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13
 14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 15 COUNTY OF FRESNO
 16

17 NATIONAL SHOOTING SPORTS
 FOUNDATION, INC., a nonprofit trade
 18 association; and SPORTING ARMS AND
 AMMUNITION MANUFACTURERS'
 19 INSTITUTE, INC., a nonprofit trade
 association,

20 Plaintiffs,

21 vs.

22 STATE OF CALIFORNIA, acting by and
 23 through its Attorney General, KAMALA D.
 HARRIS; and DOES 1 through 100, inclusive,

24 Defendants.
 25
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 27
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CASE NO. 14CECG00068 DSB

The Honorable Donald S. Black

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION**

Date: May 7, 2014

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Dept: 502

Action Filed: January 9, 2014

Trial Date: None Set

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1 **I. INTRODUCTION.**

2 This is an action for declaratory and injunctive relief through which the plaintiffs, two
3 trade associations representing members of the firearms industry, seek to enjoin the enforcement
4 of Penal Code section 31910, subdivision (b)(7)(A). That statute requires that semi-automatic
5 pistols be imprinted in two or more places on their internal surfaces or parts with a microscopic
6 array of characters identifying the make, model, and serial number of the pistol that are capable of
7 being transferred to two locations on each cartridge case when the pistol is fired (hereinafter
8 referred to as "dual placement microstamping"). It is impossible to comply with the requirements
9 of Penal Code section 31910, subdivision (b)(7)(A), because dual placement microstamping is not
10 technologically feasible in the manufacturing of firearms.

11 Plaintiffs' retailer, distributor and manufacturer members that they represent are suffering
12 massive business losses because of the impossibility of complying with Penal Code section 31910,
13 subdivision (b)(7)(A). Those losses are irreparable because the State of California (hereinafter,
14 the "State") enjoys sovereign immunity with respect to the consequences of its statutory
15 enactments. Those irreparable losses are also continuing in nature, because members of the
16 firearms industry lose additional sales for every day that Penal Code section 31910, subdivision
17 (b)(7)(A), remains in effect. Plaintiffs therefore move for a preliminary injunction enjoining the
18 State from enforcing Penal Code section 31910, subdivision (b)(7)(A), pending the entry of
19 judgment in this action.

20

21 **II. STATEMENT OF FACTS.**

22 The primary issue in this action is the lack of enforceability of Penal Code section 31910,
23 subdivision (b)(7)(A). That statute provides as follows:

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

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(b) For a pistol:

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(7) (A) Commencing January 1, 2010, for all semiautomatic 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.

As described in much greater detail below and in the concurrently filed declarations, no manufacturer of semi-automatic pistols can comply with the provisions of California Penal Code section 31910, subdivision (b)(7)(A), because it is not possible under the current state of firearms technology to imprint in two or more place on any interior surface or internal working parts of a semi-automatic pistol, a microscopic array of characters identifying the make, model and serial number of the pistol that can be transferred to two locations on each cartridge case when the pistol is fired. Since the mere existence of that penal statute constitutes a threat of impending prosecution for any retailer, distributor or manufacturer of firearms who violates it, no such retailer, distributor or manufacturer can legally sell any newly developed semi-automatic pistols in California. The market in California for semi-automatic pistols in 2013 was approximately \$183,218,651.92 and that market will plainly erode as retailers, distributors and manufacturers of firearms become increasingly unable to sell semi-automatic pistols in California because of the dual placement microstamping requirements. This erosion will occur as models of semi-automatic pistols are removed from the Roster¹ and new improved models of semi-automatic pistols are excluded from being sold in California because of the requirements of the statute.

¹ California's roster of approved handguns (the "Roster") includes those handgun models that are certified for sale in California by the California Department of Justice.

1 **III. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION AGAINST**
2 **THE ENFORCEMENT OF PENAL CODE SECTION 31910, SUBDIVISION**
3 **(b)(7)(A), ON THE GROUND THAT IT IS VOID FOR IMPOSSIBILITY OF**
4 **COMPLIANCE.**

5 Code of Civil Procedure section 526 provides three separate grounds for the issuance of a
6 preliminary injunction in this case, any one of which by itself is sufficient for a preliminary
7 injunction to issue.² Initially, a preliminary injunction may be issued “[w]hen it appears by the
8 complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof,
9 consists in restraining the commission or continuance of the act complained of...” (Code Civ.
10 Proc., § 526, subd. (a)(1).) The relief that plaintiffs demand herein is an injunction against the
11 enforcement of Penal Code section 31910, subdivision (b)(7)(A). (Compl., ¶ 16.)³

12 Plaintiffs seek an injunction against the enforcement of Penal Code section 31910,
13 subdivision (b)(7)(A), based on their contention that the provisions thereof

14 are invalid as a matter of law and cannot be enforced because it is
15 impossible for a firearm manufacturer to implement microstamping
16 technology in compliance therewith, since no semi-automatic pistol
17 can be designed or equipped with a microscopic array of characters
18 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.

19 (Compl., ¶¶ 10, 13.)

20 The impossibility challenge that plaintiffs assert thus arises from the equitable maxim that
21 “[t]he law never requires impossibilities.” (Civ. Code, § 3531.) “Consistent with this maxim, the
22 law recognizes exceptions to statutory requirements for impossibility of performance.” (*Board of*
23 *Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 300.) The State nevertheless faults

24 _____
25 ² Code of Civil Procedure section 527 provides in addition that a preliminary injunction
26 may be granted at any time before trial based on affidavits showing satisfactorily that sufficient
grounds exist for the issuance of the preliminary injunction.

27 ³ It is settled that declaratory relief may properly be sought as a remedy against the State.
28 (E.g., *Lord v. Garland* (1946) 27 Cal.2d 840, 852; *Heinly v. Lolli* (1969) 2 Cal.App.3d 904, 909.)



1 plaintiffs in its pending demurrer for “fail[ing] to allege that the statute is unconstitutional” (Dem.,
2 6:9-10), but a statute or ordinance that is otherwise void need not also be unconstitutional to be
3 subject to challenge by way of injunction. For instance, in *San Diego Tuberculosis Association v.*
4 *City of East San Diego* (1921) 186 Cal. 252, 255, an injunction was granted against the
5 enforcement of a penal ordinance that declared every hospital for the treatment of persons afflicted
6 with a contagious or infectious disease to be a nuisance. The California Supreme Court stated in
7 that case that “[t]he doctrine that an action will lie to enjoin the enforcement of an [invalid]
8 municipal ordinance in cases where such enforcement will cause substantial and irreparable injury
9 to private property or private property rights and in which there is no adequate remedy in the
10 ordinary course of law, is now too well settled to require discussion.” Likewise, in *Neary v.*
11 *Town of Los Altos Hills* (1959) 172 Cal.App.2d 721, enforcement of an ordinance prohibiting the
12 operation of a truck weighing more than twelve tons on the defendant town’s streets was enjoined
13 because it was unreasonable. As the court explained, the inquiry in the case was “*whether the*
14 *ordinance is so unreasonable as to make it void.*” (*Id.* at p. 726; emphasis added.) No issue of
15 constitutionality was present in either *San Diego Tuberculosis Association* or in *Neary*.

16 The California Supreme Court defined the concept of “impossibility” over a century ago in
17 the case of *Klauber v. San Diego Street-Car Co.* (1892) 95 Cal. 353. As the court held in that
18 case, “impossibility must consist in the nature of the thing to be done, and not in the inability of
19 the party to do it....” (*Id.* at p. 358.) “Difficulty or improbability of accomplishing the
20 undertaking will not [suffice]. It must be shown that the thing cannot by any means be effected.”
21 (*Ibid.*) An undertaking is not impossible if it “could be accomplished by any one with proper
22 means and the requisite skill and knowledge....” (*Ibid.*)

23 Plaintiffs have submitted the declaration of Frederick W. Tulleners, a forensic scientist
24 who specializes in forensic firearms identification, in support of their motion for a preliminary
25 injunction. (Tulleners Decl., ¶ 2.) Mr. Tulleners has forty-two years of experience in that field,
26 including work for the California Department of Justice, the California Criminalistics Institute, the
27 University of California at Davis, and the Los Angeles Police Department. (*Id.*, ¶¶ 3-6.) Mr.
28 Tulleners holds various certifications in forensic firearms identification, notable among them his

1 distinguished membership in the Association of Firearms and Tool Mark Examiners (“AFTE”).
2 (*Id.*, ¶ 7.) He has published fourteen peer-reviewed articles concerning firearms and ballistics
3 imaging issues, two of which concerned microstamped firing pins of the type at issue in Penal
4 Code section 31910, subdivision (b)(7)(A). (*Id.*, ¶¶ 7-8.)

5 Mr. Tulleners holds the opinion:

6 that it is impossible for any manufacturer of semi-automatic pistols
7 to comply with the provisions of California Penal Code section
8 31910(b)(7)(A), because it is not possible under the current state of
9 firearms micro serial number technology to etch or otherwise to
10 imprint, on any interior surface or internal working part of a semi-
11 automatic pistol other than its firing pin, a microscopic array of
12 characters that identify the make, model and serial number of the
13 pistol, and that can be transferred by imprinting on each cartridge
14 case when the pistol is fired.

11 (*Id.*, ¶ 33; *see also*, ¶¶ 11 & 25.) Relying on his extensive expertise, Mr. Tulleners describes in
12 painstaking detail why microstamped characters capable of being transferred to cartridge cases
13 upon firing cannot be imprinted on any internal surface or working part of a semi-automatic pistol
14 other than its firing pin. By doing so, Mr. Tulleners explains why compliance with the dual
15 placement microstamping requirement of Penal Code Section 31910, subdivision (b)(7)(A), is
16 impossible.

17 In particular, after explaining both the operation of semi-automatic pistols (*id.*, ¶¶ 16-21)
18 and the principles of firearm micro stamping (*id.*, ¶¶ 22-24), Mr. Tulleners explains, among other
19 things, that the force of the contact upon firing between the cartridge case and any internal part of
20 a semi-automatic pistol other than its firing pin is much less than the force of the contact with the
21 firing pin itself; that the hard metal (usually brass) of the cartridge case will not accept an imprint
22 of microstamped characters in the way that the softer metal of the primer, which is struck only by
23 the firing pin, will accept such an imprint; and that microstamped characters cannot be imprinted
24 over the manufacturer’s imprint on the hard metal at the back of the cartridge case. (*Id.*, ¶¶ 26-
25 31.) In doing so, Mr. Tulleners notes that the breech face, chamber wall, extractor and ejector are
26 the only internal parts of a semi-automatic pistol other than the firing pin on which microstamped
27 characters might be imprinted. Mr. Tulleners explains why none of those other places can be
28

1 possible locations for microstamped characters capable of being transferred to the cartridge case
2 upon firing. (*Ibid.*) Mr. Tulleners also specifically notes in support of his opinion that he is
3 unaware of any scientific literature that finds to the contrary that microstamped characters capable
4 of being transferred to cartridge cases upon firing can be imprinted on any internal surface or
5 internal working part of a semi-automatic pistol other than its firing pin. (*Id.*, ¶ 32.)

6 Penal Code section 31910, subdivision (b)(7)(A), plainly and unambiguously requires dual
7 placement microstamping. Mr. Tulleners' declaration plainly and unambiguously establishes that
8 compliance with dual placement microstamping is impossible, because microstamped characters
9 capable of being transferred to the cartridge case *cannot* be imprinted anywhere on the interior
10 surface or internal working parts of a semi-automatic pistol other than its firing pin. Dual
11 placement microstamping therefore cannot by any means be effected by anyone, and it is therefore
12 impossible by its very nature under *Klauber v. San Diego Street-Car Co.*, *supra*. Because it is
13 impossible to comply with Penal Code section 31910, subdivision (b)(7)(A), plaintiffs are entitled
14 to a preliminary injunction prohibiting the enforcement of Penal Code section 31910, subdivision
15 (b)(7)(A). The action required by Penal Code section 31910, subdivision (b)(7)(A), is an
16 impossibility which the law will never require. (Civ. Code, § 3531, *supra*.)⁴

17

18 **IV. A PRELIMINARY INJUNCTION SHOULD BE ISSUED BECAUSE THE STATE**
19 **OF CALIFORNIA IS THREATENING TO PROSECUTE ANYONE WHO**
20 **MANUFACTURES, DISTRIBUTES OR SELLS A SEMI-AUTOMATIC PISTOL IN**
21 **VIOLATION OF PENAL CODE SECTION 31910, SUBDIVISION (b)(7)(A),**
22 **WHICH WOULD RENDER THE JUDGMENT IN THIS ACTION INEFFECTUAL.**

23 A preliminary injunction may also be issued “[w]hen it appears, during the litigation, that a
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26 ⁴ Plaintiffs seek relief in this action in their representative capacities on behalf of their
27 manufacturer, distributor, retailer and individual hunter and recreational target shooter members.
(Compl., ¶ 3.) Such representative actions are recognized at law. (*See, e.g., Arias v. Superior*
Court (2009) 46 Cal.4th 969, 977.) Plaintiffs therefore have associational standing to maintain this
28 action.

29

1 party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done,
2 some act in violation of the rights of another party to the action respecting the subject of the
3 action, and tending to render the judgment ineffectual.” (Code Civ. Proc., § 526, subd. (a)(3).) As
4 noted above, any semi-automatic pistol that lacks the microstamping technology required by Penal
5 Code section 31910, subdivision (b)(7)(A), is deemed an “unsafe handgun” as a matter of law. In
6 addition, anyone in California “who manufactures or causes to be manufactured, imports into the
7 state for sale, keeps for sale, [or] offers or exposes to sale” any such “unsafe handgun” is subject
8 to imprisonment. (Pen. Code, § 32000, subd. (a).)⁵

9 “A person need not violate or plan to violate a penal ordinance before he can obtain a
10 declaration construing it and deciding its application to him. To hold otherwise is like ‘telling the
11 prospective victim that the only way to determine whether the suspect is a mushroom or a
12 toadstool is to eat it.’” (*California Water & Telephone Co. v. County of Los Angeles* (1867) 253
13 Cal.App.2d 16, 24-25.) Thus, a prosecution for the violation of a statute is not a condition
14 precedent to an action for declaratory relief concerning that statute. (*Id.* at p. 25.) The reason for
15 this rule is that “[t]he existence of a penal statute or ordinance apparently applicable to the existing
16 conduct of a person who seeks declaratory relief is itself a ‘threat’ to impending prosecution.” (*Id.*
17 at pp. 25-26.)

18 Plaintiffs’ manufacturer, distributor or retailer members need not actually violate Penal
19 Code section 32000, subdivision (a), by manufacturing or selling any semi-automatic pistols in the
20 State of California that are deemed to be “unsafe handguns” for failure to incorporate the dual
21 placement microstamping required by Penal Code section 31910, subdivision (b)(7)(A), before
22 plaintiffs can obtain the preliminary injunction they seek by means of this motion. The mere
23 existence of Penal Code section 32000, subdivision (a), constitutes a threat to impending
24 prosecution for any violation of Penal Code section 31910, subdivision (b)(7)(A), as a matter of
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26 ⁵ Ironically, these penal statutes are defeating the goal of promoting handgun safety by
27 preventing firearm manufacturers from introducing into California improved semi-automatic
28 pistols.

1 law. (*California Water & Telephone Co. v. County of Los Angeles, supra.*) That threat of
2 prosecution violates the right of plaintiffs' members not to be subjected to the impossible dual
3 placement microstamping requirements of Penal Code section 31910, subdivision (b)(7)(A), as
4 explained in the preceding section of this memorandum. The irreparable and unrecoverable losses
5 that plaintiffs' members will sustain while this action is pending, as detailed in the following
6 section of this memorandum, will make the judgment to be rendered in this action ineffectual to
7 that extent. Plaintiffs are thus entitled to a preliminary injunction under Code of Civil Procedure
8 section 526, subdivision (a)(3).

9

10 V. **A PRELIMINARY INJUNCTION SHOULD BE ISSUED BECAUSE PECUNIARY**
11 **COMPENSATION WOULD NOT AFFORD PLAINTIFFS ADEQUATE RELIEF**
12 **IN THIS CASE.**

13 Finally, a preliminary injunction may be issued “[w]hen pecuniary compensation would
14 not afford adequate relief.” (Code Civ. Proc., § 526, subd. (a)(4).) To obtain injunctive relief on
15 this ground, “the plaintiff must ordinarily show that the defendant’s wrongful acts threaten to
16 cause *irreparable* injuries, ones that cannot be adequately compensated in damages.” (*Intel Corp.*
17 *v. Hamidi* (2003) 30 Cal.4th 1342, 1352.) “The term ‘irreparable injury’ authorizing the
18 interposition of a court of equity by way of injunction means that species of damages, whether
19 great or small, that ought not to be submitted to on the one hand or inflicted on the other.”
20 (*Anderson v. Souza* (1952) 38 Cal.2d 825, 834.) In particular, “the owner of a business may
21 enjoin the enforcement of [a] ... void statute ... which deprives him of effective access to his
22 customers.” (*Crittenden v. Superior Court* (1964) 61 Cal.2d 565, 568.)

23 In support of this motion, plaintiffs submit eight other declarations from an economist and
24 various categories of persons who are being affected by the impossible requirements of Penal
25 Code section 31910, subdivision (b)(7)(A). All of those declarations address the irreparable injury
26 that plaintiffs' members are suffering as a result of that statute, which is depriving them of access
27 to their customers. Those eight declarations, organized by category, provide as follows:

28



1 **The Customer Declarations.** Three would-be customers from different parts of
2 California who were unable to purchase semi-automatic pistols because of the operation of Penal
3 Code section 31910, subdivision (b)(7)(A), have submitted declarations. **Manrique Gomez**, from
4 West Covina, decided to purchase a Smith & Wesson Model M&P 45, a .45 caliber semi-
5 automatic pistol, for personal protection. (Gomez Decl., ¶¶ 2-3.) Mr. Gomez went to Turner’s
6 Outdoorsman, a firearms retailer in Orange, to make his purchase, but he was unable to complete
7 the purchase because the Model M&P 45 is no longer listed on California’s roster of approved
8 handguns (the “Roster”). (*Id.*, ¶ 4.) **Jacquelyn Ann Morton**, a traveling missionary from Fresno,
9 decided to purchase a Smith & Wesson Model M&P 9c, a nine millimeter semi-automatic pistol,
10 also for personal protection, because she often feels vulnerable as an older person traveling the
11 highways at night as part of her missionary work, and because she feels that the Model M&P 9c
12 would be easier for her to handle than the .38 caliber revolvers that she currently owns. (Morton
13 Decl., ¶¶ 2-3.) Ms. Morton made layaway payments at Herb Bauer Sporting Goods, a firearms
14 retailer in Fresno, to make her purchase, but the Model M&P 9c was removed from the Roster by
15 the time she made her final layaway payment, so she is now once again making layaway payments
16 on her limited missionary income for the purchase of a more expensive pistol. (*Id.*, ¶¶ 4-5.) **Don**
17 **Carothers**, from Mission Viejo, decided to purchase a Ruger Model SR 22, a lower powered .22
18 caliber semi-automatic pistol, which he could use to teach his wife and children to shoot for
19 recreation and self-protection. (Carothers Decl., ¶¶ 2-3.) Mr. Carothers went to Ade’s Gun Shop,
20 a firearms retailer also located in Orange, to make his purchase, but he was also unable to
21 complete his purchase because the Model SR 22 is no longer listed on the Roster, and he has no
22 intention to purchase any other firearm in place of the Model SR 22. (*Id.*, ¶ 4.) Mr. Gomez, Ms.
23 Morton and Mr. Carothers are three examples of customers who would have purchased semi-
24 automatic pistols in California, but were unable to do so because of the operation of Penal Code
25 section 31910, subdivision (b)(7)(A). There are doubtless thousands of other such customers
26 throughout California.

27 **The Retailer Declarations.** Two retailers from different parts of California who have lost
28 sales because of the operation of Penal Code section 31910, subdivision (b)(7)(A), have submitted

1 declarations. **Marc Halcon**, the president and majority stockholder of American Shooting Center,
2 Inc. (“ASC”), with two locations in San Diego County that include a retail store, indoor and
3 outdoor shooting ranges, and a classroom for firearms instruction, was unable to sell two Ruger
4 Model LC9 nine millimeter semi-automatic pistols to customers who had placed deposits, and he
5 was unable to sell Model LC9s to six other customers who had inquired about purchasing them,
6 because the Model LC9 does not incorporate the microstamping technology described by
7 California Penal Code section 31910, subdivision (b)(7)(A), and is accordingly not listed on the
8 Roster. (Halcon Decl., ¶¶ 7-8.) Mr. Halcon has lost the profit he would have made from the sale
9 of those Model LC9s, the money he paid to his distributor to purchase them, and the opportunity
10 to sell ammunition and accessories to the customers who would have purchased the Model LC9s
11 that he has in stock. (*Id.*, ¶ 9.) Mr. Halcon estimates that ASC will ultimately lose approximately
12 two-thirds of its firearms sales volume because of the operation of Penal Code section 31910,
13 subdivision (b)(7)(A), which would result in ASC’s business failure. (*Id.*, ¶¶ 10-11.) **Barry H.**
14 **Bauer**, who owns Herb Bauer Sporting Goods in Fresno, has prepared an analysis of the business
15 losses he has sustained because of his inability to make any further sales of thirty-six models of
16 semi-automatic pistols that were previously listed on the Roster but have now been removed from
17 the Roster (the “Decertified Pistol Models”). Mr. Bauer sold 285 of the Decertified Pistol Models
18 in 2011 for sales in the amount of \$306,990, 239 of the Decertified Pistol Models in 2012 for sales
19 in the amount of \$257,441, and 273 of the Decertified Pistol Models in 2013 for sales in the
20 amount of \$294,064. (Bauer Decl., ¶ 9, Ex. A.) Mr. Bauer, like Mr. Halcon, has also lost
21 corresponding sales of ammunition and accessories. (*Id.*, ¶ 10.) Mr. Halcon and Mr. Bauer are
22 two examples of retailers who have suffered significant business losses because of the operation of
23 Penal Code section 31910, subdivision (b)(7)(A). There are doubtless hundreds of other such
24 retailers throughout California.

25 **The Manufacturer Declarations.** Representatives of two firearms manufacturers who
26 have lost sales because of the operation of Penal Code section 31910, subdivision (b)(7)(A), have
27 submitted declarations. **Christopher J. Killoy**, the president and chief operating officer of Sturm
28 Ruger & Co. (“Ruger”), one of the leading manufacturers of firearms in the United States, declares

1 that it is impossible for Ruger or for any other firearm manufacturer to comply with the
2 microstamping requirements of Penal Code section 31910, subdivision (b)(7)(A), and that
3 accordingly, Ruger is not manufacturing or selling in California any semi-automatic pistols that
4 comply therewith. (Killoy Decl., ¶ 6.) Mr. Killoy also declares that the microstamping
5 requirements of Penal Code section 31910, subdivision (b)(7)(A), are preventing Ruger from
6 selling newly developed semi-automatic pistols in California, and from making any modification
7 to any Ruger pistols on the Roster that are not purely cosmetic in nature. (*Id.*, ¶¶ 8, 10.) Mr.
8 Killoy adds that Ruger sold tens of thousands of semi-automatic pistols in California in 2012, the
9 last full year before Penal Code section 31910, subdivision (b)(7)(A), took effect, and that Ruger
10 is now losing those sales on an ongoing basis. (*Id.*, ¶ 9.) **James Unger**, the Director of Product
11 Innovation at Smith & Wesson Corp. (“Smith & Wesson”), which is also one of the leading
12 manufacturers of firearms in the United States, declares similarly that it is impossible for Smith &
13 Wesson or for any other firearm manufacturer to comply with the microstamping requirements of
14 Penal Code section 31910, subdivision (b)(7)(A), and that accordingly, Smith & Wesson is not
15 manufacturing or selling in California any semi-automatic pistols that comply therewith. (Unger
16 Decl., ¶ 6.) Mr. Unger specifically notes that four of Smith & Wesson’s top selling semi-
17 automatic pistols have been removed from the Roster because of non-cosmetic improvements, and
18 that two other models will likely be removed from the Roster for the same reason upon the
19 expiration of their current listings. (*Id.*, ¶ 10.) Ruger and Smith & Wesson are two examples of
20 firearms manufacturers that have suffered significant business losses because of the operation of
21 Penal Code section 31910, subdivision (b)(7)(A). There are doubtless a number of others.

22 **The Economist Declaration.** Having shown that there exist individual customers who
23 would have purchased semi-automatic pistols in California but for the operation of Penal Code
24 section 31910, subdivision (b)(7)(A), and that there exist retailers and manufacturers who have
25 suffered significant business losses because of the operation of Penal Code section 31910,
26 subdivision (b)(7)(A), it remains to be shown just how much plaintiffs’ members have lost in the
27 aggregate because of the impossible microstamping requirements of Penal Code section 31910,
28 subdivision (b)(7)(A). **John R. Dunham** is an economist who conducted research and analysis of



1 firearm purchase statistics available from various sources to determine the approximate size of that
2 loss. (Dunham Decl., ¶¶ 2-4.) As the detailed analysis contained in his declaration shows, Mr.
3 Dunham has concluded that *the approximate size of the retail market for the sale of semi-*
4 *automatic pistols in California in 2013 was \$183,218,651.92.* (*Id.*, ¶ 11.) Members of the
5 firearms industry, including plaintiffs’ manufacturer, distributor and retailer members, will lose a
6 massive amount of money over time as existing models of semi-automatic pistols are removed
7 from the Roster and new improved models of semi-automatic pistols are excluded from being sold
8 in California because of the requirements of the statute.

9 The State is of course a public entity. (Gov. Code, § 811.2.) As a public entity, it enjoys
10 sovereign immunity, except as otherwise provided by statute. (Gov. Code, § 815.) Specifically,
11 as a public entity, the State “is not liable for an injury caused by adopting ... an enactment....”
12 (Gov. Code, § 818.2.) “Enactments” as used in section 818.2 include statutes and regulations.
13 (Gov. Code, § 810.6.)

14 The foregoing statutory principles are reflected in case law. The court in *HFH, Ltd. v.*
15 *Superior Court* (1975) 15 Cal.3d 508, 519 held that a zoning ordinance was an enactment subject
16 to the protection of Government Code section 818.2. The court in *Old Town Development Corp.*
17 *v. Urban Renewal Agency* (1967) 249 Cal.App.2d 313, 334, citing Government Code section
18 818.2, held that an urban renewal agency “cannot be held liable for the consequential results of the
19 adoption of [a] resolution....” And in a directly analogous case, *Dana Corp. v. State of California*
20 (1980) 103 Cal.App.3d 424, the plaintiff corporation expended substantial sums of money to
21 develop and manufacture devices to control the emission of oxides of nitrogen (NOx) from
22 automobile engines, in reliance on a statute empowering the Air Resources Board to adopt
23 standards regulating NOx emissions. (*Id.* at p. 426.) After the State repealed that statute, the
24 plaintiff sued for its losses. Citing Government Code section 818.2, the court held that all of
25 plaintiff’s claims “run afoul of the basic rule that the state is not liable for the effect of legislation
26 enacted under the police power for what the Legislature believes is a public purpose.” (*Ibid.*)

27 As previously noted, the \$183,218,651.92 California market for semi-automatic pistols is
28 eroding because of the impossible dual placement microstamping requirements of Penal Code

1 section 31910, subdivision (b)(7)(A). That market erosion is causing plaintiffs' members to suffer
2 financial losses that continue to accumulate on a day-by-day basis. Plaintiffs' members will never
3 be able to recover damages for that loss because of the sovereign immunity that protects the State.
4 The massive losses of plaintiffs' members are irreparable because they can never be remedied by
5 pecuniary compensation. This justifies the issuance of the preliminary injunction that plaintiffs
6 seek by this motion.

7

8 **VI. THE STATE OF CALIFORNIA CANNOT RESIST THE ISSUANCE OF A**
9 **PRELIMINARY INJUNCTION IN THIS CASE BASED ON THE PUBLIC**
10 **BENEFIT EXEMPTION.**

11 Code of Civil Procedure section 526, subdivision (b)(4), provides that "[a]n injunction
12 cannot be granted ... [t]o prevent the execution of a public statute by officers of the law for the
13 public benefit." Civil Code section 3423, subdivision (d), provides in language almost identical to
14 Code of Civil Procedure section 526, subdivision (b)(4), that "[a]n injunction may not be granted
15 ... to prevent the execution of a public statute, by officers of the law, for the public benefit."
16 However, many cases hold that that rule does not apply to an invalid statute, the execution of
17 which courts have full authority to enjoin. (*E.g., Financial Indemnity Co. v. Superior Court*
18 (1955) 45 Cal.2d 395, 402; *Conover v. Hall* (1974) 11 Cal.3d 842, 850; *Agricultural Labor*
19 *Relations Board v. Superior Court* (1976) 16 Cal.3d 392, 401.) Because Penal Code section
20 31910, subdivision (b)(7)(A), is void on the ground of impossibility as noted above, the public
21 benefit exemption does not prevent the Court from issuing the preliminary injunction that
22 plaintiffs seek by this motion.

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1 VII. CONCLUSION.

2 For the foregoing reasons, plaintiffs respectfully request that the Court issue a preliminary
3 injunction enjoining the State from enforcing Penal Code section 31910, subdivision (b)(7)(A),
4 pending the entry of judgment in this action.

5 DATED: March 28, 2014.

Respectfully submitted,

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CALIFORNIA STATE COURT PROOF OF SERVICE

National Shooting Sports Foundation v. State of California - File No. 33875.02

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, CA 90012.

On March 28, 2014, I served the following document(s): **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

Susan K. Smith
Deputy Attorney General
Offices of the Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Tele: (213) 897-2105
Fax: (213) 897-1071
Susan.smith@doj.ca.gov

The documents were served by the following means:

(BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and (specify one):

Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the 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 March 28, 2014, at Los Angeles, California.

Farnaz Moradpour