

Case No. S239397

SUPREME COURT
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**Supreme Court
of the State of California**

Deputy

National Shooting Sports Foundation, Inc., et al.

v.

State of California

California Court of Appeal · Second Appellate District · Case No. F072310
Superior Court of Fresno County · Hon. Donald S. Black · No. 14CECG00068

**APPLICATION OF
GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND
AMICUS CURIAE BRIEF SUPPORTING RESPONDENT**

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CLERK SUPREME COURT

**APPLICATION OF GIFFORDS LAW CENTER
TO PREVENT GUN VIOLENCE FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT**

To the Honorable Tani Cantil-Sakauye, Chief Justice:

Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) respectfully moves for leave to file a brief as *amicus curiae* in support of Respondent.*

For nearly twenty-five years, Giffords Law Center (formerly the Law Center to Prevent Gun Violence) has provided legal expertise in support of effective gun safety laws and other violence prevention policies. Giffords Law Center works at the local, state, and national levels to provide technical expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to make their communities safer from gun violence. In addition to its expertise in these general areas of gun legislation and policy, Giffords Law Center has filed *amicus* briefs in many cases involving gun safety laws, including *District of Columbia v. Heller* (2008) 554 U.S. 570, *McDonald v. City of Chicago* (2010) 561 U.S. 742, *Fyock v. City of Sunnyvale* (9th Cir. 2015) 779 F.3d 991, and *Peña v. Lindley* (E.D.Cal. Feb. 26, 2015, Civ. No. 09-01185) 2015 WL 854684 (app. pending, argued Mar. 16, 2017). The legal principle at stake in this case—the California legislature’s ability to regulate the technology in firearms to help solve and prevent crimes—is fundamental to the organization’s mission.

* No party or counsel for a party authored the proposed *amicus curiae* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus curiae* and its members, made a monetary contribution intended to fund the preparation or submission of this brief.

For the reasons stated above, the Court should grant this application and permit Giffords Law Center to file the attached proposed *amicus curiae* brief.

DATED: November 13, 2017

Respectfully submitted,



David H. Fry

Attorney for *Amicus Curiae*
GIFFORDS LAW CENTER TO
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INTEREST OF *AMICUS CURIAE*

Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”), formerly the Law Center to Prevent Gun Violence, is a national nonprofit organization with nearly twenty-five years of experience supporting the laws, policies, and programs proven to save lives from gun violence. The organization was founded by members of the California legal community in 1993 after a disturbed gunman carried out a massacre at a downtown San Francisco law firm, using semiautomatic pistols to kill eight people and injure six at 101 California Street. Today, attorneys at Giffords Law Center provide comprehensive legal expertise in support of effective gun safety laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2007, the California legislature passed a law designed to reduce gun murders and assaults by making it easier for law enforcement to find and convict those who commit them. Assembly Bill 1471 established that, once the Department of Justice certified that the necessary technology was available and not subject to patent restrictions, no new semiautomatic handgun models could be sold within the state unless they incorporated “microstamping” technology. (Pen. Code, § 31910, subd. (b)(7)(A).) Microstamping imprints information on shell casings when a bullet is fired—including the make, model, and serial number of the gun that fired the round—which helps police officers solve gun crimes.

Anyone who watches television is familiar with the idea that the spent shell casings police find at crime scenes may be matched to the gun that fired them. To date, however, that investigative technique has been subject to a number of serious limitations that prevent it from being used to solve many gun crimes. Most significantly, to match a spent shell to the gun that fired it, the traditional technology requires police to possess the

gun itself (either at present or at some point in the past). They rarely do, and that makes it hard to identify the perpetrators of gun crimes—in California, roughly 39% of the state’s annual homicides are unsolved.

Microstamping is a leap forward because it allows authorities to match a shell to the gun that fired it, without ever having to possess the gun itself. And by allowing police to identify the weapon that fired the shells, microstamping can lead them to the weapon’s owner. When the technology is implemented, more gun crimes will be solved and they will be solved more quickly, reducing the overall level of gun violence. Finding the perpetrators will also ease the suffering that victims, families, and communities experience when a shooting goes unsolved.

Unsurprisingly, law enforcement officials support this revolutionary advance. The gun industry, on the other hand, has vocally opposed it. Smith & Wesson, for instance, announced after the requirement took effect that it “does not and will not include microstamping in its firearms.” “The microstamping mandate and the company’s unwillingness to adopt this so-called technology,” the gun maker further explained, “will result in a diminishing number of Smith & Wesson semiautomatic pistols available for purchase by California residents.”¹ To date, all other manufacturers have followed suit, preferring to stop selling new models of handguns in California and litigate this case rather than comply with the new requirement.

But Appellants’ legal theory is deeply flawed. On the merits, their impossibility argument is belied by evidence that microstamping has been extensively tested and found to be feasible and reliable. But even if that

¹ See Mather, *Smith & Wesson Says It Won’t Follow California “Microstamping” Law*, L.A. Times (Jan. 23, 2014) <http://www.latimes.com/local/lanow/la-me-ln-smith-wesson-microstamping-law-20140123-story.html#axzz2rLgnuhU8>.

evidence is ignored, and Appellants' allegation that it is impossible to manufacture a handgun with the requisite microstamping technology is accepted as true, Appellants' claim still fails because it rests on a mischaracterization of the microstamping statute. Their argument portrays the law as requiring them to do something that they contend is impossible (or at least impossible to do perfectly every time), but the statute does not require manufacturers to incorporate microstamping technology at all. It simply says that new models of handguns sold in California must include the technology. Manufacturers can comply, as they have to date, by selling the hundreds of "grandfathered" gun models currently for sale and not introducing new models in California.

If Appellants' understanding of the "impossibility" maxim were accepted, the implications would reach far beyond crime control. States and the federal government often pass laws meant to incentivize companies to innovate in ways that reduce the harms their businesses cause. Starting at least as early as the Clean Air Act in 1970, so-called "technology-forcing" regulations have set standards that companies must find a way to meet if they wish to do business in a given market. For example, California has led the nation in regulating vehicle emissions in ways that have motivated car companies to re-engineer cars to pollute less. By doing so, those companies have secured continued access to the very large California market.

It is critical that California continue to have the ability to drive innovation for the public good by regulating business in this fashion, but if Appellants' misguided "impossibility" test were accepted, all technology-forcing policies would be subject to challenge. Even more perversely, Appellants' interpretation of the impossibility maxim would provide a strong incentive *against* innovation by companies subject to technology-forcing laws because finding an engineering solution would undermine

their argument that compliance is “impossible.” California law does not require such a result, or any of the negative consequences that would stem from embracing Appellants’ reinterpretation of the impossibility maxim.

ARGUMENT

I. **Microstamping Is a Landmark Advance in Gun-Tracing Technology.**

Guns kill hundreds of Californians every year. From 2007 to 2016, there were 18,683 homicides in California in which the weapon was identified—71 percent involved a firearm and 51 percent involved a handgun.² More than 39 percent of homicides (roughly 750 per year) go unsolved,³ and unsolved crimes often precipitate additional killings as individuals retaliate after the investigatory process fails.⁴

Faced with this persistent public safety crisis, policymakers have sought a “gun fingerprinting” technology that links crime-scene evidence to a particular firearm. It has long been known that, whenever a gun is fired, markings on its interior surfaces (inadvertent byproducts of the manufacturing process) transfer onto each bullet casing in the form of microscopic scratches and indentations, similar in their uniqueness to a human fingerprint.⁵ But investigatory use of these markings requires

² California Department of Justice, Bureau of Criminal Justice Statistics Center, *Homicide in California - 2016* (Aug. 17, 2017) table 21, p. 28, <https://openjustice.doj.ca.gov/downloads/pdfs/hm16.pdf>.

³ *Id.* at table 28, p. 35.

⁴ Leovy, *Ghettoside: A True Story of Murder in America* (2015); Heinzmann, *As Chicago Killings Surge, the Unsolved Cases Pile Up*, *Chicago Tribune* (Sept. 9, 2016) <http://www.chicagotribune.com/news/local/breaking/ct-chicago-homicide-clearance-rate-20160909-story.html>.

⁵ See King et al., *Opening the Black Box of NIBIN: A Descriptive Process and Outcome Evaluation of the Use of NIBIN and Its Effects on Criminal Investigations* (Oct. 23, 2013) pp. 1-2, <https://www.ncjrs.gov/pdffiles1/nij/grants/243875.pdf>.

having something to compare them to.⁶ New York, Maryland, and Washington, D.C. once required maintenance of statewide databases containing sample shell casings fired from every new gun sold, on the theory that the samples' "ballistic fingerprints" could be compared with shells subsequently recovered at crime scenes.⁷ But the databases of physical shell casings proved impractical, expensive, and ultimately ineffective, and all three jurisdictions later repealed their laws.⁸

In a similar vein, the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives has tried to maintain a database of spent casings left at crime scenes, but its utility is generally limited to determining whether casings from one crime scene were fired from the same gun as those found at another, as opposed to identifying the gun that fired them.⁹ And the process of submitting images to the database and comparing them to others is so cumbersome and time-consuming that relatively few police departments contribute samples or consult the network.¹⁰

The shortfalls of the traditional process are exemplified by the efforts to solve the 2001 murder of Tom Wales, an Assistant United States

⁶ Ibid.

⁷ See N.Y. Gen. Bus. Law § 396-ff; D.C. Act. § 17-651 (2009); Md. Code, Pub. Safety § 5-131.

⁸ Cox, *Maryland Scraps Gun "Fingerprint" Database After 15 Failed Years*, Baltimore Sun (Nov. 7, 2015) <http://www.baltimoresun.com/news/maryland/bs-md-bullet-casings-20151107-story.html>.

⁹ See King, *supra*, pp. i, 1-10.

¹⁰ See Los Angeles Times Editorial Board, *"Microstamping" Techniques Could Help Police Crack Down on Gun Crimes—If the Gun Lobby Allows It*, L.A. Times (Oct. 24, 2016) <http://www.latimes.com/opinion/editorials/la-ed-microstamping-guns-nra-20161022-snap-story.html>; Schwartzapfel, *This Machine Could Prevent Gun Violence—If Only Cops Used It*, The Marshall Project (produced in collaboration with the Washington Post) (Oct. 6, 2016) <https://www.themarshallproject.org/2016/10/06/this-machine-could-prevent-gun-violence-if-only-cops-used-it>.

Attorney who was shot through the window of his Seattle home. Shell casings and bullets were the only physical evidence left behind, and ballistics experts were able to determine they were fired from a rare replacement gun barrel for a Makarov handgun—only 2,600 had ever been sold.¹¹ Recently, the FBI completed a *fifteen year* effort to track down each original owner of the replacement barrels, and it is now in the process of tracking each subsequent transfer for those that are no longer in the original owners' hands.¹² Meanwhile, Wales's murder remains unsolved.

Microstamping provides a solution that these first-generation tools have failed to provide. The technology uses lasers to engrave a unique tracking number onto the interior surfaces of the gun, which are then automatically stamped onto each bullet casing upon firing via the same forces that produce the unintentional markings.¹³ When shell casings are recovered, such as at the scene of a drive-by shooting, the “microstamp” would enable law enforcement to link them to a particular firearm without recovering the gun itself.¹⁴ Much in the way a license plate allows law enforcement to identify a car's owner, police will be able to read the

¹¹ Toobin, *An Unsolved Killing*, *The New Yorker* (Aug. 6, 2007) <https://www.newyorker.com/magazine/2007/08/06/an-unsolved-killing>.

¹² Carter, *Tracing Gun Barrel is Next Hurdle in Probe of Federal Prosecutor Thomas Wales' Death* (Oct. 7, 2016) *The Seattle Times*, <https://seattletimes.com/seattle-news/crime/tracing-gun-barrel-next-hurdle-for-investigators-in-2001-slaying-of-assistant-us-attorney-thomas-wales/>.

¹³ Chumbley et al., *Clarity of Microstamped Identifiers as a Function of Primer Hardness and Type of Firearm Action* (Spring 2012) 44 *AFTE Journal* 2:145 at pp. 145-146; Ohar and Lizotte, *Extracting Ballistic Forensic Intelligence: Microstamped Firearms Deliver Data for Illegal Firearm Traffic Mapping* (2009) 7434 *Proceedings of SPIE* 743416 at pp. 2-4; Lizotte and Ohar, *Forensic Firearm Identification of Semiautomatic Handguns Using Laser Formed Microstamping Elements* (2008) *SPIE Annual Optics & Technology Conference* at pp. 2-8.

¹⁴ *Ibid.*

microstamp, pinpoint the source firearm, and identify its last known buyer through California's database of gun transfers.¹⁵

Microstamp identification is far simpler and more effective than the traditional, inexact process of trying to match complex patterns of scratches and dents that are left by happenstance in the manufacturing process. Even if these patterns are decipherable, they generally allow investigators only to draw links between crimes without identifying the firearm or its owner. In the Tom Wales case, microstamping could have provided an actionable clue much earlier, and obviated the need to try to trace the ownership of more than two thousand replacement gun barrels.

Recognizing its benefits as a crime-solving tool, law enforcement officers and professional associations, including the International Association of Chiefs of Police (IACP), strongly support microstamping. In an official resolution, the IACP observed that "in a large number of violent incidents involving firearms, shell casings are left at crime scenes and law enforcement agencies have no way of identifying these casings."¹⁶ Microstamping, the IACP concluded, would "identify the first known purchaser of a weapon used in crime, therefore providing leads that would allow for substantial evidentiary information that will help identify, apprehend and arrest criminals."¹⁷ Accordingly, the IACP's resolution recommended that "all firearms produced or sold be fitted with microstamping technology" and that "all governments enact legislation that

¹⁵ *Ibid.*; see Cal. Pen. Code, § 28200 et seq. & § 11106 (requiring firearms dealers to report certain transfers to the California Department of Justice, which maintains a database of transfers for use by law enforcement).

¹⁶ Intern. Assn. of Chiefs of Police, 2008 Resolutions (Nov. 11, 2008) p. 45, <http://www.theiacp.org/portals/0/pdfs/2008Resolutions.pdf>.

¹⁷ *Ibid.*

will allow for the implementation of microstamping technology.”¹⁸

The American Bar Association has similarly urged federal and state governments “to enact laws requiring that all newly-manufactured semi-automatic pistols be fitted with microstamping technology.”¹⁹ The ABA concluded that “[m]icrostamping technology will be a material aid to law enforcement in the effort to solve crimes committed by use of guns.”²⁰

These organizations have not wasted their resources supporting science fiction. Notwithstanding gun manufacturers’ refusal to advance the technology, a growing number of studies have confirmed the legislature’s judgment that microstamping is a viable crime-solving tool. (See, e.g., Chumbley et al., *Clarity of Microstamped Identifiers as a Function of Primer Hardness and Type of Firearm Action* (Spring 2012) 44 AFTE Journal 2:145 at p. 155 [finding microstamps legible 94% to 100% of the time on nine out of ten test ammunitions fired from Sig Sauer handgun]; Lizotte and Ohar, *Forensic Firearm Identification of Semiautomatic Handguns Using Laser Formed Microstamping Elements* (2008) SPIE Annual Optics & Technology Conference at pp. 9-14 [finding microstamps legible on nearly 97% of 1500 test rounds].) In an experiment detailed via a declaration submitted in a parallel federal-court challenge to California’s microstamping requirement, the declarant examined 2,500 shell casings ejected from a handgun equipped with microstamping. He found that (1) “all eight microstamped digits from the firing pin were legible 97% of the time;” (2) “breech face markings transferred to cartridge casings were legible 96% of the time;” and (3) “[b]etween firing pin and breech face

¹⁸ Ibid.

¹⁹ American Bar Association, Recommendation (Aug. 9-10, 2010), p. 1 https://www.americanbar.org/content/dam/aba/directories/policy/2010_am_115.authcheckdam.pdf.

²⁰ Id. at p. 3.

markings, all eight microstamped digits were identifiable in all cases.”²¹ All of this evidence undercuts gun makers’ claim that microstamping technology is “impossible.”

California’s adoption of a microstamping requirement led the nation in advancing this critical crime-prevention technology. The District of Columbia has followed. Beginning on January 1, 2018, the District will prohibit licensed dealers from selling any semiautomatic pistol that is not equipped with microstamping technology.²² The legislatures of New York, Massachusetts, Maryland, and Rhode Island have also considered mandating the requirement, and others are likely to follow California’s example once litigation efforts to undermine it are resolved.

Broad adoption of microstamping laws will enhance the benefits to public safety that they already promise to provide. Such legislation naturally will work even better if firearms equipped with this technology are sold in the other forty-nine states. This result can be expected if California and the District’s laws are enforced and manufacturers start to comply with them, because manufacturers who produce compliant handguns would likely sell them in other states.²³ As more handguns begin to be equipped with microstamping, gun traffickers will be less able to

²¹ Declaration of Todd Lizotte, Docket No. 90-2, *Peña v. Lindley* (E.D.Cal. Feb. 26, 2015, Civ. No. 09-01185).

²² D.C. Code, §§ 7-2504.08; 7-2505.03 (as amended by 63 D.C. Reg. 4659 (Apr. 1, 2016)).

²³ California’s auto emissions standards have, for instance, had a positive impact in the rest of the country. (See Lochhead, *Trump Administration May Let California Keep Emissions Standards*, S.F. Chronicle (July 9, 2017) <http://www.sfchronicle.com/politics/article/Trump-administration-may-let-california-keep-11276368.php> [“The auto manufacturers aren’t going to make two different kinds of cars, California and non-California, so by default they’re really required to make cars to the California standards.”].)

move firearms that lack the technology into states that require it. More criminals who use firearms will be caught, preventing future shootings, and the lower incidence of unsolved crimes will reduce retaliatory violence. Gun traffickers and straw purchasers will think twice before purchasing a gun for a prohibited felon or domestic abuser because they will fear that, if the gun is used in a crime, the shell casings will lead police to their doorstep.

II. If Accepted, the Gun Industry’s “Impossibility” Theory Would Imperil Other Technology-Forcing Measures.

A. The Claim of “Impossibility” Is Patently Inapposite.

Although Appellants invoke California Civil Code section 3531, and contend that they cannot be required to do the “impossible,” the microstamping law does not require Appellants to do anything. Rather, the law sets a condition for offering a particular product for sale. Even if Appellants’ allegations of the infirmities of microstamping technology were accepted as true for purposes of ruling on the pleadings (notwithstanding the evidence to the contrary), the mandate would not “require” an impossible act because no one is compelled to sell new handgun models. Indeed, Appellants have complied with the microstamping law since 2013 simply by limiting their handgun sales to the hundreds of models they were permitted to sell at the time the new requirement took effect. (See Cal. Pen. Code, § 31910, subd. (b)(7)(A) [microstamping requirement applies only to semiautomatic pistols “that are not already listed on the roster” of approved handguns at the time the Department of Justice certifies the absence of patent restrictions].)

A simple hypothetical illustrates the absurd results that would stem from adopting Appellants’ understanding of “impossibility.” Suppose the legislature enacted a law providing that self-driving cars could be sold in

California only if they would stop at red lights. Under Appellants' interpretation of Section 3531, automakers unable to solve the challenge of getting self-driving cars to stop at red lights could invalidate the law—and market their light-running vehicles—by arguing that compliance was “impossible.” Of course, in reality, such a law would *not* run afoul of Section 3531 because an automaker incapable of engineering a car to meet the standard could comply with the law simply by not selling self-driving cars. The law would not “require an impossibility” because no one is required to sell a self-driving car.

The same is true here. Assuming Appellants are not already capable of incorporating microstamping into their products, they can still comply with the law by limiting their sales to existing handgun models, with the hope of one day being able to sell new models providing an appropriate incentive for them to perfect a technology that will save lives.

B. Appellants' “Impossibility” Theory Is Actually a Challenge to the Concept of Technology-Forcing Legislation.

Rather than mandating an impossible act, the microstamping law is an example of “technology-forcing” legislation—a law that creates a market incentive for companies to develop technology that will ameliorate some of the negative impacts of their business activities. Such laws are valid and have played an important role in improving Americans' lives.

Faced with a different public health crisis nearly fifty years ago—air pollution—the United States Congress acted boldly to mitigate the problem and, in doing so, set the paradigm for the technology-forcing laws of today. During debate on amendments to the Clean Air Act of 1970, Senator Edward Muskie observed: “The first responsibility of Congress is not the making of technological or economic judgments or even to be limited by what is or appears to be technologically or economically feasible. Our

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.” (Remarks of Sen. Muskie, 116 Cong. Rec. 32901-32902, 2d Sess. (1970).) Consistent with Senator Muskie’s sentiment, the amendments established air quality standards defined by what was needed to protect public health, as opposed to the best pollution-control technologies of the moment. (Sen. Rep. No. 91-1196, 2d Sess., pp. 2-3 (1970).)

The Supreme Court validated this legislative approach in *Union Electric Co. v. EPA* (1976) 427 U.S. 246, where a polluter challenged an implementation plan under the Clean Air Act on the theory that it was technologically infeasible to comply with. “Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks,” the Court explained, “[b]ut Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking.” *Id.* at p. 269. The challengers’ infeasibility theory “would render that considered legislative judgment a nullity,” the Court concluded, “and that is a result we refuse to reach.” *Ibid.*

Similarities to the microstamping requirement are obvious. Confronted with an epidemic of violent crimes committed with guns, the legislature established a new standard (microstamping on new handgun models) which manufacturers claim is not feasible for them to meet. As detailed in the State’s brief, however, lawmakers weighed evidence on both sides regarding the feasibility of the standard before opting to enact it. (OBM 13-16.) The law’s enactment reflects the legislature’s reasoned judgment that, while it is a new technology, microstamping carries such benefits for public safety that it should require manufacturers to include it in new handguns, rather than waiting for them to do so voluntarily.

This legislative action was no surprise, as California has consistently led the nation in prompting the industries it regulates to innovate for the benefit of the public. The viability of many of California’s technology-forcing measures, examples of which are discussed below, would be threatened by Appellants “impossibility” theory.

Auto Emission Standards. California is the only state to have a waiver under the Clean Air Act that allows it to set its own greenhouse gas emission standards for new motor vehicles. Under that waiver, the California Air Resources Board adopted the Advanced Clean Cars program, which “require[s] manufacturers to produce increasing numbers of pure [zero-emission vehicles] (that is battery electric and fuel cell electric vehicles) and plug-in hybrid electric vehicles . . . in the 2018 through 2025 model years.”²⁴ The zero-emission vehicle regulation is “the focused technology-forcing piece” of the Advanced Clean Car program.²⁵

Ballast Water Discharge Standards. California has adopted regulations to minimize the environmental impact of the discharge of ballast water from ships. (Cal. Pub. Resources Code, § 71200.) Vessels that carry ballast water must minimize “the uptake and release of nonindigenous species” that can wreak havoc on native ecosystems. (See id. § 71204.) California currently requires that discharged ballast water have “[n]o detectable living organisms that are greater than 50 micrometers” (see, e.g., Cal. Code Regs., tit. 2, § 2293), but the final performance standards (to be implemented by 2020) require that discharge contain “zero detectable living organisms for all organism class sizes.” See id. § 2295 (emphasis added). These requirements push the boundaries of

²⁴ See California Air Resources Board, *California’s Advanced Clean Cars Midterm Review* (Jan. 18, 2017) https://www.arb.ca.gov/msprog/acc/mtr/acc_mtr_summaryreport.pdf.

²⁵ Ibid.

existing technology.²⁶

Marijuana Health and Safety Standards. California is preparing to comprehensively regulate the manufacture, testing, and sale of marijuana when the substance is legalized for recreational use in January 2018. The rules will require marijuana to be tested for things like moisture content, residual solvents and processing chemicals, and pesticides.²⁷ Already, some have argued that these standards may be impossible to meet, particularly in the realm of pesticide testing. “[T]hat test alone would take many thousands of dollars and weeks to calibrate all the instruments,” one industry professional commented, adding that “[i]t’s virtually impossible and nobody would pay the price to actually do that test.”²⁸

In all the above examples, regulated industries have two options: strive to comply or sit out the market. Appellants ask this Court to bless a third option: litigate. If the “impossibility” theory is legitimized, an industry confronted with a technology-forcing standard would seek to undo it in a courtroom before applying its energy to meeting it. Judges would be called on to weigh complex, competing expert testimony on the feasibility of technology—a task for which they are ill-suited—while the envisioned public benefits of the technology-forcing law would go unrealized.

²⁶ See Tzankova, *The Political Consequences of Legal Victories: Ballast Regulation and the Clean Water Act* (2010) 40 *Envtl. L. Rep. News & Analysis* 10154, 10159–60 [“California’s current discharge limits are distinctly stricter than what can be attained using the default ballast management technique of open-ocean exchange, and they do appear to have produced some technology-forcing effect.”].

²⁷ McGreevy, *California Proposes New Rules and Standards for Marijuana Testing Laboratories*, *L.A. Times* (May 5, 2017) <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-proposes-new-rules-1494013681-htmstory.html>.

²⁸ Zhang, *Nobody Knows What To Do About Pesticides in Legal Marijuana*, *Wired* (Aug. 7, 2015) <https://www.wired.com/2015/08/nobody-knows-pesticides-legal-marijuana/>.

Indeed, endorsing Appellants' theory of "impossibility" would not only render technology-forcing measures ineffective, it would turn them on their head. Rather than struggle to improve their technology to remain in the market, industries' incentive would be to *forestall* development to bolster their legal claims that meeting the legislative requirements is "impossible." One need not look further than the gun industry's response to the microstamping requirement for proof on this point. There is no indication that gun makers have made any effort to refine or perfect microstamping in the ten years since the requirement was enacted. In fact, their public statements suggest the opposite.²⁹

Firearms are uniquely dangerous products, and it is up to policymakers to make them safer and manage the threats their sale poses to public safety. Other industries whose products or activities have a direct impact on human health, most prominently automakers and air polluters, are subject to technology-forcing regulatory regimes. Those industries cannot evade regulation by saying they cannot meet the requirements a state imposes to protect the public. The gun industry is no different.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeal.

²⁹ See Mather, *Smith & Wesson Says It Won't Follow California "Microstamping" Law*, L.A. Times (Jan. 23, 2014) [quoting Smith & Wesson's press release as stating that "[t]he microstamping mandate and the company's *unwillingness* to adopt this so-called technology will result in a diminishing number of Smith & Wesson semiautomatic pistols available for purchase by California residents"] (emphasis added) <http://www.latimes.com/local/lanow/la-me-ln-smith-wesson-microstamping-law-20140123-story.html#axzz2rLgnuhU8>.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

According to the word count function in Microsoft Office Word 2010, this brief, including footnotes but excluding portions excludable under Rule 8.520(c)(3), contains 4,251 words.

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Craig A. Lavoie

PROOF OF SERVICE

I, Julie Lunsford, declare as follows:

I am over the age of 18 and am not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94105.

On November 13, 2017, I served true copies of the attached document described as

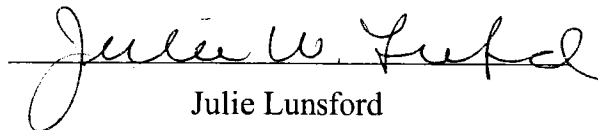
APPLICATION OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF SUPPORTING APPELLANTS

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


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