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

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

May a court hold a trial to determine the practical feasibility of compliance with a technical standard imposed by the Legislature as a condition on the sale of a new product in California, based on a non-constitutional claim that the statutory standard is facially invalid if a trier of fact concludes it would be "impossible" to comply with?

INTRODUCTION

Over the last ten years, handguns have been used to commit over 10,000 homicides in California.[1] In 2015 alone, handguns were used in roughly 50 percent of homicides, where the type of weapon was identified.[2] A recurrent problem in addressing these and other crimes involving handguns is that it is often difficult or impossible to reliably link a crime to a particular gun.

In 2007, the Legislature decided to try a new approach to the problem by adding "microstamping" to the list of state handgun standards. (Stats. 2007, ch. 572.) After the law's effective date, new models of a particular type of handgun, semiautomatic pistols, cannot be added to the State's roster of guns certified for sale in California unless they are equipped with a technology that stamps a microscopic array of identifying characters unique to the gun on each fired cartridge—or with some equally effective alternative technology that allows law enforcement to connect a spent cartridge with a particular gun. (Pen. Code, § 31910, subd. (b)(7).)[3] At the time of the law's enactment, and perhaps even today, the relevant

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[1] See California Department of Justice, Homicide in California (2015) p. 28, Table 21 <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/homicide/hm15/hm15.pdf?> [as of June 16, 2017].

[2] *Ibid.*

[3] All further undesignated statutory references are to the Penal Code.

technology could be fairly described as emerging. Indeed, the trade group plaintiffs in this case argued strenuously before the Legislature that microstamping was untested and unproven. But the Legislature determined that the industry should bring the new technology—or some equally effective alternative—to market, or be limited to selling the many models of semiautomatic pistols already on the State's roster.

Plaintiffs seek a court order declaring the microstamping law invalid and enjoining the State from enforcing it. They do not, however, assert that the law violates the state or federal Constitutions. Instead, they argue that microstamping is not technically feasible, and rely on Civil Code section 3531—a maxim of jurisprudence, embodied in the Code in 1872, declaring that "[t]he law never requires impossibilities." The Court of Appeal agreed, concluding that plaintiffs are entitled to have a trial court assess the feasibility of microstamping, and enjoin enforcement of the law if it concludes that there is no workable technology currently available that complies with the statutory standard.

That decision should be reversed. Maxims of jurisprudence can help courts ascertain and effectuate the Legislature's intent when construing statutes. They do not give rise to substantive rights or causes of action, or empower courts to rewrite or invalidate later-enacted laws. The "impossibility" maxim does not authorize courts to create a "feasibility" exemption to the technical standard for new-model semiautomatic pistols clearly set out by the Legislature in the microstamping law.

Allowing any such claim would also violate the constitutional separation of powers. (Cal. Const., art. III, § 3.) Courts have no authority to strike down state laws unless they violate the state or federal Constitution. Recognizing plaintiffs' non-constitutional claim would invade the Legislature's core lawmaking function, inviting parties unhappy with a legislative outcome to continue factual or policy disputes in the

courts. If plaintiffs believe they cannot, or should not be forced to, implement or develop microstamping or equivalent technology as a condition of bringing new models of semiautomatic pistols to market in California, they must continue to make that argument to the Legislature—not to the courts.

BACKGROUND

California adopted the Unsafe Handgun Act in 1999 in an effort to bring uniformity to the State's rules governing the sale of handguns. (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 912.)[4] Among other things, the Act establishes a set of standards that all models of handguns sold in the State must meet. (*Ibid.*; § 31910.) For example, handguns must fire repeatedly without malfunction, and must not discharge when dropped. (§§ 31900, 31905, 31910, subd. (b).) The Act charges the California Department of Justice with testing new models of handguns for compliance with the Act's standards. (§§ 31905, 32000, 32015; Cal. Code Regs., tit. 11, §§ 4046-4075.) Handguns that meet the criteria and pass the required tests are placed on DOJ's roster of handguns certified for sale. (§ 32015; Cal. Code Regs., tit. 11, § 4070.) There are over 730 models of handguns, including hundreds of semiautomatic pistols, currently on the roster that may be sold in the State. (See California Department of Justice, *Roster of Handguns Certified for Sale* <http://certguns.doj.ca.gov/> [as of June 16, 2017].)[5] Manufacturers may

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[4] A "handgun" is a firearm that can be concealed on a person and includes pistols, revolvers, and Derringers. (§ 16640, subd. (a).)

[5] A "semiautomatic pistol" is a pistol that can fire a fixed cartridge, extract and eject the fired cartridge, and load a fresh cartridge into the chamber, each time the trigger is pulled. (§ 17140; see also RA 63 [diagram of a semiautomatic pistol].)

keep their handguns on the approved roster by paying a $200 annual fee. (Cal. Code Regs., tit. 11, §§ 4071-4072.) Models not listed on the roster may not be imported into, manufactured, or sold in the State. (§ 32000.)

The Crime Gun Identification Act of 2007 (Stats. 2007, ch. 572) added a further criterion that new models of semiautomatic pistols must meet before they can be listed on the roster of handguns certified for sale. (See § 31910, subd. (b)(7).)[6] Specifically, the pistol must have a unique array of microscopic characters—letters, numbers, graphics, or symbols—etched or imprinted in "two or more places on the interior surface or internal working parts of the pistol." (§ 31910, subd. (b)(7)(A).) And the pistol must transfer that unique character set onto a cartridge when fired. (*Ibid.*) This is commonly referred to as "microstamping." Alternatively, the statute allows a pistol to be added to the State's roster if it is equipped with some other method of connecting a spent cartridge to the gun from which it was fired, provided that the alternative is of "equal or greater reliability" to microstamping and has been approved by the Attorney General. (§ 31910, subd. (b)(7)(B).)

The "two or more places" requirement was added to address concerns that criminals would attempt to alter microstamped pistols to avoid detection. Microstamping was first tested by etching characters onto a gun's firing pin. (See, e.g., RA 64.) But those engravings can be defaced (by filing the characters off) or removed altogether (by replacing the firing pin). (See Sen. Com. on Pub. Safety, Rep. on Bill No. 1471 (2007-2008

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[6] This new requirement applies only to models proffered for certification after the Act's effective date. (§ 31910, subd. (b)(7)(A).) It does not prohibit the manufacture or sale of semiautomatic pistols that were "already listed on the [State's] roster" at the time the microstamping requirement took effect. (*Ibid.*)

Reg. Sess.) June 26, 2007, p. 8 (Sen. Pub. Safety Rep.).)[7] The Legislature responded to those possibilities by adopting the dual-microstamping mandate. (§ 31910, subd. (b)(7)(A).)

At the time that the microstamping bill became law, one form of microstamping technology was patented. (See Sen. Pub. Safety Rep. at pp. 9-10.) Accordingly, the Legislature provided that the law would not take effect until the Department of Justice certified, based on its examination of existing patents, "that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions." (§ 31910, subd. (b)(7)(A); see also Sen. Pub. Safety Rep. at pp. 9-11.)

The Legislature adopted the microstamping requirement after considering evidence of this new technology's crime-solving potential. (Sen. Pub. Safety Rep. at p. 6.) The Legislature was especially interested in microstamping's ability to help police investigate unsolved murders. (*Ibid.*) In the years before the microstamping law was adopted, no arrest had been made in about 45 percent of all homicides in California. (*Ibid.*) During that time, handguns were the most common weapon used to commit homicides, and semiautomatic pistols were the most commonly sold handgun. (*Ibid.*)

The Legislature was also interested in microstamping's crime-prevention potential. Microstamping promised to give police leads that would allow them to apprehend dangerous individuals who committed one crime before they went on to commit others. (Sen. Pub. Safety Rep. at p. 6.) It could be especially useful in crimes where cartridges were the only evidence left at the scene, such as drive-by shootings. (*Ibid.*)

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[7] This report is available online at <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200720080AB1471> [as of June 16, 2017]. It is also contained in the record at 3 JA 544-564.

Microstamping also promised to discourage trafficking of new semiautomatic pistols by deterring legal buyers from making straw purchases on behalf of felons and other people who may not lawfully possess firearms. (*Id.* at p. 12.)

When it was introduced, the microstamping bill generated intense interest from both advocates and opponents. A wide range of stakeholders—including law enforcement groups, the chiefs of over 60 police departments, and political leaders—supported the bill. (Sen. Rules Com., Office of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1471 (2007-2008 Reg. Sess.) Aug. 28, 2007, pp. 3-5.)[8] Several organizations—including plaintiffs National Shooting Sports Foundation, Inc. (NSSF) and Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI)—opposed it. (*Id.* at pp. 5-6.)

As the bill made its way through the legislative process, concern arose over whether microstamping could be effectively implemented. As a report prepared by the Senate Public Safety Committee noted, the "most significant question regarding the efficacy of the technology is whether the stamp would actually work the way the manufacturer claims; that is, would the stamp be legible under most real-life circumstances?" (Sen. Pub. Safety Rep. at p. 8.) The Legislature received evidence demonstrating that the answer to that question was yes. The bill's author, for example, distributed a presentation to the Senate Public Safety Committee that depicted microstamped cartridges. (RA 57-73.) He specifically drew the committee's attention to a slide (reprinted below) that "depict[ed] the 2501st round that was fired from a weapon to test the efficacy of this

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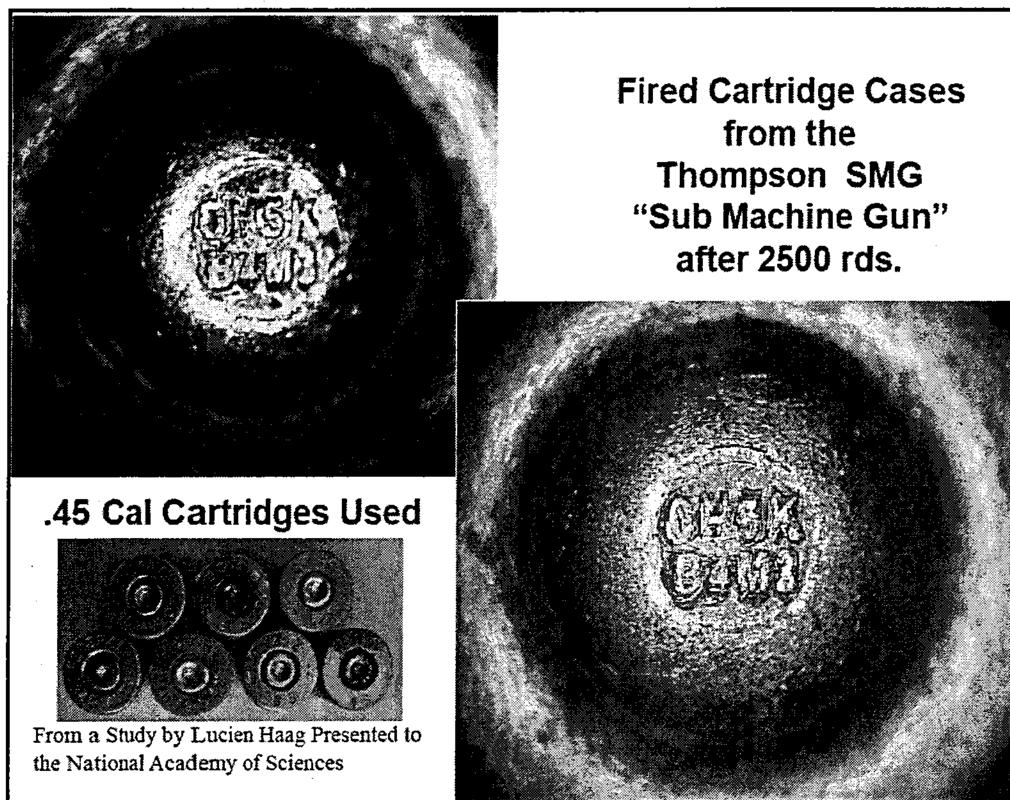
[8] This report is available online at <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200720080AB1471> [as of June 16, 2017]. It is also contained in the record at 4 JA 627-636.

technology," and that showed "very clearly ... [that] anyone can determine the make, model, and serial number of the weapon" by examining an expelled cartridge. (Testimony of Assemblymember Mike Feuer, Senate Public Safety Committee – Part 1, June 26, 2007, at 55:30-56:10 (Feuer Testimony).)[9]



(RA 67.)[10] That presentation also included a slide (reprinted below) featuring a photograph of a cartridge that had been fired from a pistol

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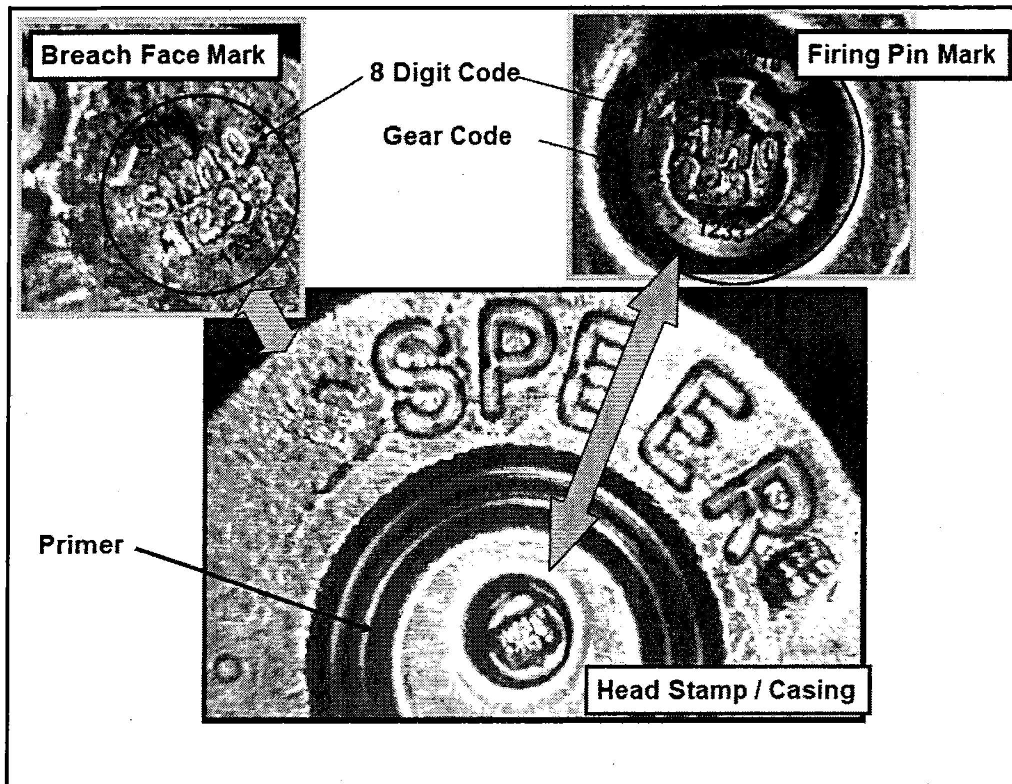
[9] Available at <http://senate.ca.gov/media-archive?title=&startdate=06%2F26%2F2007&enddate=06%2F26%2F2007> [as of June 16, 2017].

[10] The images reproduced in this brief were copied from a version of the presentation distributed to the Senate Public Safety Committee that was downloaded from the internet. The same slides are in the record. (RA 65, 67.) The internet version appears in this brief because it is clearer, and can be found at <http://documentslide.com/documents/cracking-the-case-microstamping-joshua-horwitz-educational-fund-to-stop-gun-violence-jhorwitzcsgvorg.html> [as of June 16, 2017].

equipped with characters etched onto the gun's breech face—that is, a part *other* than the gun's firing pin.



(RA 65.) The bill's author argued that these slides and other studies "show [that microstamping] works." (Feuer Testimony at 55:30; see also *id.* at 53:00-56:00; 1:24:30-1:26:30.) In addition, the Legislature considered a study that summarized the results of several tests that evaluated microstamping's efficacy. (Sen. Pub. Safety Rep. at pp. 8-9, citing Krivosta, *NanoTag™ Markings from Another Perspective* (Winter 2006) vol. 38, No. 1, AFTE Journal 41 (the Krivosta study).) One of those tests found that the entire array of microscopic characters could be discerned on 54 of the 100 cartridges expelled from pistols whose firing pins had been etched with a "large[] font" microstamp. (Krivosta, *supra*, at pp. 42-43.)

The Legislature also received evidence that cast doubt on whether this new technology was ready for implementation. The Krivosta study concluded that microstamps could not be read on the "vast majority" of

cartridges expelled from a pistol whose firing pins had been etched with a smaller microstamp. (Krivosta, *supra*, at p. 42.) The Governor's Office of Planning and Research expressed concern that the technology had been "insufficiently developed and tested," and that some studies had concluded that microstamped pistols "fail[ed] to strike with enough force to leave a complete imprint" on cartridges. (4 JA 616-618.)

Trade groups, including plaintiffs NSSF and SAAMI, also wrote letters to the Governor and the bill's sponsor, urging them to reject the proposal because microstamping technology was unreliable. (See RA 18-23; see also RA 24-28, 50-55, 90-99.) They argued that the Krivosta study demonstrated that microstamps could not be legibly imprinted onto cartridges ejected from pistols featuring etched firing pins. (RA 19-20.) They also argued that the bill should not become law because of "serious question[s] about whether manufacturers can satisfy" the law's "two or more places" mandate. (RA 96.) While they agreed that it was possible to etch microstamps onto a pistol's firing pin, NSSF and SAAMI contended that it was unclear where a second set of markings could be placed. (RA 96.) The bill should not become law, they argued, because "no independent research ha[d] been done" to test whether microstamps etched on parts other than the firing pin would reliably "reproduce legible markings" onto cartridges. (RA 97.)

After weighing the evidence and arguments concerning the state of the technology, the Legislature adopted the microstamping law. (Stats. 2007, ch. 572.) On May 17, 2013, the Department of Justice certified the absence of patent restrictions (1 JA 18), which caused the microstamping requirement to take effect (§ 31910, subd. (b)(7)(A)).

STATEMENT OF THE CASE

Shortly after the microstamping requirement took effect, NSSF and SAAMI (collectively, NSSF) filed a complaint in Fresno County Superior

Court. (1 JA 9-18.) NSSF did not allege that the microstamping law violated any provision of the state or federal Constitutions. (*Ibid.*) Instead, it asked for a "judicial declaration" that the microstamping law was "invalid as a matter of law and cannot be enforced because it is impossible for a firearm manufacturer to implement microstamping technology." (1 JA 16.) NSSF alleged that it was entitled to relief because "no semi-automatic pistol can be designed or equipped with a microscopic array of characters identifying the make, model and serial number of the pistol that are etched or otherwise imprinted in two or more places … and that can be legibly … transferred from both such places to a cartridge case when the firearm is fired." (1 JA 16-17.) NSSF asked the trial court to enjoin the State from "taking any action to enforce" the microstamping law and from "taking any action to prosecute any person or entity" that failed to comply with its requirements. (1 JA 17.)

The State demurred, arguing that NSSF's assertion of "impossibility" failed to state a cognizable claim. (1 JA 28-32.) In its opposition, NSSF confirmed that it was not raising a constitutional challenge—stating, for example, that it was "not advancing any claims premised on the Second Amendment." (1 JA 95.)[11] It argued that the demurrer should be overruled, because a statute "that is otherwise void need not also be unconstitutional to be subject to challenge." (1 JA 93.) NSSF contended that the trial court could enjoin the microstamping law under Civil Code section 3531, a maxim of jurisprudence that provides that the "law never

[11] California's Unsafe Handgun Act, including the microstamping requirement, has been challenged under the Second Amendment in another suit. (See *Peña v. Lindley* (E.D. Cal. Feb. 26, 2015) No. 09-cv-1185, 2015 WL 854684.) The Ninth Circuit heard oral argument in that case on March 16, 2017, but has yet to issue its decision. (See *Peña v. Lindley*, Ninth Circuit Case No. 15-15449, ECF No. 10359372.)

requires impossibilities." (1 JA 93.) The trial court overruled the demurrer. (1 JA 114-119.)

The State then filed a motion for judgment on the pleadings, arguing that NSSF's maxim-based claim and request for relief were barred by the separation of powers doctrine. (1 JA 124-148.) In its opposition, NSSF again made clear that it was not asserting a constitutional challenge. (See, e.g., 4 JA 592-593 [arguing that cases "recognize impossibility as a ground to enjoin the enforcement of a statute, even in the absence of any other, constitutional grounds"].)

While that motion was pending, the parties conducted discovery. In response to the State's request for admissions, NSSF conceded that it did not know whether its members had "made any efforts to comply" with the microstamping law. (6 JA 957, 960.)[12] NSSF also stated that its case rested primarily on the opinion of a forensic examiner. (6 JA 969, 972, 980; see also 1 JA 36-60.) While discovery continued, the parties also filed cross-motions for partial summary judgment. (4 JA 738-762 [NSSF's motion]; 5 JA 899-925 [State's motion].)

Before discovery was complete, and without ruling on the parties' summary judgment motions, the trial court granted the State's motion for judgment on the pleadings. (6 JA 1160-175.) The court noted that NSSF had "expressly declined to assert a constitutional challenge" to the microstamping law. (6 JA 1166.) As a result, the court held, the separation

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[12] At the time the parties filed their cross-motions for partial summary judgment, no firearms manufacturer had submitted a new model of semiautomatic pistol for inclusion on the State's roster after the microstamping law's effective date. (5 JA 934-935.) One manufacturer announced its "unwillingness to adopt" the technology, stating in a press release that it "d[id] not and w[ould] not include microstamping in its firearms." (6 JA 992.) As of the date of this brief, no semiautomatic pistol featuring microstamping technology is listed on the roster.

of powers doctrine required dismissal of NSSF's suit. (6 JA 1168-1169.) NSSF's assertions about the technology's feasibility, the court concluded, "are for the legislature, not the courts." (6 JA 1170.) Moreover, because NSSF had "chosen to stand on [its] pleading," and had "suggested no possible amendment to cure the fundamental defect with [its] claim," the court granted the State's motion without leave to amend. (6 JA 1170.)

NSSF appealed. In its briefs in the Court of Appeal, NSSF again made clear that it was not challenging the microstamping law's constitutionality. (See, e.g., Appellants' Opening Brief pp. 22-23 [arguing that the trial court committed reversible error by failing to analyze whether the impossibility maxim was a "statutory proscription" that a court could rely upon to invalidate a statute]; Appellants' Reply Brief p. 8 [arguing that "constitutional ***and*** statutory proscriptions both have equal dignity as a basis for enjoining the enforcement of invalid statutes," italics and bold in original].) And at oral argument, NSSF confirmed that it was not "bring[ing] a constitutional challenge." (See State's Request for Judicial Notice, Ex. A, pp. 48-49.)

The Court of Appeal reversed the trial court's decision. It recognized that the separation of powers doctrine prohibits one branch from exercising the "'core' or 'essential' functions" of another. (Opn. 7.) It also observed that the Legislature's "essential function is making law," that the judiciary may not evaluate the wisdom or desirability of the Legislature's policy choices, and that, if a statute's validity depends on the existence of a certain state of facts, courts must "'presume[] that the Legislature has investigated and ascertained the existence of that state of facts before passing the law.'" (*Ibid.*, quoting *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 511 (*Alfaro*).) But it also reasoned that "the judiciary can invalidate legislation if there is some overriding constitutional, statutory or charter prescription." (*Id.* at p. 8, citing *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898,

915.) And it concluded that Civil Code section 3531, a maxim, was such a statutory proscription. (*Ibid.*) The Court accepted as true NSSF's "factual allegation" that dual-microstamping is impossible to implement. (*Ibid.*)[13] It held that if NSSF could prove that it was impossible to implement the technology, "the separation of powers doctrine would not prevent the judiciary from invalidating that legislation." (*Ibid.*) It also rejected the State's argument that NSSF could comply with the law simply by manufacturing and selling handgun models that are currently on the State's roster, reasoning that "this solution does not provide the relief appellants are requesting." (*Id.* at p. 11.)

The State filed a petition for rehearing, arguing that the Court of Appeal made a mistake of law by assuming that Civil Code section 3531 expresses substantive law and is an independent basis on which a court may invalidate a later-enacted statute. The petition argued that the Court of Appeal's construction of this maxim was foreclosed by this Court's decision in *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471. (Petition for Rehearing pp. 5-7.) The Court of Appeal summarily denied the petition.

This Court granted the State's petition for review.

ARGUMENT

I. THE MAXIMS OF JURISPRUDENCE DO NOT AUTHORIZE A FREESTANDING FACIAL "IMPOSSIBILITY" CLAIM EMPOWERING A COURT TO INVALIDATE A STATUTE

The Court of Appeal held that a trial court may entertain a freestanding facial challenge to a state statute under the authority of Civil

[13] Before the Court of Appeal, the State contended that a manufacturer could satisfy the statue by placing two microstamps on the firing pin. (Opn. 9; 6 JA 963, 966.) The Court of Appeal rejected that argument as a matter of statutory construction (Opn. 9-10), and the State's petition to this Court did not seek review on that issue.

Code section 3531, and invalidate that statute if the plaintiff proves to a court's satisfaction that compliance with some aspect of the statute is "impossible." (Opn. 8.) That conclusion misunderstands section 3531's purpose, and is foreclosed by this Court's precedent.

Section 3531 is one of several "maxims of jurisprudence" set forth in the Civil Code. (See Civ. Code, §§ 3509-3548.) The maxims are "aid[s] to the just application of statutory law." (*Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 21; see also Civ. Code, § 3509.) The Legislature codified the maxims to help courts "ascertain and effectuate the underlying legislative intent" when construing statutes. (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012; see also *Daniels v. McPhail* (1949) 93 Cal.App.2d 479, 482 [maxims guide courts "in construing the proper application of common-law principles or of code sections"].) Section 3531 and its companion maxims are legal "rule[s] of thumb," a series of "nonbinding legal norm[s]" that sum up legal experience and "guide [courts] without compelling decisions." (Eisenberg, Expression Rules in Contract Law & Problems of Offer & Acceptance (1994) 82 Cal. L.Rev. 1127, 1140.) The maxims do not, however, "qualify" the other provisions of the Civil Code. (Civ. Code, § 3509.) They cannot be applied in a manner that "would frustrate the intent underlying the statute." (*Moore, supra*, 2 Cal.4th at p. 1012; see also *Campbell v. Mahoney* (2001 Mont.) 29 P.3d 1034, 1038 [similar maxim contained in Montana's code does not limit "other substantive statutory provisions"].) And they certainly cannot be applied in a way that precludes the implementation or enforcement of the express terms of later-enacted laws. (See

Rossi v. Brown (1995) 9 Cal.4th 688, 715 [one legislative body "may not bind future Legislatures"].)[14]

Consistent with these principles, this Court in *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471 (*Ford V-8 Coupe*) held that a statute's "express terms may not be nullified or defeated by a maxim." (*Id.* at p. 476.) In that case, a lien-holding bank opposed the State's effort to seize a car that had been used to transport drugs. (*Id.* at pp. 472-473.) The narcotics forfeiture law at issue allowed any party with an interest in a seized automobile to recover the money it was owed, upon proof that the claiming party had conducted a "reasonable investigation" into the purchaser's "moral responsibility, character, and reputation" before the lien had been created. (*Id.* at p. 472.) Although the bank had not conducted the required investigation, the trial court ruled in the bank's favor. (*Id.* at p. 473.) The trial court determined that had the bank conducted the required investigation, it would have found nothing at fault with the purchaser. (*Ibid.*) The trial court reasoned that the bank's inspection would have been an idle exercise, and that the bank was therefore entitled to recover its interest in the car because, under the maxims, the "law neither does nor requires an idle act." (*Ibid.*, citing Civ. Code, § 3532.)

This Court reversed. (*Ford V-8 Coupe*, *supra*, 36 Cal.2d at p. 478.) The question before it, the Court held, was one of statutory interpretation. (*Id.* at p. 475.) And in construing statutes, courts are "not authorized to insert qualifying provisions not included and may not rewrite the statute to

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

conform to an assumed intention which does not appear from its language," but are instead "limited to the intention expressed." (*Ibid.*) The statute at issue expressly required lenders to conduct an investigation before the lien was created—and left no room for the judiciary to excuse a party from that mandate. (*Id.* at p. 477.) In other words, the Legislature had determined "that the policy of crime prevention" would be served by the inspection requirement, and left only the "question of reasonableness" of the investigation to the courts. (*Ibid.*) The trial court thus erred in relying on a maxim to "declare an exception dispensing with the requirement for prior investigation." (See *id.* at p. 475.)[15]

NSSF's freestanding impossibility challenge is similarly foreclosed. Like the bank in *Ford V-8 Coupe*, NSSF seeks to use a maxim to nullify a later-enacted law—here a public safety statute—by declaring an "impossibility" exception. The Legislature has expressly provided, however, that new models of semiautomatic pistols may not be added to the roster of handguns certified for sale in this State unless they come equipped with microstamping technology—or some equally effective alternative method of connecting a spent cartridge to a particular gun. (§ 31910, subd. (b)(7).) Neither the text of the statute nor its legislative history suggests that, in adopting this requirement, the Legislature intended to provide an exception if a gun manufacturer (or any other party) could prove that microstamping is technologically infeasible. To the contrary, the

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[15] See also *Tulare County v. Kings County* (1897) 117 Cal. 195, 202-203 (*Tulare County*) [per curiam] [where neither statute nor Constitution provided right of action to resolve dispute over inter-county indebtedness when one county is created from another, courts will not recognize cause of action based only on maxim that "for every wrong there is a remedy"]; *City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 590 [maxim "[f]or every wrong there is a remedy" does not override express terms of statute of limitations].

Legislature was acutely aware of the challenges that implementing microstamping presented when it passed the microstamping law. It nonetheless chose to require those who want to sell or manufacture semiautomatic pistols in this State to devise solutions to those problems, develop an equally effective alternative—or limit themselves to manufacturing and selling any of the hundreds of semiautomatic pistols and other handguns that were on the State's roster at the time the microstamping law took effect. Civil Code section 3531 may not be applied in a manner that would override this legislative choice. Neither the impossibility maxim—nor any other—permits courts to "declare an exception" to the Legislature's clear purpose in adopting the microstamping law. (*Ford V-8 Coupe*, *supra*, 36 Cal.3d at p. 475; see also *Larcher v. Wanless* (1976) 18 Cal.3d 646, 658 [in interpreting statutes, maxims must "give way … [to] evidence of a contrary legislative intent"].)

In reaching the opposite result, the Court of Appeal relied principally on *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286 (*McMahon*). (Opn. 8.) That decision does not, however, hold that a court may entertain a facial challenge to a statute grounded only in Civil Code section 3531. In *McMahon*, the California Department of Social Services sued Butte County, arguing that a local measure was invalid because it prohibited the county from funding its share of a welfare program in the amounts required by state law. (219 Cal.App.3d at pp. 291-292.) The county counter-sued, asserting among other things that its financial condition made it impossible to comply with the State's funding requirements, and relying on section 3531. (*Id.* at pp. 299-300.) The trial court granted a preliminary injunction in the county's favor, and required the State to fund the entire non-federal share of the program. (*Id.* at p. 294.)

The court of appeal reversed. (*McMahon*, *supra*, 219 Cal.App.3d at p. 299.) It acknowledged the existence of "the equitable doctrine excusing

performance where circumstances make such performance impossible." (*Ibid.*) But the court held that this limited defense to enforcement was inapplicable to the case before it. The county's "impossibility" argument was based on its purported inability to pay for both state-mandated programs, such as the welfare program at issue, and local programs. (*Id.* at p. 300.) Because the county had failed to demonstrate that it could not pay all (or even part) of its share toward the state program by reorganizing priorities or raising additional local funds, it was not entitled to a preemptive injunction against enforcement. (*Id.* at p. 300.) "[R]elief from state mandates," the Court reasoned, "must come from the legislature and not from the courts." (*Id.* at p. 301.)

At most, *McMahon*'s reasoning supports the unremarkable proposition that a court exercising its equitable powers in the circumstances of a particular dispute may decline to issue an order requiring a party to perform an impossible act. That proposition is consistent with this Court's precedent. (See, e.g., *Sutro Heights Land Co. v. Merced Irr. Dist.* (1931) 211 Cal. 670, 704 [declining to order water district to install facilities to drain single landowner's property, where district was undertaking comprehensive plan to drain all lands in district as required by law, and was without funds to do more].)[16] But it does not suggest that a court may rely on the "impossibility" maxim to reject a clearly and expressly stated

[16] The Court in *Sutro Heights* also observed that the remedy requested by the landowner plaintiff would be inconsistent with the Legislature's intent in adopting the law at issue in that case: "We do not believe that, under this state of facts, it was ever intended by those responsible for the enactment of the Drainage Act of 1907 that an irrigation district, situated as is the defendant in this action, should be compelled to work its own destruction by undertaking to provide drainage facilities for the district, the expense of which is beyond its financial ability to meet or pay for." (*Sutro Heights*, *supra*, 211 Cal. at p. 703.)

legislative mandate, or to declare a later-enacted statute "invalid as a matter of law," or to enjoin the State from "taking any action to enforce" it, as NSSF seeks to do here. (1 JA 16.)[17]

II. RECOGNIZING NSSF'S FREESTANDING IMPOSSIBILITY CLAIM WOULD VIOLATE THE SEPARATION OF POWERS DOCTRINE

Any construction of Civil Code section 3531 to provide a freestanding facial challenge based on asserted impossibility would also violate the separation of powers doctrine. Courts are authorized to enjoin the enforcement of a state statute only to the extent required by the state or federal Constitutions. They are not empowered to entertain claims that a statute is simply ill-considered or unwise. Claims of that nature are properly directed back the Legislature—the branch charged with making policy decisions.

A. The Separation of Powers Doctrine Prevents One Branch from Interfering with the Core Powers of Another

Article III, section 3, of the California Constitution provides that "[t]he powers of state government are legislative, executive, and judicial." Persons "charged with the exercise of one power" may not exercise those of "either of the others," except as otherwise permitted by the Constitution. (*Ibid.*) This mandate has been a part of the California Constitution "[f]rom its inception." (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52 (*Mendocino*), citing Cal. Const. of 1849, art. III, § 1; see also

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[17] See also *McMahon*, *supra*, 219 Cal.App.3d at p. 303, fn. 10 [noting that Code of Civil Procedure 526 prohibits injunctions that prevent government officials from enforcing statutes, and that, while there are exceptions, none applied and there was no basis to create another]; Civ. Code, § 3423, subd. (d) ["An injunction may not be granted .... [t]o prevent the execution of a public statute, by officers of the law, for the public benefit"].

Nougues v. Douglass (1857) 7 Cal. 65, 70 (*Nougues*) ["Each department must be kept within its appropriate sphere"].)

The separation of powers doctrine is central to California's constitutional arrangement. It "articulates a basic philosophy of our constitutional system of government" by establishing a "system of checks and balances to protect any one branch against the overreaching of any other branch." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) By dividing power among three co-equal branches, the doctrine prevents a single person or group of people from consolidating the "basic or fundamental powers of government" into their hands. (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297 (*Carmel Valley*).) That separation is "fundamental to the preservation of our civil liberties." (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 191.)

The divisions between the branches are not, however, absolute. The legislative, executive, and judicial departments are "in many respects mutually dependent," and one branch may take actions that "significantly affect those of another branch." (*Mendocino, supra*, 13 Cal.4th at p. 52.) At the same time, the doctrine "unquestionably places limits upon the actions of each branch with respect to the other[s]." (*Id.* at p. 53.) Most importantly, Article III, section 3 prohibits one branch from "arrogat[ing] to itself the core functions of another branch." (*Carmel Valley, supra*, 25 Cal.4th at p. 297.)

The California Constitution vests "the legislative power of this State" in the Legislature. (Cal. Const., art. IV, § 1.) In contrast to the United States Congress, which possesses only those powers specifically delegated to it by the federal Constitution, the state Legislature "possesses *plenary* legislative authority." (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 498 (*Howard Jarvis*), italics in original.) That authority gives the Legislature "'the *actual* power to pass any act it pleases,' subject

only to those limits that may arise elsewhere in the state or federal Constitutions." (*Ibid.*, citation omitted, italics in original.) For the Legislature, "[f]ull power exists when there is no limitation." (*People v. Tilton* (1869) 37 Cal. 614, 626.)

The authority to make laws lies "at the core" of the Legislature's power. (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254 (*Matosantos*); see also *Carmel Valley*, *supra*, 25 Cal.4th at p. 299 ["The core functions of the legislative branch include passing laws …."].) The Legislature is the "creative element in the government;" it "makes the laws." (*Nougues*, *supra*, 7 Cal. at p. 70.) And that power is expansive—except for those powers reserved to the people themselves, "the entire law-making authority of the state" rests with the Legislature. (*Matosantos*, *supra*, 53 Cal.4th at p. 254.)

Consistent with its recognition that the Legislature is vested with broad powers, this Court has held that the judiciary may review legislative enactments only for specific, limited reasons. Courts may, of course, "pass[] upon the constitutional validity" of legislative actions. (*Mendocino*, *supra*, 13 Cal.4th at p. 53.) But their power to review and invalidate statutes extends no further. So long as the Legislature "confines its actions" to conform with the Constitution's limits, courts may not "interfere by injunction or otherwise" to prevent the adoption or enforcement of duly enacted statutes. (*Nougues*, *supra*, 7 Cal. at p. 70.) Indeed, courts have a "duty to *uphold* the legislative power," unless one of the Legislature's acts transgresses constitutional bounds. (*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461, italics added.)[18]

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[18] In rejecting the State's separation of powers arguments, the Court of Appeal relied on *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 915. (Opn. 8.) *Cooper*, however, holds only that a *locality*

Confining judicial review to constitutional questions serves an important practical purpose. That limitation allows the political branches to devise innovative solutions to social, economic, and public health ills as they develop. The Legislature's police power is not a "'circumscribed prerogative,'" but is instead "'elastic and ... capable of expansion to meet existing conditions of modern life.'" (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 160, citation omitted.) Cabining courts' review to constitutional claims ensures that they do not "sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (*Estate of Horman* (1971) 5 Cal.3d 62, 77.) "[A]bsent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Mendocino*, *supra*, 13 Cal.4th at p. 53.)

B. NSSF's Impossibility Claim Would Allow a Court to Override the Legislature's Core Power to Set Public Safety Policy

In this case, NSSF does not challenge the microstamping law on constitutional grounds. (See *ante*, pp. 16-19). It advances instead a freestanding "impossibility" challenge untethered from any constitutional claim. It seeks a judicial declaration that section 31910(b)(7) is "invalid as a matter of law and cannot be enforced because it is impossible for a firearm manufacturer to implement microstamping technology." (1 JA 16.) And it argues that it is entitled to a trial (or at least a summary judgment ruling) on that issue.

The separation of powers principles discussed above foreclose this claim. Both this Court and the U.S. Supreme Court have repeatedly held that the judiciary may not strike down statutes unless they "'run afoul of

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may not adopt a law that conflicts with general *state* laws. (See *Cooper*, *supra*, 13 Cal.3d at pp. 906-911, 915-916.)

some specific [state or] federal constitutional prohibition.'" (*Werner v. Southern Cal. Associated Newspapers* (1950) 35 Cal.2d 121, 129 (*Werner*), quoting *Lincoln Fed. L. Union v. Northwestern I. & M. Co* (1949) 335 U.S. 525, 536.) Indeed, even in cases where a plaintiff formally alleged that a law violated the Constitution, this Court has rejected claims that sought only to relitigate the Legislature's policy judgments. In *Werner*, for example, the Court held that courts may not rely on the due process clause "to invalidate a legislative policy that [they] may deem unwise." (*Werner, supra*, 35 Cal.2d at p. 129.) While such actions might in theory protect society from laws that some would consider ill-advised, they might also "summarily put an end" to laws that were sound, along with those "that may be wise in the long run although they appear foolish at the moment." (*Ibid.*; see also *id.* at pp. 129-130 [law that precluded libel and slander plaintiffs from recovering special damages if defendant media company published retraction did not violate due process clause because suit was directed "not at the constitutionality of [the] legislation but at its wisdom"].) A court cannot invalidate a law solely because it "'disagrees with the desirability of the legislation.'" (*Werner, supra*, 35 Cal. 2d at p. 130, citation omitted.)

NSSF's maxim-based cause of action seeks the same type of judicial intervention into policymaking that this Court rejected in *Werner*. NSSF states that it agrees with and even "support[s]" the State's goal of deterring and solving handgun-related crimes. (Answer to Petition for Review p. 14, fn. 4.) But it challenges the wisdom of the Legislature's policy choice to address this problem, in part, by requiring the use or development of certain technology as a condition on legal permission to sell new models of semiautomatic pistols in California. Having failed to persuade the Legislature to reject the microstamping requirement, NSSF now seeks a

judicial declaration that the State may not enforce the Legislature's preferred solution to a pressing public safety problem.

The Legislature's policy decision at issue in this case—to mandate that industry move to a new technology—is akin to choices that legislatures routinely make in other contexts. For example, in the environmental arena, state and federal lawmakers regularly adopt technology-forcing standards—laws and regulations that are "'expressly designed to force regulated sources to develop pollution control devices 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, quoting *Union Electric v. EPA* (1976) 427 U.S. 246, 256-257.) Such laws are "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." (*Ibid.*)

A legislature's prerogative to adopt technology-forcing laws is well established. In *Union Electric v. EPA* (1976) 427 U.S. 246, for example, the U.S. Supreme Court rejected the argument that, in adopting amendments to the Clean Air Act, Congress intended to allow a regulated party to "raise the claim that it is economically or technologically infeasible to comply" with the mandated pollution limits in a federal court. (*Id.* at p. 249.) Such claims, the Court held, were "wholly foreign" to the amendments. (*Id.* at p. 256.) Congress did not intend the emissions standards to be "'limited by what is or appears to be technologically or economically feasible.'" (*Id.* at p. 258, quoting Remarks of Sen. Muskie, 116 Cong. Rec. 32901-32902 (1970).) Instead, those amendments were intended to "'establish what the public interest requires to protect the health of persons'"—even if that meant that industry would have "'to do what seems to be impossible at the present time.'" (*Id.* at pp. 258-259, quoting

Remarks of Sen. Muskie, 116 Cong. Rec. 32901-32902.)[19] Moreover, the high court held that regulated parties could not challenge emissions limits in federal court as economically or technologically infeasible, because those suits would "frustrate [Congress's] intent" when it passed the Clean Air Act amendments. (*Id.* at pp. 268-269.)

As long as the Legislature confines its actions to the Constitution's limits, as it did here, it may adopt "'any act it pleases'"—including laws that require regulated industries to meet standards that may be beyond current technological capabilities. (*Howard Jarvis, supra*, 62 Cal.4th at p. 498, citation omitted.)[20] And absent a constitutional concern, any defects in the microstamping law must be corrected through the legislative process. (See *Werner, supra*, 35 Cal.2d at p. 130; see also *Matosantos, supra*, 53 Cal.4th at p. 255 [it is a legislative prerogative to abrogate existing laws].) Allowing courts to invalidate statutes on non-constitutional grounds would deflect responsibility for a law's success or its failure from those on "'whom in a democratic society it ultimately rests—the people.'" (*Werner*,

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[19] The Court also noted that the emissions standards were not infeasible in a "literal sense," because the "offending sources always have the option of shutting down if they cannot otherwise comply." (*Union Electric, supra*, 427 U.S. at p. 265, fn. 14.) In this case, the State made a similar argument to the Court of Appeal, noting that a manufacturer can comply with the microstamping law simply by not selling new models of semiautomatic pistols that do not have microstamps. The Court of Appeal dismissed that argument, stating only that this option would "not provide the relief appellants are requesting." (Opn. 11.)

[20] See also *Nougues, supra*, 7 Cal. at p. 70 [courts may not "interfere by injunction or otherwise" to prevent the enforcement statutes that comply with the Constitution].

supra, 35 Cal.2d at p. 130; quoting *A.F.L. v. American Sash & Door Co.* (1949) 335 U.S. 538, 553 [conc. opn. of Frankfurter, J.].)[21]

III. NSSF's Impossibility Claim Would Circumvent the Requirements for a Proper Due Process Challenge

NSSF has suggested that its freestanding facial impossibility claim is perhaps not so novel, as it could simply be reframed as one grounded in due process, and the case would proceed along substantially the same lines. (See, e.g., Answer to Petition for Review p. 18, fn. 5 [noting that, on remand, NSSF "would have the right to seek to amend their complaint to add a due process claim"]; see also opn. 8 [characterizing NSSF's claim as a challenge to the Legislature's determination as "arbitrary or irrational"].) This is incorrect.

There are important differences between a due process cause of action and NSSF's asserted impossibility claim. When analyzing a claim that a law violates due process because it is arbitrary and capricious, courts ask only whether the law "reasonably relates 'to a proper legislative goal.'" (*Coleman v. Dept. of Personnel Administration* (1991) 52 Cal.3d 1102, 1125, citation omitted.) In addition, legislative choices 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.) As long as a court can identify some "'reasonably conceivable set of facts'" demonstrating a rational relationship between the regulation and the

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[21] NSSF acknowledges that manufacturers can produce pistols equipped with microstamps etched on one interior surface. (6 JA 963 [NSSF admission that firing pin can be equipped with microstamps that "can sometimes be successfully transferred" onto cartridges; 6 JA 966 [same admission from SAAMI].) If NSSF believes that this is the best that industry can do, it is free to take that argument to the Legislature and ask it to amend the law.

government's legitimate ends, it must sustain the law. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 292 (*Garamendi*), citation omitted.) And—at least when entertaining facial challenges—courts typically rule on such claims as a matter of law, without allowing discovery or making factual determinations. (See, e.g., *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 478; see also *Alfaro*, *supra*, 98 Cal.App.4th at p. 511 [where statute's validity "'depends on the existence of a certain state of facts,'" courts must "'presume[] that the Legislature has investigated and ascertained the existence of that state of facts'" before adopting the law, citation omitted]; see also *id.* at pp. 509-510 [where constitutional challenge presents question of law, trial court may resolve case on demurrer].) Had NSSF asserted a due process claim, the trial court undoubtedly would have dismissed it on demurrer, because NSSF has not disputed (and could not) that, as a matter of law, the microstamping law "reasonably relates 'to a proper legislative goal'" (*Coleman*, *supra*, 52 Cal.3d at p. 1125, citation omitted), and that the Legislature could at least have "rational[ly] speculat[ed]" that microstamping (or an equally effective alternative) is technologically feasible (*Jenkins*, *supra*, 50 Cal.4th at p. 1181).

In contrast—and by NSSF's own account—the factual impossibility claim advanced in this case would require the "development of a complete factual record" and a motion for summary judgment or a trial. (See Answer to Petition for Review p. 5.)[22] That would change the relevant inquiry from a legal question about what the Legislature might rationally have concluded in deciding to enact the law into a question about the underlying facts—requiring a trial that, in this case, could devolve into a battle of experts.

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[22] Neither NSSF nor the Court of Appeal addressed how a trial on impossibility might proceed as a practical matter.

(See 6 JA 969 [NSSF's case rests primarily on declaration of forensic examiner].)[23] Moreover, under NSSF's theory, the law would rise or fall depending on the adversarial process, the parties' arguments and resources, the rules of evidence, discovery, and personal jurisdiction, or even which party bears the burdens of proof and persuasion. And a court would decide whether or not to enjoin the microstamping law based on its own views of the evidence and the technology's feasibility.

Allowing NSSF's impossibility claim to proceed would also impermissibly circumvent established precedent intended to preserve the Legislature's authority whenever possible. NSSF believes that it is entitled to a decision nullifying a law if it can convince a court—presumably by a preponderance of the evidence—that, as a factual matter, microstamping is currently impossible to implement. In contrast, statutes may not be struck down as unconstitutional unless they "positively and certainly" violate the Constitution. (*Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692.) All doubts must be resolved in favor of the Legislature's exercise of its plenary authority: "'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action.'" (*Id.* at p. 691, citation omitted.) These precepts apply with special force when considering a claim that a law violates due process because it is arbitrary and capricious: if the statute does not infringe upon some fundamental right, it is "*presumptively* constitutional under the due process clause." (*Garamendi*, *supra*, 8 Cal.4th at p. 292, italics added.)

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[23] The State has already been forced to spend resources propounding and responding to discovery, defending a deposition, and drafting a motion for partial summary judgment. (See 6 JA 937-990 [excerpts from requests for admissions, production, and interrogatories] 5 JA 781-796 [excerpts from deposition]; 5 JA 899-925 [State's motion for partial summary judgment].)

Constitutional litigation standards such as these are carefully formulated and enforced in order to preserve the proper balance between legislative and judicial powers. The novel, non-constitutional "impossibility" claim advanced by NSSF and accepted by the Court of Appeal would subvert that balance, and this Court should reject it. As the Court observed more than a century ago, where a dispute pertains to policy and is not of constitutional dimension, "[t]he remedy … is with the legislature … and not with the courts." (*Tulare County*, *supra*, 117 Cal. at p. 203.)

CONCLUSION

The Court of Appeal's decision should be reversed.

Dated: June 21, 2017

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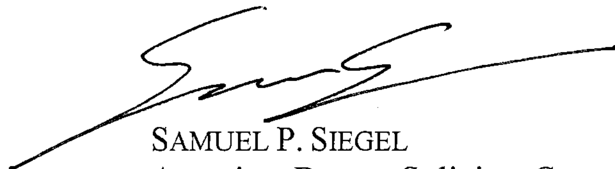

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 8,293 words, as counted by the Microsoft Word word-processing program, excluding the parts of the brief excluded by California Rules of Court, rule 8.520(c)(3).

Dated: June 21, 2017

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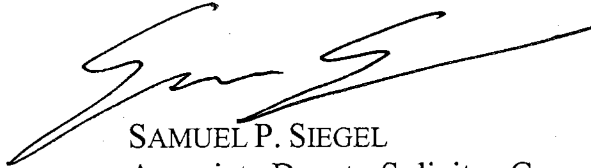

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **National Shooting Sports Foundation v. State of California**
Case No.: **S239397**

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 June 21, 2017, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** 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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Fresno, CA 93729

Fifth Appellate District
Court of Appeal of the State of California
2424 Ventura Street
Fresno, CA 93721

County of Fresno
Downtown Courthouse
Superior Court of California
1100 Van Ness Avenue
Fresno, CA 93724-0002

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 June 21, 2017, at San Francisco, California.

M. Campos — Declarant

M. Campos — Signature

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