encourage experimentation for the benefit of public safety. (See *Hernandez v. Dept. of Motor Vehicles* (1981) 30 Cal.3d 70, 82 [acknowledging the "long established" principle that the Legislature has "broad scope to experiment" in regulating with respect to safety hazards related to driving].) The role of the Legislature in encouraging innovation is consistent with this Court's long-held understanding of the police power as "elastic," intended to be "capable of expansion to meet existing conditions of modern life" so that it can "thereby keep pace with the social, economic, moral, and intellectual evolution of the human race." (*Consolidated Rock Products Co. v. City of L.A.* (1962) 57 Cal.2d 515, 522.) Thus, in the context of a *constitutional* challenge, it is a "well settled rule" that determination of the necessity and form of regulations enacted pursuant to the police power "is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a

particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity?" (*Ibid.*) *A fortiori*, where a party does *not* bring a constitutional challenge, but relies merely on a *maxim of jurisprudence* to challenge the Legislature's exercise of its police power, as here, it is outside the ambit of the judicial function to question the Legislature's carefully considered policy decision.

NSSF's impossibility argument rests on an unstated assumption that the microstamping law is impermissible because it effectively precludes the manufacture and sale of new models of semiautomatic firearms. But, "[w]ith respect to some businesses which deal in products or activities essential to the public welfare, the legislative branch of government may control anything which relates to, or affects, the health of the community generally[.]" (*Francis v. Stanislaus County* (1967) 249 Cal.App.2d 862, 873-74.) Further, the Legislature has the authority to prohibit sales of certain products outright, subject to constitutional limitations. (See, e.g., *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 446 ["Under [the Federal Insecticide, Fungicide, and Rodenticide Act], a state agency may ban the sale of a pesticide if it finds, for instance, that one of the pesticide's label-approved uses is unsafe."]; *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456 [upholding a state ban on the sale of milk in plastic containers].) Thus, the Legislature may certainly take the *less restrictive* approach of conditioning the sale of a product on compliance with a duly considered safeguard. Even accepting firearms manufacturers' claims that they could not have complied with the microstamping law today if they had tried to put in place the proper technology, which they have not, the law is not invalid merely because those manufacturers may be limited in selling new semiautomatic firearms. Though the statute touches upon firearm restrictions, NSSF has not brought a Second Amendment challenge. This

statute is thus no different from any other seeking to promote public safety through industry regulation and is not subject to challenge as long as such action was not arbitrary so as to violate due process.

The Court should be particularly wary of infringing on the Legislature's prerogative when the Legislature has enacted technology-forcing legislation. "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation." (*New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 [Brandeis, J. dissenting].)

Indeed, the U.S. Supreme Court has recognized that a legislature may establish requirements that "are of a technology-forcing character, and are expressly designed to force" private entities to innovate in a way "that might at the time appear to be economically or technologically infeasible." (*Union Electric Co. v. E.P.A.* (1976) 427 U.S. 246, 257 [citation and internal quotation marks omitted].) The *Union Electric* Court cited approvingly to then-Senator Edmund Muskie's floor statement that a legislature's "responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time." (*Id.* at pp. 258-59.) Moreover, "[t]echnology-forcing hopes can prove realistic." (*Whitman v. Am. Trucking Assns.* (2001) 531 U.S. 457, 492 [Breyer, J. concurring].)

Contrary to NSSF's argument, *see* Answer Brief at 34 & n.12, there is no authority or basis to limit the Legislature's authority to enact technology-forcing legislation to the "pollution control industry." (See *Motor Veh. Manufacturers Assn. of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.* (1983) 463 U.S. 29, 49 ["[T]he Motor Vehicle Safety Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards did not depend on

current technology and could be 'technology-forcing' in the sense of inducing the development of superior safety design. . . . [U]nder the statute, the agency should not defer to the industry's failure to develop safer cars[.]"]; see also *State Farm Mutual Automobile Ins. Co. v. Dole* (D.C. Cir. 1986) 802 F.2d 474, 495; *Chrysler Corp. v. Dept. of Transportation* (6th Cir. 1972) 472 F.2d 659, 671-72 ["The explicit purpose of the [Automobile Safety Act of 1966 ('the Act')], as amplified in its legislative history, is to enable the Federal government to impel automobile manufacturers to *develop and apply new technology* to the task of improving the safety design of automobiles as readily as possible. . . . As it stands, the Act is reasonable, and the power of the Agency to channel the creative energies and vast technology of the automobile industry into a vigorous and competitive effort to improve the safety of vehicles fully meets the need for motor vehicle safety." (internal quotation marks omitted; emphasis added)].) In fact, in *American Coatings Association, Inc. v. South Coast Air Quality District* (2012) 54 Cal.4th 446, this Court upheld a regulatory standard that was "designed to compel the development of new technologies to meet public health goals." (*Id.* at p. 465.) The microstamping requirement reflects the Legislature's effort to meet a public health goal—the reduction of gun violence—every bit as urgent as the pollution emissions at issue in *American Coatings*. Nothing in *American Coatings* suggests that the Legislature may only seek to improve public health as it relates to pollution control; such a rule would defy logic, would violate the separation of powers doctrine, and would contravene the U.S. Supreme Court's clear statement of the law.

Moreover, the rationale for technology-forcing environmental legislation applies equally in the context of gun-related crimes. In the environmental context, "the principle of technology-forcing is based on the premise that because pollution is a negative externality, industry generally

has insufficient incentive to develop or adopt new pollution control technology in the absence of regulation." (*Am. Coatings*, *supra*, 54 Cal.4th at p. 466.) Likewise, the criminal use of guns is a negative externality of the lawful manufacture and sale of firearms. "[I]n the absence of regulation[,]" gun manufacturers generally have an "insufficient incentive to develop or adopt new" technology that reduces gun crimes and gun violence. (*Ibid.*)

Thus, the Legislature properly enacted technology-forcing legislation to achieve public health and safety goals. NSSF may not rely on a maxim of jurisprudence to seek the judicial invalidation of a carefully considered statute that was designed to encourage innovation for the public welfare.

CONCLUSION

For the foregoing reasons, amicus supports the position of Respondent State of California. This Court should reject NSSF's flawed reasoning and reverse the judgment of the Court of Appeal.

DATED: November 13, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1)

Pursuant to California Rule of Court 8.204(c)(1), I certify that the text of this brief consists of 3,421 words, excluding the required tables and this certificate. In so certifying, I am relying on the word count of Microsoft Word, the computer program used to prepare this brief.

DATED: November 13, 2017

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 725 South Figueroa Street, 31st Floor, Los Angeles, CA 90017-5524.

On November 13, 2017, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE OFFICE OF THE LOS ANGELES CITY ATTORNEY IN SUPPORT OF RESPONDENT STATE OF CALIFORNIA** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Boies Schiller Flexner LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 13, 2017, at Los Angeles, California.

Margie Odanaka

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