S239397

In the Supreme Court of the State of California

NATIONAL SHOOTING SPORTS FOUNDATION, INC.,

and

SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, INC.,

Plaintiffs and Appellants,

vs.

STATE OF CALIFORNIA,

Defendant and Respondent.

APPELLANTS' ANSWER BRIEF ON THE MERITS

On Review From the Court of Appeal for the Fifth Appellate District
5th Civil No. F072310

After Appeal From the Superior Court of the State of California
for the County of Fresno, Case Number 14CECG00068
Honorable Donald S. Black

LEWIS BRISBOIS BISGAARD & SMITH LLP
Daniel C. DeCarlo, State Bar No. 160307
*Lance A. Selfridge, State Bar No. 101940
633 West 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: 213.250.1800 • Facsimile: 213.250.7900
Dan.DeCarlo@lewisbrisbois.com • Lance.Selfridge@lewisbrisbois.com

Attorneys for Plaintiffs and Appellants National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.

S239397

In the Supreme Court of the State of California

NATIONAL SHOOTING SPORTS FOUNDATION, INC.,

and

SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, INC.,

Plaintiffs and Appellants,

vs.

STATE OF CALIFORNIA,

Defendant and Respondent.

APPELLANTS' ANSWER BRIEF ON THE MERITS

On Review From the Court of Appeal for the Fifth Appellate District
5th Civil No. F072310

After Appeal From the Superior Court of the State of California
for the County of Fresno, Case Number 14CECG00068
Honorable Donald S. Black

LEWIS BRISBOIS BISGAARD & SMITH LLP
Daniel C. DeCarlo, State Bar No. 160307
*Lance A. Selfridge, State Bar No. 101940
633 West 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: 213.250.1800 • Facsimile: 213.250.7900
Dan.DeCarlo@lewisbrisbois.com • Lance.Selfridge@lewisbrisbois.com

Attorneys for Plaintiffs and Appellants National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Court Cases

State Court Cases

State Constitutional Provisions

State Statutory Authorities

State Court Rules

Additional Authorities

I. ISSUE PRESENTED.

This Court accepted this case for review of the following issue, as presented by the petition for review filed by respondent, State of California: 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 it? Specifically, this Court is being asked to decide whether appellants may seek to enjoin the enforceability of a statute that impacts only the firearms industry, on the ground that the statute requires compliance that is physically impossible to achieve.

II. INTRODUCTION.

Appellants, National Shooting Sports Foundation, Inc. ("NSSF"), and Shooting Arms and Ammunition Manufacturers' Institute, Inc. ("SAAMI"), challenge the enforceability of Penal Code section 31910, subdivision (b)(7)(A). That statute requires that all semi-automatic pistols manufactured, imported or sold in California be

> equipped with a microscopic array of characters [a "microstamp"] 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.

The process described by section 31910, subdivision (b)(7)(A), is known as "dual placement microstamping."

In a single cause of action for declaratory and injunctive relief, appellants allege that dual placement microstamping technology is impossible to implement. Specifically, while appellants acknowledge that a microstamp imprinted on the firing pin of a semi-automatic pistol will occasionally transfer to the primer located at the rear of a cartridge case upon firing, the record contains uncontroverted expert testimony that it is impossible to imprint a microstamp on any other surface or part of a semi-automatic pistol that will transfer to the cartridge case when the pistol is fired. (JA 45, 48, 772.) Respondent implicitly admits the truth of appellants' allegations, by acknowledging that "the relevant technology could fairly be described as emerging." (Op. Brief 8-9.) Respondent also implicitly admits that only one of the two microstamps required by section 31910, subdivision (b)(7)(A), may be placed on a pistol's firing pin, by not seeking review of that issue. (Op. Brief 20.) Nevertheless, the trial court granted respondent's motion for judgment on the pleadings without leave to amend, despite the fact that appellants' allegations must be taken as true at this stage of the litigation. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) The Court of Appeal reversed, and found as a matter of statutory construction, based on the legislative history, that section 31910, subdivision (b)(7)(A), does not allow both microstamps to

be placed on the same part of the pistol. (*National Shooting Sports Foundation, Inc. v. State of California* (2016) 6 Cal.App.5th 298, 307-308, review granted March 22, 2017, S239397; hereinafter, "*NSSF v. California.*").

This case therefore squarely presents an issue of fundamental fairness as to whether the Legislature may require the performance of a plainly impossible act as a condition to the exercise of an otherwise lawful right. Respondent argues that the separation of powers doctrine absolutely prevents this Court from reviewing the Legislature's decision to enact Penal Code section 31910, subdivision (b)(7)(A), but the core legislative function of passing laws does not deprive the judiciary of its own constitutional power to set aside laws that are palpably arbitrary. Respondent also argues that appellants may not assert a cause of action based on the maxim of jurisprudence contained in Civil Code section 3531 that "[t]he law never requires impossibilities," but it is actually the separation of powers doctrine itself that invests section 3531 with the same operative force as any other statute. Appellants therefore request that this Court affirm the decision of the Court of Appeal, and allow this action to be resolved on its factual merits, either through summary judgment or trial, as the case may be.

III. STATEMENT OF THE CASE.

A. The Parties.

Respondent is the State of California. (JA 11.) Appellant NSSF is a nonprofit trade association for members of the firearms, ammunition, hunting and shooting sports industries whose mission is to promote, protect and preserve hunting and the shooting sports. (JA 10, 778.) Appellant SAAMI is a non-profit trade association of domestic firearms, ammunition and propellant manufacturers whose mission is to develop and publish industry recommended practices and voluntary standards pertaining to the safety, interchangeability, reliability and quality of semi-automatic pistols, other firearms and ammunition. (JA 10-11, 775.) Both NSSF and SAAMI therefore have a natural interest in laws such as Penal Code section 31910, subdivision (b)(7)(A), which affect the design and operation of firearms.

B. The Enactment of Penal Code Section 31910, Subdivision (b)(7)(A).

The issue of microstamping semi-automatic pistols first arose in the California Legislature on February 10, 2005, when Assembly Member Paul Koretz introduced Assembly Bill No. 352. (JA 847-851.) Assembly Bill No. 352 proposed that a semi-automatic pistol that was not already listed on the Roster of Handguns Certified for Sale (the "Roster"), that Penal Code section 32015, subdivision (a), requires respondent's Department of Justice

to maintain, would be deemed to be "an unsafe handgun" if "it is not designed with a microscopic array of characters, that identify the make, model, and serial number of the pistol, etched into the interior surface or internal working parts of the pistol, and which are transferred by imprinting on each cartridge case when the pistol is fired." (JA 849.) Assembly Bill No. 352 thus would have required that a semi-automatic pistol contain only one microstamp ("single placement microstamping"). Assembly Bill No. 352 ultimately died in conference on November 30, 2006. (JA 854.)

The issue of microstamping semi-automatic pistols arose in the Legislature again on February 23, 2007, when Assembly Member Michael Feuer introduced Assembly Bill No. 1471. (JA 856-858.) As originally introduced, Assembly Bill No. 1471 contained the same single placement microstamping provision as Assembly Bill No. 352. (JA 858.) However, concerns were raised in the Legislature over the ability that criminals would have to defeat a pistol's microstamping features by defacing a microstamp placed on the firing pin. For example, as an April 10, 2007 report of the Senate Republican Office of Policy succinctly stated, "Criminals could easily defeat the intended identification purpose of this bill by filing off the microstamping on a firing pin. They could also switch the firing pin from one pistol to another pistol." (JA 606.)

To address this concern, Assembly Bill No. 1471 was amended, coincidentally also on April 10, 2007, to incorporate the dual placement

microstamping provisions that now appear in Penal Code section 31910, subdivision (b)(7)(A). (JA 867.)[1] Legislative history subsequent to the amendment plainly reveals the Legislature's intention that the second microstamp required under section 31910, subdivision (b)(7)(A), must be placed elsewhere than on a pistol's firing pin, because a microstamp on the firing pin can be easily defaced, and because the firing pin itself can simply be replaced with another firing pin bearing a different microstamp or no microstamp at all. For example, the September 11, 2007 analysis of the Senate Rules Committee upon the third reading of Assembly Bill 1471 states that "Bill 1471 would require newly designated semi-automatic handguns sold after January 1, 2010, be equipped with 'micro-stamping' technology. This technology consists of engraving microscopic characters onto the firing pin and other interior surfaces, which would be transferred onto the cartridge casing when the handgun is fired." (JA 633-634.)

In addition, the September 19, 2007 analysis of Assembly Bill 1471 that was prepared by the Governor's Office of Planning and Research stated that "[p]roponents of the bill argue that countermeasures can be taken by the manufacturer to prevent circumvention of the technology. Specifically,

---

[1] The microstamping statute enacted by virtue of Assembly Bill No. 1471 was denominated Penal Code section 12126. As noted by the Law Revision Commission Comment to section 31910, section 12126 was later redenominated as Penal Code section 31910 without substantive change. (Senate Bill No. 1080, 2010 Regular Session.)

they suggest that parts of the gun that come into contact with the bullet casing, other than the firing pin, can be similarly microengraved to make filing the engraving away more difficult." (JA 618.)[2] The legislative history reveals no contrary intention whatsoever by the Legislature to permit both microstamps to be placed on the pistol's firing pin. The Court of Appeal therefore found that "the only logical interpretation of the statute is that the Legislature intended the microstamping to be on two different internal parts of the pistol. If one microstamp on the firing pin can be easily defeated, the same is true for two." (*NSSF v. California*, *supra*, 6 Cal.App.5th at p. 308.)[3]

As ultimately enacted, Penal Code section 31910, subdivision (b)(7)(A), incorporated the dual placement microstamping provisions of

---

[2] Both of those analyses are proper sources of legislative history. (*Levine v. Superior Court* (2005) 35 Cal.4th 935, 948 [Senate floor analysis]; *Smith v. Workers' Compensation Appeals Board* (2009) 46 Cal.4th 272, 280 [Legislative Counsel's analysis].)

[3] While initially taking a contrary view, respondent now admits that a microstamp placed on the firing pin of a semi-automatic pistol can be easily defeated (Op. Brief 11), and that the Legislature adopted dual placement microstamping as part of Assembly Bill No. 1471 to address that defect in Assembly Bill No. 352, by requiring that a second microstamp be imprinted on some surface or part of a semi-automatic pistol other than the pistol's firing pin (Op. Brief 12). Accordingly, respondent no longer contends that the placement of two microstamps on the firing pin would comply with the statute. (Op. Brief 20.)

Assembly Bill No. 1471. Section 31910, subdivision (b)(7)(A), provides as follows:

> As used in this part, "unsafe handgun" means any pistol, revolver, or other firearm capable of being concealed upon the person, for which any of the following is true:
>
> * * *
>
> (b) For a pistol:
>
> * * *
>
> (7)(A) Commencing January 1, 2010, for all semi-automatic 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.

On May 13, 2013, the California Department of Justice certified that the technology used to create the imprint of the microscopic array of characters required by the provisions of Penal Code section 31910, subdivision (b)(7)(A), is available to more than one manufacturer unencumbered by any patent restrictions, thereby allowing the statute to take effect. (JA 781, 787-788, 839.) The Department of Justice did not, however, certify that dual placement microstamping is possible to implement in semi-automatic pistols, nor did section 31910, subdivision (b)(7)(A), require it to do so.

C. The Impossibility of Dual Placement Microstamping.

Microstamped characters that identify the make, model, and serial number of a semi-automatic pistol (a "microstamped alpha numeric code") can be etched or imprinted on the tip of the pistol's firing pin, and such a microstamped alpha numeric code will sometimes transfer onto the primer contained within the cartridge case, which the firing pin strikes during the pistol's firing process. (JA 45.)[4] However, a microstamped alpha numeric code that is etched or imprinted on the breech face, chamber wall, extractor, ejector or magazine of a semi-automatic pistol cannot be imprinted or transferred to the cartridge case during the pistol's firing process. (JA 46-48, 772.) There are no interior surfaces or internal working parts of a semi-automatic pistol on which a microstamped alpha numeric code could be etched or imprinted other than the firing pin, breech face, chamber wall extractor, ejector and magazine. (JA 45, 772.) The record below is uncontroverted with respect to this point.[5] The foregoing facts appear in

---

[4] Even when it does imprint, a microstamped alpha numeric code does not satisfy the requirements of Penal Code section 31910, subdivision (b)(7)(A), because it does not by itself identify the make, model and serial number of the pistol. A database must still be consulted to convert the markings of the microstamped alpha numeric code into the information required by the statute.

[5] Although this appeal arises from the entry of judgment following the granting of respondent's motion for judgment on the pleadings without leave to amend, much of the factual record is already developed because of the unusual procedural posture of the case. Specifically, respondent did not bring its motion for judgment on the pleadings until late in the course of

the declarations of Frederick Tulleners, who has been a forensic scientist specializing in forensic firearms identification since 1971, and who has been employed by respondent's Department of Justice as the supervising criminalist in both its Riverside and Sacramento laboratories. (JA 37.)

Respondent submitted no expert testimony in the trial court to contradict Mr. Tulleners, and instead relies for purposes of this appeal on statements made in the Legislature by the author of Assembly Bill No. 1471, who in turn relied on a photograph purporting to show that the breech face of a semi-automatic pistol transferred a microstamp to a cartridge case fired by that pistol. (Op. Brief, 13-15.) The comments in the Legislature by the author of Assembly Bill No. 1471 are inadmissible hearsay for purposes of this action, because they concern a statement made other than by a witness while testifying that respondent now offers as proof of the matter stated (Evid. Code, § 1200), and the record contains no evidence to show that the author even possesses the technical expertise to comment regarding the effectiveness of breech face microstamping, which deprives his comments of any evidentiary value (Evid. Code, § 801, subd. (b).) Likewise, the photograph on which the author relied is unauthenticated hearsay for purposes of this appeal. There is no evidence in the record that

---

this litigation, long after appellants' evidentiary motion for a preliminary injunction had already been decided. (JA 1210-1211.)

the photograph is what respondent claims it to be, as required by Evidence Code section 1400, and the photograph also concerns a statement made other than by a witness while testifying that respondent now offers as proof of the matter stated, rendering it inadmissible hearsay under Evidence Code section 1200.[6] Respondent's reliance on such material underscores the need to conduct a trial in this case to establish through admissible evidence the truth of appellants' allegations that dual placement microstamping is in fact impossible to implement.

D. The Loss to Appellants Caused by Penal Code Section 31910, Subdivision (b)(7)(A).

On January 9, 2014, the date this case was filed in Fresno County Superior Court (JA 9), there were 867 semi-automatic pistols listed on the Roster. A pistol that is not listed on the Roster is a handgun that has not been determined not to be unsafe. (Pen. Code, § 32015, subd. (a).) It is a crime in the State of California to manufacture, import or sell any such unsafe handgun. (Pen. Code § 32000 subd. (a).)

As of July 31, 2017, there were only 504 semi-automatic pistols listed on the Roster, representing a decrease of approximately 42% over a

---

[6] Indeed, if respondent attempts to introduce evidence of this breech face photograph at trial, appellants intend to introduce rebuttal evidence that the photograph does not depict what it purports to depict.

period of slightly more than three and one-half years.[7] If appellants have correctly alleged that dual placement microstamping is impossible to implement, the number of semi-automatic pistols listed on the Roster will continue to decrease, because older pistol models that are no longer manufactured due to obsolescence will continue to be removed from the Roster, and because newer pistol models will not be added to the Roster since they cannot comply with the dual placement microstamping requirements of Penal Code section 31910, subdivision (b)(7)(A). This represents an annual loss to appellants' manufacturing members of approximately $183 million, unadjusted for inflation since 2014. (JA 69.)[8]

---

[7] The Roster, which appears on the internet at <http://certguns.doj.ca.gov/safeguns_resp.asp>, listed 504 semi-automatic pistols as of July 31, 2017. As of that same date, the list of de-certified handgun models maintained by the Bureau of Firearms of respondent's Department of Justice, which appears on the internet at <https://oag.ca.gov/sites/oag.ca.gov/files/pdfs/firearms/removed.pdf>, listed 363 semi-automatic pistols that have been de-certified from the Roster since January 9, 2014, the date on which appellants filed their complaint. Thus, as of January 9, 2014, there were 867 semi-automatic pistols on the Roster.

[8] As the Roster continues to shrink, Second Amendment issues will obviously arise, because semi-automatic pistols are protected firearms under the decision of the United States Supreme Court in *District of Columbia v. Heller* (2008) 554 U.S. 570, 628-629, and because the protection for semi-automatic pistols recognized in *Heller* extends to the States. (*MacDonald v. City of* Chicago (2010) 561 U.S. 742, 791.) However, appellants do not raise any such Second Amendment issues in this litigation, because they are trade association plaintiffs which concern themselves with issues of economic importance to the firearms industry. (JA 10-11, 13, 15.) The Second Amendment issues are being presented by

IV. PROCEDURAL POSTURE.

A. Relief Sought in the Trial Court.

On January 9, 2014, appellants filed their complaint against respondent, asserting a single cause of action for declaratory and injunctive relief. (JA 9-18.) Appellants allege that "[a]n actual controversy has arisen and now exists between [themselves] and the manufacturer, distributor and retailer members they represent, on the one hand, and [respondent], on the other hand, concerning their respective rights and duties pursuant to the provisions of California Penal Code section 31910, subdivision (b)(7)(A)." (JA 13.) Specifically, appellants contend that

> the provisions of California Penal Code section 31910, subdivision (b)(7)(A), are invalid as a matter of law and cannot be enforced because it is impossible for a firearm manufacturer to implement microstamping technology in compliance therewith, since 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 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.

(*Ibid.*) The complaint then alleges that respondent contends to the contrary and that a judicial declaration is accordingly appropriate, before concluding

---

other, unrelated litigants in *Peña v. Lindley* (E.D. Cal. 2015) 2015 U.S. Dist. LEXIS 23575, which is currently on appeal in the United States Court of Appeals for the Ninth Circuit as Case No. 15-15449.

by requesting that the enforcement of Penal Code section 31910, subdivision (b)(7)(A), be enjoined. (JA 13, 15-16.)[9]

B. Judgment from which Appellants Appeal.

On February 18, 2015, nearly a year after respondent's demurrer to appellant's complaint had been overruled, respondent moved for judgment on the pleadings with respect to that complaint. (JA 113-116, 124-126.) Prior to the hearing of that motion on April 29, 2015, the trial court issued a tentative ruling to deny the motion, finding in appellants' favor with respect to all of the issues presented by the motion, including the separation of powers issue that is one of the primary issues on this appeal. (JA 733-736.) In particular, after noting respondent's citation to authority stating, "[T]he separation of powers doctrine [holds] that in the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation," the trial court

---

[9] Code of Civil Procedure section 1060 provides in pertinent part that "[a]ny person ... who desires a declaration of his or her rights or duties with respect to another ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action ... in the superior court for a declaration of his or her rights and duties in the premises...." Numerous cases hold that such declaratory relief actions are an appropriate procedural vehicle for challenging invalid legislative enactments. (*E.g.*, *Portnoy v. Superior Court* (1942) 20 Cal.2d 375, 378; *LaFranchi v. Santa Rosa* (1937) 8 Cal.2d 331, 332, 335-336.) Respondent does not contend that appellants' have failed to allege the existence of an actual controversy sufficient to satisfy the pleading requirements of section 1060.

acknowledged that "impossibility of compliance with a state law is ground for enjoining enforcement of a statute." (JA 733.) The trial court did so in reliance on *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 299-300, which appellants cited in opposition to respondent's motion. (JA 733.)

However, on July 6, 2015, while cross-motions for summary judgment were pending (JA 738-740, 899-902), the trial court mistakenly reversed itself and issued an order granting respondent's motion for judgment on the pleadings without leave to amend (JA 1139-1147). Although the trial court acknowledged that the *McMahon* court "found that the impossibility doctrine did not apply in that case," and thereby presumed the existence of the doctrine, the trial court nevertheless incorrectly assumed that impossibility is not a ground for enjoining the enforcement of a statute, cryptically noting that the *McMahon* court "did not directly address [that] issue." (JA 1143-1144.) The trial court also incorrectly stated that the *McMahon* court "did not 'reach any separation-of-power issues,'" without addressing whether the provision of the Civil Code on which the *McMahon* court relied is itself a statutory proscription on which a court could rely to invalidate another statute on the ground of impossibility of compliance. (JA 1144.) Then, based on its order granting respondent's motion for judgment on the pleadings without leave to amend, the trial

court entered judgment in favor of respondent and against appellants on July 22, 2015. (JA 1160-1173.)

C. Reversal by the Court of Appeal.

In its published opinion issued on December 1, 2016, the Court of Appeal reversed the judgment and remanded the case for further proceedings. Citing *Dunn v. County of Santa Barbara*, *supra*, 135 Cal.App.4th at p. 1298, the Court of Appeal correctly recognized that "[b]ecause judgment was granted on the pleadings, we must accept the truth of the complaint's properly pleaded facts," and that "[a]ccordingly, we must accept appellants' claim that it is impossible to effectively microstamp the required characters on any part of a semiautomatic pistol other than the firing pin." (*NSSF v. California*, *supra*, 6 Cal.App.5th at p. 302.) As previously noted, the Court of Appeal also "reject[ed] respondent's position that stamping the characters in two places on the firing pin would comply with the statute," finding that [a]ppellants have the right to present evidence to attempt to prove their claim." (*Ibid.*)

The Court of Appeal carefully considered the separation of powers argument on which respondent relies.[10] The Court of Appeal noted that

[10] In this Court, respondent also attacks the statutory value of Civil Code section 3531, the maxim of jurisprudence stating that "[t]he law never

"each branch [of California's system of state government] is vested with 'certain "core" ... or "essential" ... functions that may not be usurped by another branch,'" and that "'[t]he separation of powers doctrine protects each branch's core constitutional functions from lateral attack by another branch.'" (*NSSF v. California*, *supra*, 6 Cal.App.5th at p. 305.) Accordingly, the Court of Appeal also noted that "the courts must defer to the Legislature's factual determination unless it is palpably arbitrary and must uphold the challenged legislation so long as the Legislature could rationally have determined a set of facts that support it." (*NSSF v. California*, *supra*, 6 Cal.App.5th at p. 306.) However, noting once again that it "must accept as true appellants' factual allegation that it is impossible to effectively microstamp a semiautomatic pistol in two or more places on the interior of the pistol as required by Penal Code section 31910, subdivision (b)(7)(A)," the Court of Appeal found that "[i]t would be illogical to uphold a requirement that is currently impossible to accomplish." (*Ibid.*) Accordingly, the Court of Appeal held that

> appellants have the right to present evidence and if they are able to prove it is impossible to comply with the dual microstamping requirement, the separation of powers doctrine would not prevent the judiciary from invalidating that legislation. Although courts must generally defer to the Legislature's factual determination, that is not the case if such

---

requires impossibilities," but respondent did not rely on that argument in the Court of Appeal.

> determination is arbitrary or irrational. Therefore, the trial court erred in granting judgment on the pleadings in favor of respondent based on the separation of powers doctrine.

(*Ibid.*) The Court of Appeal then rejected respondent's petition for rehearing on December 15, 2016.

D. Review by the Supreme Court.

This case arrives in this Court upon the granting of respondent's petition for review on March 22, 2017 by a vote of 6-0, with the Chief Justice and Justices Werdegar, Corrigan, Liu, Cuéllar and Kruger participating.

V. ARGUMENT.

A. The Court of Appeal Correctly Determined that Appellants' Action to Enjoin the Enforcement of Penal Code Section 31910, Subdivision (b)(7)(A), Does Not Violate the Separation of Powers Doctrine.

Respondent asserts that appellants' action to enjoin the enforcement of Penal Code section 31910, subdivision (b)(7)(a), on the ground that it requires impossible compliance, violates the separation of powers doctrine on three separate grounds. Respondent asserts first that appellants' action interferes with the core powers of the Legislature; second that appellants' action improperly questions the wisdom of legislative enactments; and third that appellants' action prevents the enactment of technology-forcing legislation. None of respondent's arguments with respect to the separation

of powers doctrine withstands scrutiny, and in fact, the separation of powers doctrine is what mandates that the opinion of the Court of Appeal be affirmed.

1. Appellants' Action Does Not Interfere with the Core Powers of the Legislature Because the Legislature May Not Enact Legislation that Is Palpably Arbitrary, Such as Appellants Allege Penal Code Section 31910, Subdivision (b)(7)(A), To Be.

The separation of powers doctrine arises from the California Constitution. As stated therein, "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) Each branch of government is thereby vested with certain core functions that may not be usurped by either other branch. (*People v. Bunn* (2002) 27 Cal.4th 1, 14.) In the case of the Legislature, that core power is the power to legislate. (Cal. Const., art. IV, § 1.) The power to legislate is of course the power to pass laws. (*Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287, 297.)

Citing *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461, respondent suggests that "courts have a 'duty to uphold the legislative power,' unless one of the Legislature's acts transgresses constitutional

bounds." (Op. Brief 28.) But the constitutional system from which the separation of powers doctrine arises assumes some degree of mutual oversight and influence among the three branches of government. (*People v. Bunn*, *supra*, 27 Cal.4th at p. 14.) Thus, in *Lockard*, where the trial court had declared invalid certain provisions of a zoning ordinance presenting no constitutional issue (33 Cal.2d at p. 455), the court described the duty of the judiciary to uphold legislative power in terms significantly less deferential than respondent acknowledges, and specifically retained for the judiciary a power to exercise oversight with regard to the legislative process extending beyond constitutional challenges:

> ***The courts will, of course, inquire as to whether the scheme of classification and districting is arbitrary or unreasonable***, but the decision of the zoning authorities as to matters of opinion and policy will not be set aside or disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power.... In passing upon the validity of legislation it has been said that "the rule is well settled that the legislative determination that the facts exist which make the law necessary, must not be set aside or disregarded by the courts, ***unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice.***"

(*Id.* at p. 461; emphasis added.)

Lockard therefore recognizes that the core legislative function of passing laws does not deprive the judiciary of its own constitutional power

to set aside laws that are palpably arbitrary, regardless of whether those laws are also unconstitutional. The record in *Lockard* contained undisputed facts supporting the validity of the zoning ordinance at issue, as a result of which the court reversed the judgment of the trial court. (33 Cal.2d at pp. 463, 468.) The court would not have reached that result based on the factual record if, as respondent contends, the court simply had a mandatory "duty" to uphold the ordinance at issue because it transgressed no constitutional prohibition. (Op. Brief 28.) Rather, the *Lockard* court examined the facts and upheld the ordinance because the court found nothing palpably arbitrary about the ordinance.

By conducting its examination of the record to determine that the ordinance at issue was not palpably arbitrary, the *Lockard* court performed the same judicial function that appellants ask the judiciary to perform in this case. Appellants allege that Penal Code section 31910, subdivision (b)(7)(A), requires impossible compliance (JA 13), and a statute that requires impossible compliance is palpably arbitrary. Appellants are entitled to the opportunity to prove at trial that their allegation of impossible compliance is meritorious.

2. By Seeking to Enjoin Penal Code Section 31910, Subdivision (b)(7)(A), on the Ground that it Requires Impossible Compliance, Appellants Are Not Challenging the Wisdom of the Legislature's Underlying Goal of Crime Reduction.

Appellants seek to enjoin Penal Code section 31910, subdivision (b)(7)(a), on the ground that it requires impossible compliance. Appellants thereby challenge the statute on the ground that it is palpably arbitrary, which presents an appropriate issue for judicial review, as just noted. Appellants do not challenge, and in fact wholeheartedly support, the wisdom of the Legislature's goal of crime reduction, which of course has motivated the enactment of Penal Code section 31910, subdivision (b)(7)(A). (JA 605, 609, 613.) It is not the wisdom of the legislative goal, but rather the impossible method the Legislature has chosen to achieve that goal, that lies at the heart of this case.

A case cited by respondent, *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, shows that one branch of state government may indeed exercise a degree of oversight over another branch of government, without violating the separation of powers doctrine or impermissibly questioning the wisdom of legislative decisions. In that case, the Superior Court of Mendocino County challenged the power of the County of Mendocino to decree that the Superior Court observe certain unpaid furlough days as a cost saving measure. (*Id.* at p. 1049.) Although cost saving is plainly a legitimate legislative goal, the Supreme Court found that

while a court has inherent power to control the hours and days of its operations, "the Legislature generally may adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not 'defeat' or 'materially impair' a court's exercise of its constitutional power or the fulfillment of its constitutional function." (*Id.* at p. 1055.) Similarly, if a court enjoined the enforcement of a single piece of legislation that was palpably arbitrary, that judicial act would not defeat or materially impair the Legislature's exercise of its constitutional power to pass other laws regarding the same subject matter.

The *Mendocino* court also noted that

> unlike those instances in which it has been held that the separation of powers doctrine bars the Legislature from exercising an exclusive judicial function (such as readjudicating or setting aside a final judicial judgment), the Legislature's power to designate legal holidays or other nonjudicial days on which courts generally will be closed does not inevitably threaten the integrity or independence of the judicial process. The circumstance that a court will be closed on a particular day is unlikely to affect the resolution of a particular controversy or prevent a court from proceeding in accordance with its own view of the governing legal principles.

(*Id.* at pp. 1059-1060.) Likewise, a finding in the instant case that dual placement microstamping is impossible to implement would not intrude upon the Legislature's authority to adopt other crime reduction measures that would be possible to implement.

Finally, the Superior Court in *Mendocino* argued that the legislation permitting the imposition of unpaid furlough days was "invalid under the separation of powers doctrine because it limits the public's 'access to justice,' a subject that the Superior Court suggests lies exclusively within the province of the judicial branch." (*Id.* at p. 1060.) The Supreme Court rejected that argument, stating that

> [t]he objective of preserving and promoting the public's access to justice and the judicial system, however, is by no means solely the concern or province of the judicial branch. The legislative and executive branches are necessarily and centrally involved in the formulation of a great variety of measures that vitally affect the public's "access to justice" through the judicial system, from determining the number and location of new judgeships and courthouses to establishing which court-related expenses should be financed at the state level and which at the local level.

(*Ibid.*) Likewise, the judiciary plainly involves itself in crime reduction efforts, from the trial of criminal suspects to the sentencing of those who are convicted, so the Legislature can hardly usurp unto itself the sole responsibility for fighting crime in California.

Citing *Werner v. Southern California Associated Newspapers* (1950) 35 Cal.2d 121, 130, respondent also asserts that courts may not invalidate legislation that they deem unwise, because "they may summarily put an end to certain laws that may be foolish but also to certain laws that may be wise." *Werner* involved a suit for defamation arising from a false charge that the plaintiff had been convicted of a crime, which was dismissed

because the plaintiff did not allege that he had suffered any special damage as required by the statute at issue. (*Id.* at pp. 123-124.) While the wisdom of a statute requiring special damage as an element of the tort of defamation may legitimately be the subject of conflicting opinion, there can be no legitimate disagreement that a statute requiring impossible compliance is not wise, because it cannot possibly achieve its legislative goal, which in the case of Penal Code section 31910, subdivision (b)(7)(A), is the important goal of crime reduction. Appellants have alleged that compliance with section 31910, subdivision (b)(7)(A), is literally impossible, and the purpose of trial in this action is to determine the truth of that allegation. Regardless of the outcome at trial, no wise law will be enjoined as a result of appellants' action.

3. No Authority Permits the Enactment of Legislation that Requires the Development of Technology that Is Completely Impossible to Implement.

Respondent tries to save Penal Code section 31910, subdivision (b)(7)(A), from the injunctive relief appellants seek by relying on *American Coatings Association v. South Coast Air Quality Management District* (2012) 54 Cal.4th 446. According to respondent, which argues by analogy to the pollution control industry, "lawmakers and regulators regularly adopt technology-forcing standards - laws and regulations that are 'are expressly designed to force regulated sources to develop ***pollution control devices***

that might at the time appear to be economically or technologically infeasible.'" (Op. Brief 31; emphasis added.)

According to *American Coatings*, statutes may impose technology-forcing standards only where those standards "are reasonably anticipated to exist by the compliance deadline." (54 Cal.4th at p. 452.) The statutory standards that were enforced in *American Coatings* were based on several studies conducted by outside consultants concluding that the standards could be reasonably anticipated to become feasible by the compliance deadline. (*Id.* at p. 457-458.) Finally, the legislation under consideration expressly required that the required technology be achievable. (*Id.* at p. 451.)

American Coatings thus differs markedly from the present litigation. First, appellants allege that the dual placement microstamping requirements of Penal Code section 31910, subdivision (b)(7)(A), are impossible, and thus certainly not achievable at any time. (JA 13.) A proposed technology that violates the laws of physics now will always violate the laws of physics. Second, section 31910, subdivision (b)(7)(A), contains no compliance deadline, and instead demands immediate compliance, now that it has been certified by the Department of Justice. Third, appellants do not allege, and respondent does not argue, that any study has ever been conducted showing any reasonable anticipation that dual placement microstamping will ever be possible to implement. In fact,

uncontroverted, expert evidence submitted by appellants in support of their motion for a preliminary injunction and their motion for summary judgment (which had not been decided before the trial court granted respondent's motion for judgment on the pleadings) shows that it is impossible to microstamp any surface or part of a semi-automatic pistol other than its firing pin. (JA 45-48, 772.) Finally, the value of the annual market for semi-automatic pistols in California is approximately $183 million. (JA 69.) Firearms manufacturers would have a strong financial incentive to comply with section 31910, subdivision (b)(7)(A), if dual placement microstamping were in fact possible, in order to share in such a lucrative market.[11]

The technology-forcing statutory standards that *American Coatings* court found acceptable were therefore specific to the pollution control industry.[12] That is hardly surprising, because filtering has been practiced

---

[11] Respondent argues that firearms manufacturers have made no effort to comply with the statute's dual placement microstamping requirements, simply because no manufacturers have submitted any new pistol models for inclusion on the Roster. (JA 18.) That argument begs the question of how firearms manufacturers could seek to comply with Penal Code section 31910, subdivision (b)(7)(A), if they had no available means to manufacture a compliant firearm.

[12] Other technology-forcing cases of which appellants are aware likewise concern only the pollution control industry, and likewise concern regulations that do not require immediate compliance. (*See, Union Electric Co. v. Environmental Protection Agency* (1976) 427 U.S. 246, 249-250 [challenge to state implementation plan under Clean Air Act]; *Natural*

for centuries, and pollution control is simply high-technology filtering. Accordingly, absent any showing that the factors on which the *American Coatings* court based its decision apply also to the firearms industry, *American Coatings* actually supports appellants' position. The factual record developed in this litigation after summary judgment or trial will show the actual state of microstamping technology in the firearms industry, and thus whether there is any reasonable expectation that dual placement microstamping technology can ever be developed for semi-automatic pistols.

By making its argument in reliance on technology-forcing standards under the circumstances of this litigation, respondent tacitly admits that it is not aware of any expert evidence tending to show that dual placement microstamping technology can ever be developed for semi-automatic pistols. In that regard, it is important to note that appellants merely ask that the enforcement of Penal Code section 31910, subdivision (b)(7)(A), be enjoined. (JA 16.) If dual placement microstamping technology ever

---

Resources Defense Council, Inc. v. U.S. Environmental Protection Agency (D.C. Cir. 1981) 655 F.2d 318, 322 [challenges to Environmental Protection Agency standards governing emissions of particulate matter and oxides of nitrogen from diesel vehicles]; *Sherwin-Williams Co. v. South Coast Air Quality Management District* (2001) 86 Cal.App.4th 1258, 1265 [challenge to rules promulgated by the South Coast Air Quality Management District regarding reduction in use of flat paint containing air pollutants].)

becomes possible to implement, respondent could return to court and seek to have the injunction against the enforcement of section 31910, subdivision (b)(7)(A), lifted.[13]

B. THE MAXIM OF JURISPRUDENCE ON WHICH APPELLANTS RELY, CIVIL CODE SECTION 3531, PROVIDING THAT THE LAW NEVER REQUIRES IMPOSSIBILITIES, ALLOWS APPELLANTS TO SEEK AN INJUNCTION AGAINST PENAL CODE SECTION 31910, SUBDIVISION (b)(7)(A), ON THE GROUND OF IMPOSSIBLE COMPLIANCE.

The maxim of jurisprudence contained in Civil Code section 3531 succinctly provides that "[t]he law never requires impossibilities." Appellants' cause of action, seeking "a judicial declaration that the

---

[13] In a footnote, respondent suggests that it would be possible to comply with Penal Code section 31910, subdivision (b)(7)(A), simply by not selling any semi-automatic pistols in California that do not comply with the dual placement microstamping requirements of the statute. (Op. Brief 32.) Respondent's suggestion is illusory, because it evades the issue of impossible compliance, and because any statute imposing impossible requirements on a voluntary, lawful activity could be "complied" with under respondent's reasoning simply by not performing the activity toward which the impossible requirements are directed. Three cases cited in the text below that enjoined the enforcement of statutes requiring impossible compliance, *Buck v. Harton* (M.D. Tenn. 1940) 33 F.Supp. 1014, *Gigliotti v. New York, Chicago & St. Louis Railroad Co.* (1958) 107 Ohio App. 174, and *Ivaran Lines, Inc. v. Farovi Shipping Corp.* (Fla.App.1984) 461 So.2d 123, implicitly reject respondent's suggestion, because it did not matter to the courts in those cases that the statutes at issue could have been complied with by not performing the otherwise lawful activities the statutes purported to forbid. The Court of Appeal of course dismissed respondent's suggestion for the obvious reason that it does not provide appellants with the relief they seek. (*NSSF, supra*, 6 Cal.App.5th at p. 308.)

provisions of California Penal Code section 31910, subdivision (b)(7)(A), are invalid and cannot be enforced because it is impossible for a firearm manufacturer to implement microstamping technology in compliance therewith," plainly relies on that maxim. (JA 15.)

Respondent did not challenge appellants' reliance on section 3531 in the motion for judgment on the pleadings from which this appeal arises (JA 127-148), so the Court of Appeal did not consider the effect of the maxim in its opinion. Respondent has now pivoted to challenge section 3531, and in fact asserts that challenge as the primary argument in its brief. (Op. Brief 20-26.) Respondents' challenge to section 3531 fails, however, because the separation of powers doctrine requires the judiciary to accord maxims the same operative force as any other statute. It also fails because section 3531 is not barred by Civil Code section 3509 as respondent asserts, and because the right to challenge the enforcement of a statute is already recognized both in California and in its sister states.

1. The Separation of Powers Doctrine Requires the Judiciary to Accord Civil Code Section 3531 the Same Operative Force as Any Other Legislative Enactment.

Civil Code section 3531 is obviously a statute. As such, in construing the meaning of the statute, the Supreme Court's

> "fundamental task ... is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." In

> this search for what the Legislature meant, "[t]he statutory language itself is the most reliable indicator, so [the Supreme Court] start[s] with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, [the Supreme Court] presume[s] the Legislature meant what it said, and the statute's plain meaning governs...."

(*Martinez v. Coombs* (2010) 49 Cal.4th 35, 51.) Thus, the construction of section 3531 is not at issue in this appeal. It plainly expresses exactly what the Legislature meant when it adopted the statute in 1872: "The law never requires impossibilities." Never means never, and respondent does not contend otherwise.

(a) Maxims of Jurisprudence Have Historically Carried the Force of Law.

Citing several cases and a 1994 law review article, respondent seeks to devalue section 3531's operative force as a statute. Respondent asserts that because section 3531 is a maxim of jurisprudence, it is a mere, nonbinding "rule of thumb," simply an "aid to the just application of statutory law." (Op. Brief 21.) But significantly, respondent cites to no case holding that codified maxims are not entitled to the same dignity as any other statutory law. Citing only the law review article, respondent

asserts that maxims do nothing more than "sum up legal experience ... without compelling decisions." (*Ibid.*)[14]

This dismissive interpretation of maxims in general, and of section 3531 in particular, has simply been pulled out of thin air. There is no legal justification in any cases or commentaries for the dubious proposition that codified maxims are not entitled to the same operative force as any other statute. Codified maxims are, after all, statutes that the Legislature duly enacted nearly 150 years ago. Respondent has not cited to any legislative history or any other statute that suggests that codified maxims in general or Civil Code section 3531 in particular are mere "rules of thumb" that are not entitled to the full operative force that the law bestows on any statute.

John Bouvier was a Philadelphia lawyer best known for his legal writings.[15] In 1856, sixteen years before the adoption of the Field Code in California, the sixth edition of his "Law Dictionary Adapted to the Constitution and Laws of the United States of America and the Several States of the American Union" (the "Bouvier Law Dictionary") was published. The Bouvier Law Dictionary defines a maxim as follows:

---

[14] Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance* (1994) 82 Cal. L. Rev. 1127, 1140.)

[15] *See*, <https://en.wikipedia.org/wiki/John_Bouvier> [as of Aug. 2, 2017].

1. An established principle or proposition. A principle of law universally admitted, as being just and consonant With reason.

2. Maxims in law are somewhat like axioms in geometry. They are principles and authorities, and part of the general customs or common law of the land; ***and are of the same strength as acts of parliament....***

(<http://www.lawfulpath.com/ref/bouvier/maxims.shtml> [as of June 27, 2017]; emphasis added.) Included among "some of the more important maxims" summarized in the Bouvier Law Dictionary is the following: "A l'impossible nul n'est tenu. No one is bound to do what is impossible." (*Ibid.*) That is the maxim that the California Legislature ultimately codified as Civil Code section 3531, and the fact that it was originally written in Law French should not escape notice. The maxim is such an indelible part of the common law that it dates to the Middle Ages.

A far more incisive and recent commentary on the purpose of maxims appeared in 2010. Equitable maxims such as that codified by Civil Code section 3531 (which are sometimes referred to as "codified canons" or "common law canons") "focus on the imperfections in the legislative process and address unforeseen consequences common to the enactment of a wide variety of statutes." (Scott, *Codified Canons and the Common Law of Interpretation* (2010) 98 Geo. L.J. 341, 391.) The enactment of such maxims shows that

> ***many legislatures want judges to limit statutes where their application would be unworkable.*** Although commentators

> may criticize [such] canon[s] because [they] result[] in some measure of judicially exercised policymaking authority, no one can call a judge who uses this canon a usurper of legislative authority (at least in jurisdictions with such a rule). Ten legislatures are comfortable with judges making policy choices in this regard. The common codification declares that "[i]n enacting a statute, it is presumed that: ... A result feasible of execution is intended." Thus, interpreters faced with ambiguous statutes are on notice to steer away from impossibly onerous or burdensome interpretations unless that presumption can be overcome. Another state codifies this canon implicitly, allowing interpreters faced with "unworkable results" to consult "extratextual evidence of the meaning of the statute" to illuminate the statute. ***Montana's legislature advises that "[t]he law never requires impossibilities." No legislature rejects this canon--even a legislature that stresses plain meaning builds in unworkable results as an exception to the plain meaning rule.***

(*Id.* at p. 395; emphasis added.) Montana's impossibility maxim is of course identical to California Civil Code section 3531, both in language and effect.

A somewhat earlier commentary in the California Law Review concurs. The author addressed the issue of impossible statutory compliance as follows:

> In other cases, the courts properly may take account of the infeasibility of immediate compliance. Assume that the case arises in which immediate compliance is physically impossible, where, for example, a court has determined under a water pollution statute that all dam operators must immediately obtain permits if they are to continue discharging water downstream. ***There is a simple answer to the apparent dilemma between the statutory requirement and the realities of the situation. The answer lies in the principle that courts cannot require the doing of an impossibility: Equity will not decree a vain thing.***

(Plater, *Statutory Violations and Equitable Discretion* (1982) 70 Cal. L. Rev. 524, 580; emphasis added.) This commentary properly recognized that impossible compliance is an existing defense in equity to statutory enforcement.[16] The Court of Appeal, in recognition of that existing defense, asked at oral argument below whether an impossibility challenge could be raised to a law requiring that all automobiles operate as hovercrafts, implying that such a challenge indeed could be raised. (Resp's RJN, Ex. A [11/16/2016 Ct. of App. RT, 35-36].)

(b) California's Sister Jurisdictions Recognize that the Enforcement of a Statute Requiring Impossible Compliance May Be Enjoined Based on the Impossibility Maxim.

Since California's maxims of jurisprudence are codifications of common law principles, authority from other common law jurisdictions respecting the effect of maxims is highly persuasive regarding the operative effect of Civil Code section 3531 and the maxim it codifies. Thus, in *Buck v. Harton*, *supra*, a statute required that the price for performance of musical compositions be fixed upon a per piece basis. (33 F.Supp. at p.

[16] This commentary also assumed that a court had been asked to compel impossible compliance. The instant case presents the obverse situation, because appellants ask the judiciary to enjoin a statute requiring impossible compliance. There is no meaningful difference between the two situations, because in both the dispositive issue is that a legislative body may not enact a law imposing requirements with which persons subject to the law cannot possibly comply.

1018.) However, because the public performance rights for musical compositions fluctuated, it was impossible to ascertain what the performance price should be at any given time, and it was therefore also impossible to comply with the statute. (*Id.* at pp. 1018-1019.) ***Because of that impossibility, "[c]omplainants [were] entitled to a decree granting a permanent injunction restraining defendants ... from bringing or permitting to be brought ... any proceeding at law or in equity for the purpose of enforcing said Statute against complainants...."*** (*Id.* at p. 1021; emphasis added.)

In another impossibility case, *Gigliotti v. New York, Chicago & St. Louis Railroad Co.*, *supra*, a statute required train engineers to sound their train's whistle "at least 80 and not further than 100 rods" from highway crossings. (107 Ohio App. at p. 181.) At a railroad spur crossing, the plaintiff's car collided with a train which had not sounded its whistle. (*Id.* at pp. 177-178.) However, there was no evidence that the spur track was at least 80 rods long, so "a literal compliance with the statute was impossible." (*Id.* at p. 181.) Based on that finding of impossibility, the court held as follows:

> It is well settled that the law is not so unreasonable as to require the performance of impossibilities ... and, when Legislatures use language so broad as to lead to such results, courts may properly say that the Legislature did not intend to include those cases in which a literal obedience has become impossible. ***If a statute apparently requires the performance of something which cannot be performed, a court may hold***

> ***it inoperative. [¶] Under these circumstances, the statute requiring the blowing of a whistle "at a distance of at least 80 and not further than 100 rods" from the crossing was inoperative...."***

(*Ibid.*; emphasis added.)

Finally, in *Ivaran Lines, Inc. v. Farovi Shipping Corp.*, *supra*, the defendants shipped an automobile abroad without obtaining a certificate of right of possession, as required by a Florida penal statute. (461 So.2d at p. 124.) However, no such certificates of right of possession became available until after the date on which the automobile was shipped abroad. (*Ibid.*) The court excused the violation of the statute, explaining that "[g]enerally, the violation of a duty prescribed by statute is negligence per se but exceptions to this rule have been recognized where compliance with the provisions of the statute is impossible or where noncompliance is excusable." (*Id.* at p. 125.) The court added that "[t]he law does not require the performance of impossibilities as a condition to assertion of acknowledged rights, and if a statute requires performance of something which cannot be performed, the court may hold it inoperative." (*Ibid.*) ***Thus, the court held "in accordance with the prevailing law that violation of a statute or regulation, whether deemed prima facie evidence of negligence or negligence per se, is excused where it appears without dispute that compliance with the statute is impossible even in the exercise of reasonable diligence."*** (*Id.* at p. 126; emphasis added.)

The foregoing cases from California's sister jurisdictions all hold, with support from the maxim that the law never requires impossibilities, that statutes may be enjoined on the ground that they require impossible compliance. The instant case, addressing the same issue, is one of first impression in California. If California deviates from the uniform holdings of its sister states, California would become the first common law jurisdiction to deny maxims the operative legal effect that they historically have always had. California's maxims of jurisprudence were not codified merely to add advisory commentary or simple clutter to the Civil Code. California's maxims of jurisprudence were purposefully codified in 1872 ***as law***, and they have remained so ever since.

(c) In the Absence of Any Overriding Constitutional, Statutory or Charter Proscription to Civil Code Section 3531, the Judiciary Must Acknowledge the Operative Force of the Maxim of Jurisprudence Codified Therein.

Ironically, in the final analysis, it is the separation of powers doctrine itself, on which respondent unsuccessfully relies in its effort to deny appellants their right to trial in this action, that compels the judiciary to acknowledge the operative force of Civil Code section 3531. This Court's definitive statement of the separation of powers doctrine appears in *City & County of San Francisco v. Cooper* (1975) 13 Cal.3d 898. That is a

case on which respondent relied in the trial court in support of its motion for judgment on the pleadings (JA 139-140), but which respondent no longer embraces.[17]

The separation of powers doctrine "recognizes that in the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation." (*Cooper*, *supra*, 13 Cal.3d at p. 915.) Neither respondent, any California court, nor any commentator has ever identified any constitutional provision, statute or charter provision that overrides Civil Code section 3531. Furthermore, respondent cites no cases that hold that statutes may not be enjoined on the ground of impossible compliance, in contradistinction to *Buck*, *Gigliotti* or *Ivaran Lines*.

In the absence of any such constitutional, statutory or charter proscriptions, and in the absence of any cases that reach holdings contrary to *Buck*, *Gigliotti* or *Ivaran Lines*, the separation of powers doctrine

---

[17] *Cooper* was decided much more recently than *Lockard v. City of Los Angeles*, *supra*, on which respondent now prefers to rely. Whether respondent relies on either *Lockard* or *Cooper* today does not matter, because both cases recognize that challenges to statutes are not limited only to constitutional challenges. As stated in *Lockard*, statutes must not be set aside "unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice." (33 Cal.2d at p. 461.) The notion that courts retain the power to invalidate only those statutes that are unconstitutional is demonstrably incorrect.

requires the judiciary to accord section 3531 its due weight as a statute embodying the force of law. If section 3531 is to be in any way emasculated, the Legislature, not the judiciary, must be the branch of state government to undertake that task. Since the Legislature has not done so, section 3531, as a codified maxim, retains just as much operative force as any other statute, as maxims were originally intended to have. (Bouvier Law Dictionary, *supra.*)

2. Civil Code Section 3509 Does Not Bar Appellants from Relying on Civil Code Section 3531 in Support of Their Claim that the Enforcement of Penal Code Section 31910, Subdivision (b)(7)(A), Should Be Enjoined.

Civil Code section 3509 provides that "[t]he maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this code, but to aid in their just application." The language of section 3509 simply does not purport to prevent any maxim of jurisprudence from being applied in cases arising under statutes not contained in the Civil Code. This accords with the historical fact that the maxims of jurisprudence themselves have existed as part of the common law since the Middle Ages and are still part of the common law today.

The maxims of jurisprudence as "[p]rinciples of equity have long been enshrined as a ***vital*** part of California's jurisprudence." (*McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 131, 135, 142; emphasis added.)

Thus, in *Booksa v. Patel* (1994) 24 Cal.App.4th 1786, the court relied on another codified maxim, Civil Code section 3514, providing that "[o]ne must so use his own rights as to not infringe upon the rights of another," to find that while an owner has the right to possess his land and everything beneath it, he had no right to sever the roots of a neighbor's tree that extended beneath his land. (*Id.* at pp. 1790, 1792.) And in *Jacobs v. State Board of Optometry* (1978) 81 Cal.App.3d 1022, the court held that administrative review of a certain matter was unnecessary where the agency had already made clear what its ruling on that matter would be, relying on yet another codified maxim, Civil Code 3532, which provides that "[t]he law does not require the performance of a useless or idle act." (*Id.* at pp. 1029-1030.) The foregoing cases involved the application of codified, equitable maxims to statutes contained in codes other than the Civil Code, but Civil Code section 3509 did not restrict those courts from relying on the maxims at issue for that purpose. Likewise, it does not restrict the judiciary from applying Civil Code section 3531 to the determination of appellants' impossible compliance claim.

Respondent does still assert that Civil Code section 3531, as well as the other maxims, binds the legislative prerogative of future Legislatures. (Op. Brief 21-22.) That argument ignores the power of Legislatures to repeal previously enacted legislation. As a necessary part of their elective duties, Legislatures regularly repeal outdated statutes when those statutes

no longer serve society's purposes. A law that remains in effect does so because the current Legislature allows it to remain in effect. In the words of a popular song, "If you choose not to decide you still have made a choice." (Rush (1980) "Freewill" [lyrics by Neil Peart].) Civil Code section 3531 remains in effect by legislative design, and therefore is a proper statutory proscription to the enforcement of Penal Code section 31910, subdivision (b)(7)(A).

Respondent cites *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471 to support its argument that a statute may not be nullified or defeated by a maxim. (Op. Brief 22-23.) In that case, an automobile registered to a private owner, which a bank claimed to own pursuant to a conditional sales contract, was seized because the registered owner had used the automobile unlawfully to transport narcotics. (36 Cal.2d at p. 472.) A section of the Health and Safety Code provided that the claimant of an interest in a vehicle seized for that reason could prove that its interest was bona fide if the interest was created after a reasonable investigation of the moral character of the purchaser and without knowledge that the vehicle was used for an unlawful purpose. (*Ibid.*) Although the bank did not know that the seized automobile was to be used for the unlawful transportation of narcotics, the bank never conducted the investigation contemplated by the Health and Safety Code. (*Id.* at p. 473.)

Judgment was rendered after trial for the bank in *One 1940 Ford* because evidence was introduced at trial that an investigation, if it had been conducted, would have shown that the registered owner of the seized automobile was a person of good repute. (*Ibid.*) In that regard, the bank was allowed to rely at trial on Civil Code section 3532, the maxim of jurisprudence providing that the law does not require an idle act. (36 Cal.2d at p. 473.) Nevertheless, the Supreme Court reversed the judgment in favor of the bank, finding that performing the investigation was not an idle act, and that the maxim thus did not apply. (*Id.* at p. 477.) The court explained as follows:

> Inquiry prior to entering into the contract is thus related to the legislative purpose and if reasonably pursued would produce the facts as to the moral responsibility, character and reputation of the purchaser. ***Such investigation may not be said to be an idle act even though the proof at the trial may be entirely in his favor.***

(*Ibid.*)

One 1940 Ford thus supports appellants' position rather than respondent's position. The *One 1940 Ford* court did not find that Civil Code section 3532 had no operative force, as respondent would like to argue. Instead, the *One 1940 Ford* court found that section 3532 did not apply ***because the required investigation was not an idle act within the scope of the maxim***. (36 Cal.2d at p. 477.) By making that finding, the court expressly acknowledged the operative force of section 3532.

Expressed differently, in deciding *One 1940 Ford*, this Court found in 1950 that a codified maxim carries the full force of law like any other statute.

Civil Code section 3531, by contrast, providing that "[t]he law never requires impossibilities," directly applies to the instant case, because appellants have alleged that "it is impossible for a firearm manufacturer to implement microstamping technology in compliance with Penal Code section 31910, subdivision (b)(7)(A)," and that allegation must be taken as true on appeal from a judgment arising from a pleading motion. (JA 13; *Dunn v. County of Santa Barbara*, *supra*, 135 Cal.App.4th at p. 1298.) Moreover, the *One 1940 Ford* decision by its terms applied only to the specific statutes then under consideration, namely certain provisions of the State Narcotics Act contained in the Health and Safety Code. (*Id.* at p. 472, 476.) The case did not consider the applicability of section 3531, and even if it had, the statutory compliance at issue in *One 1940 Ford* was found to be plainly possible. (*Id.* at p. 477.)[18]

As noted above, the Legislature may not act in ways that are palpably arbitrary in enacting legislation. (*Lockard v. City of Los Angeles*,

---

[18] Respondent also cites *Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999 to support its argument that a statute may not be nullified or defeated by a maxim. (Op. Brief 21.) *Moore* adds little to the present analysis, because it contains only a passing reference in dicta to maxims, none of which were actually at issue in the case. (*Id.* at p. 1012.)

supra, 33 Cal.2d at p. 461.) The required statutory compliance in *One 1940 Ford* was not palpably arbitrary, and the bank could have easily complied with the statute at issue by undertaking the simple administrative task of conducting an investigation, which this Court held would not have been an idle act. The instant case arises in a much different context: There is no better example of a palpably arbitrary legislative enactment than one requiring an act that is physically impossible to perform, as appellants allege. The Legislature in this case simply chose, perhaps as a matter of political expedience, to blithely ignore the impossible compliance that Penal Code section 31910, subdivision (b)(7)(A), requires.[19] Ignoring the required impossible compliance is what invokes the pre-existing impossibility defense to statutory enforcement that the *McMahon* court acknowledged twenty-seven years ago, and which remains a vital part of California jurisprudence today. (*McMackin v. Ehrheart*, *supra*, 194 Cal.App.4th at p. 131, 135, 142.)

---

[19] Respondent euphemistically refers to the impossible compliance required by Penal Code section 31910, subdivision (b)(7)(A), as "the ***challenges*** that implementing microstamping presented." (Op. Brief 24; emphasis added.)

3. The Court of Appeal Properly Relied on *Board of Supervisors v. McMahon* in Ruling that Appellants Have the Right to Present Evidence that It Is Impossible to Comply with Penal Code Section 31910, Subdivision (b)(7)(A).

As noted above, the separation of powers doctrine "recognizes that in the absence of some overriding constitutional, ***statutory*** or charter proscription, the judiciary has no authority to invalidate duly enacted legislation." (*City & County of San Francisco v. Cooper*, *supra*, 13 Cal.3d at p. 915; emphasis added.) The trial court relied on *Cooper* for a statement of the separation of powers doctrine when it granted respondent's motion for judgment on the pleadings (JA 1144-1145), but the trial court did not analyze the effect of any such statutory proscription in this action. By failing to do so, the trial court committed reversible error in granting respondent's motion for judgment on the pleadings, as the Court of Appeal recognized. (*NSSF v. California*, 6 Cal.App.5th at p. 306.)

The impossibility challenge that appellants assert to section 31910, subdivision (b)(7)(A), arises directly from the codified equitable maxim that "[t]he law never requires impossibilities." (Civ. Code, § 3531.) ***"Consistent with this maxim, the law recognizes exceptions to statutory requirements for impossibility of performance."*** (*Board of Supervisors v. McMahon*, *supra*, 219 Cal.App.3d at p. 300; emphasis added.) By making that statement, the *McMahon* court recognized that Civil Code section 3531 is an overriding statutory proscription to the enforcement of other statutes.

Since Penal Code section 31910, subdivision (b)(7)(A), requires performance with which it is impossible to comply, as appellants allege in their complaint (JA 15), section 3531 proscribes its enforcement.

Civil Code section 3531 does not equivocate. It declares absolutely that "[t]he law ***never*** requires impossibilities." (Emphasis added.) Respondent provided no citations below to any authority that reduces the impact of that statutory edict, and neither respondent nor the trial court explained how a statute that is fatally defective for impossibility of compliance can nevertheless be enforced either as a legal or a practical matter. Indeed, the judgment below can be reversed simply by applying the common rules of statutory construction that "[i]n the construction of a statute the intention of the Legislature ... is to be pursued, if possible" (Civ. Code, § 1859), and that "[t]he terms of a writing are presumed to have been used in their primary and general acceptation...." (Civ. Code, § 1861.) As the *McMahon* court understood, when the Legislature used the word "never" in Civil Code section 3531, ***it meant "never."*** Appellants are entitled to show as a factual matter upon summary judgment or at trial that it is impossible to comply with Penal Code section 31910, subdivision (b)(7)(A). If they make that showing, Civil Code section 3531 will prevent the enforcement of Penal Code section 31910, subdivision (b)(7)(A), without the need for any further inquiry.

McMahon is central to the determination of this appeal, and the Court of Appeal correctly determined that it provides the basis for appellants' cause of action to enjoin the enforcement of section 31910, subdivision (b)(7)(A). (*NSSF v. California*, *supra*, 6 Cal.App.5th at p. 306.) First, as noted, it was the *McMahon* court that unambiguously declared, in reliance on the statutory proscription of Civil Code section 3531, that "[c]onsistent with this maxim, the law recognizes exceptions to statutory requirements for impossibility of performance." (219 Cal.App.3d at p. 300.) Perhaps even more significant, however, is the fact that the *McMahon* court carefully analyzed the claim of impossibility of compliance that the respondent asserted. The *McMahon* court would not have undertaken that analysis if impossibility of compliance were not a defense to the enforcement of a statute in the first place.

At issue in *McMahon* was the liability for payment of the state's fifty percent share of funding for the federal Aid to Families with Dependent Children (AFDC) program, in which California has elected to participate. (*Id.* at p. 291.)[20] A provision of the Welfare and Institutions Code required counties to pay 5.4 percent of the total cost of AFDC grants. (*Ibid.*) However, the County of Butte adopted an ordinance, Measure E,

---

[20] The federal government paid the other fifty percent share of AFDC funding. (219 Cal.App.3d at p. 291.)

that prohibited the use of any county funds for AFDC funding. (*Id.* at p. 292.) The state petitioned for a writ of mandate and sued for injunctive relief against the county, contending that Measure E violated state law, and the county cross-complained for declaratory and injunctive relief, seeking to compel the state to fund the entire nonfederal portion of the AFDC program. (*Ibid.*)

The county's chief administrative officer, Martin Nichols, testified at trial that the increased welfare costs imposed on the county by the AFDC program had forced the county to cut local services such as police and fire protection, road maintenance, and libraries. Nichols also projected that the county would run out of money for other local programs and services. (*Id.* at p. 293.) The county claimed based thereon that it could not comply with the funding mandate of the Welfare and Institutions Code, and it asked the court "to invoke the equitable doctrine excusing performance where circumstances make such performance impossible." (*Id.* at p. 299.) Acknowledging, as noted above, that "[c]onsistent with [Civil Code section 3531], the law recognizes exceptions to statutory requirements for impossibility of performance" (*id.* at p. 300), the *McMahon* court meticulously analyzed the county's claim of impossibility. If the *McMahon* court had not considered impossibility as a defense to compliance with the statute at issue, it would have (and indeed should have) treated the county's arguments as irrelevant.

Rather than simply disregarding the county's position altogether, the *McMahon* court made the factual finding that "Nichols's testimony demonstrates no *literal* impossibility of County funding for the AFDC program at the heart of this dispute. Nichols's revenue projections do not show that the County will *ever* be unable to make the AFDC payments at the heart of this dispute." (*Ibid.*; emphasis in original.) Moreover, "the County has at least five years before projected increases in state-mandated program costs would halt local County programs completely," as a result of which "Nichols's window gave the County and the Legislature some time to address the County's problems." (*Id.* at p. 301.) The court found that "the record lacks the extensive factual development sufficient to justify affirmative relief," and that "[t]he County simply has not demonstrated that it has exhausted its ability to raise new revenues or deliver services differently." (*Id.* at p. 303.) The court thus could not "conclude that, ***on the record before the trial court***, the County demonstrated a reasonable probability of prevailing on its 'impossibility' claim." (*Ibid.*; emphasis added.)

The *McMahon* opinion makes sense because impossibility of compliance is a recognized defense to the enforcement of a statute. The *McMahon* court devoted significant effort to showing that the county had failed to prove its asserted inability to comply with its AFDC funding obligations. That effort would not have been justified if impossibility of

compliance were not a defense to the enforcement of a statute. Indeed, it would have been a waste of valuable judicial time for the *McMahon* court to undertake that effort simply as an academic exercise if no such defense to statutory enforcement existed.

McMahon is the only California case known to appellants wherein the impossibility doctrine is addressed in light of Civil Code section 3531.[21] Appellants know of no case from any jurisdiction reaching a contrary result, and given the absolute nature of the declaration in section 3531 that "[t]he law never requires impossibilities," one would not expect any such contrary case to exist. In any event, impossibility of compliance as a ground to enjoin the enforcement of a statute is not a new or novel concept. Civil Code section 3531 was enacted in 1872 as a codification of a common law principle that is centuries old. *McMahon* itself was decided a quarter of a century ago.

Moreover, impossibility of compliance as a ground to enjoin the enforcement of a statute is not a doctrine peculiar to California. As demonstrated by *Buck v. Harton*, *supra*, 33 F.Supp. 1014, *Gigliotti v. New York, Chicago & St. Louis Railroad Co.*, *supra*, 107 Ohio App. 174, and

---

[21] Impossibility as a defense to statutory enforcement was also addressed in *Sutro Heights Land Co. v. Merced Irrigation District* (1931) 211 Cal. 670, but without reliance on Civil Code section 3531. Appellants discuss *Sutro* on the next two pages.

Ivaran Lines, Inc. v. Farovi Shipping Corp., *supra*, 461 So.2d 123, it has been equitably applied across the United States when necessary to prevent the miscarriage of justice. By relying on impossibility of compliance as the basis for their suit to enjoin the enforcement of Penal Code section 31910, subdivision (b)(7)(A), appellants are hardly asking this Court to make a radical departure from existing law. Under these circumstances, the trial court's judgment suggesting that the separation of powers doctrine renders courts powerless to enjoin the enforcement of a statute that seeks impossible compliance ignores both sound judicial policy and common sense. By this appeal appellants seek redress from this inequitable result.

Respondent admits that *McMahon* supports the "unremarkable" proposition that a court exercising its equitable powers may decline to require an impossible act. (Op. Brief 25.) The proposition is unremarkable indeed, as respondent states, because it has long existed in equity. The proposition also captures the exact relief appellants seek in this action. Appellants simply ask this Court to decline to require them to comply with Penal Code section 31910, subdivision (b)(7)(A), if appellants can prove their allegation that the statute imposes impossible dual placement microstamping requirements.

Finally, respondent describes the *McMahon* case as being consistent with this Court's decision in *Sutro Heights Land Co. v. Merced Irrigation District*, *supra*. (Op. Brief 25.) Indeed it is. In *Sutro*, this Court refused to

compel an irrigation district to drain certain lands as required by statute, because the facilities and work necessary to accomplish that drainage would have brought "financial ruin upon the district." (211 Cal. at pp. 673, 699-700, 703.) This Court in essence found that the Legislature did not intend to compel the performance of an impossible act, explaining as follows:

> 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 [namely, the Legislature], 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.

(*Id.* at p. 703.)

Sutro, like *McMahon* and the instant case, presented no constitutional claim. The *Sutro* court nevertheless upheld the impossibility claim made by the irrigation district, without even relying on Civil Code section 3531. The *Sutro* court identified the element of factual impossibility that was missing in *McMahon* (and as a result of which the *McMahon* court issued no injunction), but which appellants allege is present in the instant action. This Court should provide appellants the same opportunity that the irrigation district had in *Sutro* to prove that the statute

at issue requires impossible compliance, and that its enforcement should therefore be enjoined.[22]

[22] Respondent concludes its discussion of the maxims of jurisprudence with a one-sentence footnote apparently relying on Code of Civil Procedure section 526, subdivision (b)(4), which provides that "[a]n injunction cannot be granted ... [t]o prevent the execution of a public statute by officers of the law for the public benefit," and Civil Code section 3423, subdivision (d), which provides in almost identical language that "[a]n injunction may not be granted ... to prevent the execution of a public statute, by officers of the law, for the public benefit." Many cases, however, hold that that the public benefit exemption does not apply to an invalid statute, the execution of which courts have full authority to enjoin. (*E.g.*, *Financial Indemnity Co. v. Superior Court* (1955) 45 Cal.2d 395, 402; *Conover v. Hall* (1974) 11 Cal.3d 842, 850; *Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal.3d 392, 401.) Those statutes are therefore red herrings as applied to this appeal, because respondent's reliance on them begs the question of whether Penal Code section 31910, subdivision (b)(7)(A), is an invalid statute. If section 31910, subdivision (b)(7)(A), is indeed invalid by reason of statutory proscription as appellants argue, no court need ever consider whether it is subject to the public benefit exemption of Code of Civil Procedure section 526, subdivision (b)(4), or Civil Code section 3423, subdivision (d).

VI. CONCLUSION.

Respondent sprinkles the word "freestanding" throughout its opening brief, with pejorative intent. "The maxims of jurisprudence," respondent says, "do not authorize a freestanding facial 'impossibility' claim empowering a court to invalidate a statute." (Op. Brief 20.) "Recognizing NSSF's freestanding impossibility claim," respondent adds, "would violate the separation of powers doctrine." (Op. Brief 26.) Respondent essentially argues that appellants' cause of action to enjoin the enforcement of Penal Code section 31910, subdivision (b)(7)(A), is not tethered to any supporting legal principles. Respondent is wrong.

Appellants have shown above, based on long-established authority, that the separation of powers doctrine does not foreclose judicial review of legislative enactments that are palpably arbitrary. Appellants have also shown above, based on authority that reaches back to the early common law, that the codified maxims of jurisprudence are entitled to the same operative force as any other statute, and that the separation of powers doctrine itself restrains courts from devaluing those maxims as organic law. By repeatedly characterizing as "freestanding" the legal foundations that support appellants' cause of action, respondent merely tries to mask the fact that courts have long possessed the power to enjoin the enforcement of laws that require impossible compliance.

The very fact that this is a firearms case makes it a case of significant public importance. Its importance is enhanced by the issue of first impression it presents as to the effect to be accorded to California's codified maxims of jurisprudence. Its importance is further enhanced by the question of fundamental fairness it presents as to whether the Legislature may require the performance of a plainly impossible act as a condition to the exercise of an otherwise lawful right. Appellants submit that this Court should answer that question in the negative. Thus, for the foregoing reasons, appellants respectfully request that this Court affirm the decision of the Court of Appeal, reverse the judgment against appellants, and remand this case to the trial court for further proceedings.[23]

---

[23] Respondent includes a section in its opening brief discussing the effect of a due process challenge to Penal Code section 31910, subdivision (b)(7)(A), that appellants could possibly make. (Op. Brief 33-36.) Appellants had mentioned in a footnote in their answer to respondent's petition for review that they would have the right to seek to amend their complaint upon remand to assert a due process claim under Article I, Section 7, of the California Constitution. (Ans. Pet. Rev. 18.) Appellants included that footnote because at the hearing in the Court of Appeal below, Justice Franson asked why appellants did not originally bring a constitutional challenge on grounds other than the Second Amendment. (Resp's RJN, Ex. A [11/16/2016 Ct. of App. RT, 48-49].) But since appellants have not yet actually made any such due process challenge, it is not properly before this Court now. It is sufficient to say at present that if appellants ever do raise a due process challenge to section 31910, subdivision (b)(7)(A), the challenge would be meritorious, because a statute requiring impossible compliance is not a statute that reasonably relates to a proper legislative goal, or one that is based on rational speculation. (*See*, *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125; *In re Jenkins* (2010) 50 Cal.4th 1167, 1181.)

DATED: August 18, 2017.

Respectfully submitted,

Lance A. Selfridge

Daniel C. DeCarlo
Lance A. Selfridge
LEWIS BRISBOIS BISGAARD & SMITH LLP

633 West 5th Street, Suite 4000
Los Angeles, California 90071
(213) 250-1800
Dan.DeCarlo@lewisbrisbois.com
Lance.Selfridge@lewisbrisbois.com

Attorneys for Plaintiffs and Appellants National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The foregoing answer on the merits contains 13,466 words as counted in accordance with California Rules of Court, rule 8.204(c)(3), by the Microsoft Word 2010 word processing program that was used to generate the answer.

DATED: August 18, 2017.

Lance A. Selfridge

Daniel C. DeCarlo
Lance A. Selfridge
LEWIS BRISBOIS BISGAARD & SMITH LLP

633 West 5th Street, Suite 4000
Los Angeles, California 90071
(213) 250-1800
Dan.DeCarlo@lewisbrisbois.com
Lance.Selfridge@lewisbrisbois.com

Attorneys for Plaintiffs and Appellants National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.

CALIFORNIA STATE COURT PROOF OF SERVICE

National Shooting Sports Foundation, Inc. & Sporting Arms and Ammunition Manufacturers' Institute, Inc. v. State of California; Supreme Court Case No. S239397; Fifth Appellate Dist. 5th Civil No. F072310; Fresno County Superior Court Case No. 14CECG00068

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 633 West 5th Street, Suite 4000, Los Angeles, CA 90071.

On August 18, 2017, I served the following document(s): **ANSWER TO PETITION FOR REVIEW**

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

XAVIER BECERRA
Attorney General of California
EDWARD C. DuMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON,
Supervising Deputy Attorney General
NELSON R. RICHARDS
Deputy Attorney General
SAMUEL P. SIEGEL
Associate Deputy Solicitor General
State Bar No. 294404
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(415) 703-2551
Sam.Siegel@doj.ca.gov

California Court of Appeal
5th Appellate District
2424 Ventura Street
Fresno, CA 93721-3004

Superior Court of the State of California
County of Fresno
The Honorable Donald S. Black
B.F. Sisk Courthouse
1130 "O" Street
Fresno, CA 93721-2220

The documents were served by the following means:

☒ (BY OVERNIGHT DELIVERY) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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

Executed on August 18, 2017, at Los Angeles, California.

F. Moradpour

FARNAZ MORADPOUR