In the Supreme Court of the State of California

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

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA,

Defendant and Respondent.

Case No. S239397

SUPREME COURT
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Deputy

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Introduction 1
Argument 2
I. The Court of Appeal's Decision Runs Counter to Settled Separation-of-Powers Principles 3
II. The Court of Appeal's Decision Recognizes an Unprecedented Facial Challenge to a Statute Based Only on a Maxim 4
III. The Court of Appeal's Decision May Encourage Similar "Impossibility" Claims in Other Contexts 7
Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

American Coatings Assn., Inc. v. South Coast Air Quality Dist.
(2012) 54 Cal.4th 446 8

Board of Supervisors v. McMahon
(1990) 219 Cal.App.3d 286 .... 5, 6

Booska v. Patel
(1994) 24 Cal.App.4th 1786 6

Buck v. Harton
(M.D. Tenn. 1940) 33 F.Supp. 1014 4

City and County of San Francisco v. Cooper
(1975) 13 Cal.3d 898 3

Coleman v. Dept. of Personnel Administration
(1991) 52 Cal.3d 1102 7

Ex parte Collie
(1952) 38 Cal.2d 396 4

Fuentes v. Workers' Comp. Appeals Bd.
(1976) 16 Cal.3d 1 4

Gigliotti v. New York, Chicago St. Louis Railroad Co.
(1958) 107 Ohio App. 174 4

Howard Jarvis Taxpayers Assn. v. Padilla
(2016) 62 Cal.4th 486 2

In re Jenkins
(2010) 50 Cal.4th 1167 7

Ivaran Lines, Inc. v. Waicman
(Fla.App.1984) 461 So.2d 123 4

TABLE OF AUTHORITIES

Page

Jacobs v. State Bd. of Optometry
(1978) 81 Cal.App.3d 1022 6

McMackin v. Ehrheart
(2011) 194 Cal.App.4th 128 6

O'Connell v. City of Stockton
(2007) 41 Cal.4th 1061 3

People v. One 1940 Ford V-8 Coupe
(1950) 36 Cal.2d 471 (*Ford V-8*) 3, 5

Rossi v. Brown
(1995) 9 Cal.4th 688 4

Webster v. Superior Court
(1998) 46 Cal.3d 338 4

STATUTES

Civ. Code, § 3531 .... 2, 5, 6

Code Civ. Proc., § 526, former 2nd subd. 4, now subd. (b)(4) 6

INTRODUCTION

The State in its petition presented several reasons why this Court should grant review. This case raises the significant question of the validity of a statewide law designed to bring to market cutting-edge microstamping technology that will help deter and solve crimes. The Court of Appeal's decision—which recognizes a novel freestanding "impossibility" claim based solely on a maxim of jurisprudence—not only threatens this gun safety law, but may invite other similar claims, resulting in courts second-guessing the Legislature's determinations without the deference that traditionally accompanies judicial review of statutes. The decision below cannot be reconciled with this Court's decisions addressing settled separation-of-powers principles, and holding that a statute may not be nullified by a maxim.

In response, Appellants National Shooting Sports Foundation, Inc. and Sporting Arms and Ammunition Manufacturers' Institute, Inc. (together, NSSF) argue that the law recognizing their impossibility claim is settled. But NSSF fails to identify a single case holding that a court may enjoin a law in all of its applications based on a maxim of jurisprudence. In addition, NSSF contends that the Court should wait to consider granting review until after the development of a complete factual record and a final judgment on the merits. But that approach will waste public resources trying a claim that is defective as a matter of law. And it leaves on the books a decision that could be enlisted to derail the enforcement of other laws, including technology-forcing statutes and regulations. Review is necessary to resolve the important questions of law presented by this case and correct the mistaken course charted by the Court of Appeal.

ARGUMENT

NSSF does not dispute that, absent this Court's intervention, the trial court may invalidate the microstamping law statewide if NSSF succeeds in convincing the trier of fact that compliance is "impossible."[1] Instead, NSSF attempts to minimize the benefits of the law, arguing that if implementing microstamping technology "is in fact impossible," then the law will be "useless as a crime fighting tool . . . because no microstamping of any semi-automatic pistols will ever take place." (Answer 14, fn. 4.) But the Legislature has already concluded that microstamping *is* feasible, and was of the view that requiring the technology for newly listed semiautomatic pistols will move at least some members of the industry to implement it. (See Petition 7-9.) NSSF's observation merely highlights the important legal issues presented by this case, which relate to the proper, respective roles of the judiciary and the Legislature.

Specifically, review is necessary to settle whether a court may enjoin a statute in all of its applications not because the statute violates a constitutional command, but instead because a trier of fact finds that its implementation is, as a general matter, practically infeasible, as measured by a maxim of jurisprudence. (See Petition 11-14; Civ. Code, § 3531 ["[t]he law never requires impossibilities"].) As the State noted in its petition, authorizing a de novo challenge to the Legislature's determination of feasibility runs contrary to both established separation-of-powers principles—which recognize the Legislature's plenary legislative authority subject only to constitutional limits (see *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 498)—and to the rule that a statute cannot

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[1] As the State noted in its petition, the Court of Appeal did not address how trial on "impossibility" might proceed as a practical matter. (Petition 14, fn. 10.)

be "nullified or defeated by a maxim" (*People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 476 (*Ford V-8*)). (Petition 11-14.) Allowing the Court of Appeal's decision to stand may also invite other freestanding, non-constitutional "impossibility" claims to other laws that encourage innovation and serve the public interest. Review is necessary to resolve these important questions of law.

I. THE COURT OF APPEAL'S DECISION RUNS COUNTER TO SETTLED SEPARATION-OF-POWERS PRINCIPLES

NSSF argues that the Court of Appeal's discussion of the separation-of-powers doctrine is consistent with "established law"—specifically, this Court's decision in *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898. (Answer 13-15; see also *id.* at 24.) According to NSSF, *Cooper* stands for the proposition that any "statutory . . . proscription[,]" including a maxim of jurisprudence, empowers a court to invalidate legislation. (*Id.* at 15, citation and quotation marks omitted.)

NSSF misreads *Cooper*. That case merely applies the longstanding rule that *localities* may not adopt laws that conflict with general state laws. (*City and County of San Francisco v. Cooper*, *supra*, 13 Cal.3d at pp. 906-911, 915-916; see also *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067.) *Cooper* does not, however, hold that a court may enjoin a later-enacted statute because it is in some sense "proscribed" by an earlier statute. Indeed, *Cooper* itself rejects that contention: "It is a familiar principle of law that no legislative [body], by normal legislative enactment, may divest itself or future [bodies] of the power to enact legislation within its competence." (*Cooper*, *supra*, 13 Cal.3d at p. 929; see also

Rossi v. Brown (1995) 9 Cal.4th 688, 715-716 [same]; *Ex parte Collie* (1952) 38 Cal.2d 396, 398 [same].)[2]

In addition, none of the out-of-state cases that NSSF cites have enjoined statutes because "compliance was impossible." (Answer 15-16.) Instead, two of those cases held only that a party may assert an impossibility *defense* to negligence per se claims based on specific factual circumstances. (See *Gigliotti v. New York, Chicago St. Louis Railroad Co.* (1958) 107 Ohio App. 174, 180-181 [railroad could not be held liable for not complying with requirement that it sound its whistle not less than "80 rods," or 1320 feet, before a crossing where the distance between the station and the crossing was only 33 feet]; *Ivaran Lines, Inc. v. Waicman* (Fla.App.1984) 461 So.2d 123, 124-126 [shipping company could not be found negligent for noncompliance with statute because State administrative agency had not issued forms that the law required to be completed].) And the third struck down the statute at issue not because it was impossible to comply with, but instead because it violated several constitutional provisions. (See *Buck v. Harton* (M.D. Tenn. 1940) 33 F.Supp. 1014, 1020-1021.)

II. THE COURT OF APPEAL'S DECISION RECOGNIZES AN UNPRECEDENTED FACIAL CHALLENGE TO A STATUTE BASED ONLY ON A MAXIM

NSSF also contends that it is well established that a freestanding impossibility claim can be grounded in a maxim of jurisprudence, citing

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[2] In any event, if two statutes appear to conflict, the proper remedy is not to nullify the later-adopted statute. Instead, courts must first attempt to reconcile the two statutes. (*Webster v. Superior Court* (1998) 46 Cal.3d 338, 348.) And where it is not possible to harmonize, courts must "give effect to the more recently enacted law." (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7.)

Board of Supervisors v. McMahon (1990) 219 Cal.App.3d 286. (Answer 15; see also *id.* at 20, 24-25.) This argument overstates *McMahon*, and, in any event, fails to address this Court's clear statement about the function and limits of the maxims of jurisprudence set forth in *Ford V-8*.

In *McMahon*, the California Department of Social Services sued Butte County contending that a local measure was invalid because it attempted to prevent the county from funding a welfare program in the amounts required by state law. (*Board of Supervisors v. McMahon, supra*, 219 Cal.App.3d at pp. 291-292.) The county in turn sued the State, asserting that the measure was valid and cataloguing its own financial hardships. (*Id.* at p. 292.) The county sought to prevent application of the statute on several grounds, including that its financial condition made it "impossible" to comply with the State's funding requirements. (*Id.* at pp. 299-300, citing cases and Civ. Code, § 3531.) The court of appeal rejected that argument. (*Ibid.*) It acknowledged that a court, exercising its powers in equity, may refuse to order a party to comply with a statutory mandate where the party establishes that compliance is impossible based on the facts of the particular case. (*Id.* at p. 302.) But it held that the county had failed to establish that compliance—or substantial compliance—could not be achieved by, for example, reorganizing priorities and raising additional local funds. (*Id.* at p. 300.) The court reasoned that "relief from state mandates must come from the legislature and not from the courts." (*Id.* at p. 301.)

McMahon thus stands for the unremarkable proposition that a court exercising its equitable powers in the circumstances of a particular dispute may decline to issue an order requiring the impossible.[3] It does not suggest

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[3] The cases cited by NSSF (Answer 18-19) are consistent, holding only that a party may be excused from strict compliance with a statute

(continued...)

that a court may entertain a facial challenge to a statute based on Civil Code section 3531 and effectively strike down a statute because it disagrees with the feasibility of what the Legislature has clearly and intentionally required.[4]

Perhaps recognizing the novelty of its facial impossibility claim, NSSF suggests that on remand to the trial court, it could simply re-formulate its "impossibility" claim as a "due process claim." (Answer 18, fn. 5.)[5] A due process claim would of course be cognizable—and one that

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(...continued)
under certain fact-specific circumstances. (See *McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 142 [party may be excused from statute of limitations if it can prove its delay was induced by other party's wrongdoing]; *Booska v. Patel* (1994) 24 Cal.App.4th 1786 [landowner does not have absolute right to sever the roots of his neighbor's tree, but instead must do what is reasonable]; *Jacobs v. State Bd. of Optometry* (1978) 81 Cal.App.3d 1022, 1030 [plaintiff seeking writ of mandate to compel organization to change its membership criteria need not submit an application to join organization before filing writ where organization has already informed him that he would not be accepted].)

[4] Indeed, even *McMahon* noted that the county's suit sought to expand the court's power to enjoin statutes. As the court explained, California law prohibits courts from entering injunctions that would "'prevent the execution of a public statute by officers of the law for the public benefit.'" (*Board of Supervisors v. McMahon, supra,* 219 Cal.App.3d at p. 303, fn. 10, quoting Code Civ. Proc., § 526, former 2nd subd. 4, now subd. (b)(4).) And while California courts have recognized four exceptions to this rule—that the statute is facially unconstitutional, that the statute is being unconstitutionally applied, that the statute does not cover the plaintiffs' activities, and that the public official's action exceeds his or her power—the court in *McMahon* held that "[n]one of these exceptions applie[d]" to the case before it, and saw "no basis" on the record there "to engraft another." (*Ibid.*)

[5] (See also Answer 16 [equating an impossibility cause of action with a claim challenging a statute as "arbitrary and unreasonable"]; *id.* at 17 [noting that if NSSF had "raised a constitutional challenge to the"
(continued...)

the State would win as a matter of law without any evidentiary trial. In resolving due process claims, courts evaluate only whether the challenged law "reasonably relates 'to a proper legislative goal.' [Citation]." (*Coleman v. Dept. of Personnel Administration* (1991) 52 Cal.3d 1102, 1125.) And legislative choices that are challenged as irrational under the Due Process Clause are "not subject to courtroom factfinding and may be based on rational speculation *unsupported by evidence or empirical data*." (*In re Jenkins* (2010) 50 Cal.4th 1167, 1181, citations and quotation marks omitted.) But NSSF's claim does not recognize these limits.[6] Instead—as evidenced by its recitation of expert testimony—NSSF seeks to put the Legislature's determination that the technology is feasible on trial. (See Answer 26-27.) NSSF's own description of how its claim will be tried brings into sharp relief the significant separation-of-powers concerns that the Court of Appeal's decision creates, and underscores why this Court should not "await the development of a complete factual record" before granting review. (Answer 25-27.)[7]

III. THE COURT OF APPEAL'S DECISION MAY ENCOURAGE SIMILAR "IMPOSSIBILITY" CLAIMS IN OTHER CONTEXTS

In addition to the considerations noted above, this Court should grant review to prevent the proliferation of "impossibility" lawsuits in other areas

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(...continued)
microstamping law, the statute could be struck down on due process grounds if it was "'wholly arbitrary'"].)

[6] Indeed, in the courts below, NSSF repeatedly disclaimed any constitutional challenge to the microstamping law. (See Petition 9-10, 12, fn. 8.)

[7] In any event, even if NSSF were to voluntarily reframe its claim on remand, the Court of Appeal's decision recognizing an extra-constitutional, free-standing facial "impossibility" claim would remain as precedent. (See Part III, *infra*.)

where regulated entities may want to avoid the perceived expense or inconvenience of technology-forcing requirements. (Petition 15-16.) The State often adopts standards that incentivize regulated industries to develop solutions to problems "that might at the time appear to be economically or technologically infeasible." (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 466, citations and quotation marks omitted).

NSSF argues that *American Coatings* is distinguishable because it was decided in the "environmental context," and, NSSF asserts, involved standards that "could be reasonably anticipated to become feasible by the compliance deadline," as evidenced by "several studies conducted by outside consultants." (Answer 21.) NSSF states that "the case has no persuasive value in this litigation." (Answer 23.)

NSSF's parsing of *American Coatings* misses the point. NSSF cannot refute that the Court of Appeal's decision, which broadly recognizes a free-standing facial challenge based on "impossibility," may well be cited in future challenges to a variety of technology-forcing (and technology-nudging) regulations. If allowed to stand, the Court of Appeal's decision may be relied upon by those who might find it more cost-effective or advantageous to litigate than innovate, contrary to the intent of the Legislature and to the detriment of the public.

CONCLUSION

This Court should grant the petition for review.

Dated: February 16, 2017

Respectfully submitted,

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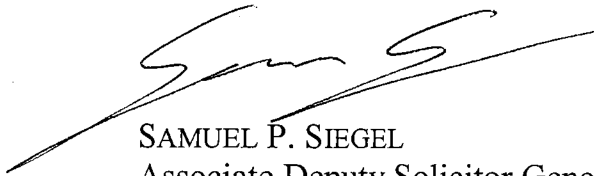

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CERTIFICATE OF COMPLIANCE

I certify that the attached Reply to Answer to Petition for Review uses a 13 point Times New Roman font and contains 2,301 words.

Dated: February 16, 2017

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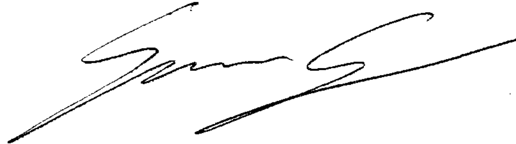

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 16, 2017, I served the attached **REPLY TO ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 16, 2017, at San Francisco, California.

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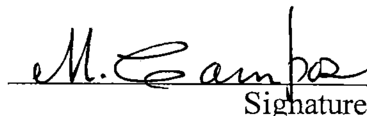
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