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In the Supreme Court of the State of California

NATIONAL SHOOTING SPORTS FOUNDATION, INC., et al.,
Plaintiffs and Appellants,
v.
STATE OF CALIFORNIA,
Defendant and Respondent.

Case No. _____

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

OTHER AUTHORITIES

PETITION FOR REVIEW

The State of California, by and through the Attorney General, respectfully petitions for review of the published decision of the Fifth Appellate District in *National Shooting Sports Foundation, Inc. v. State of California* (2016) 6 Cal.App.5th 298. The slip opinion is attached as Exhibit A. The Court of Appeal filed the decision December 1, 2016. The State's petition for rehearing was denied on December 15, 2016. This petition for review is timely. (Cal. Rules of Court, rule 8.500(e)(1).)

ISSUES PRESENTED

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

REASONS FOR GRANTING REVIEW

California's handgun microstamping law (Pen. Code, § 31910, subd. (b)(7)) requires that certain semiautomatic pistols not already approved for sale in the State may not be certified for sale, going forward, unless they incorporate technology that imprints microscopic identifying information on fired cartridge cases.[1] Appellant industry groups contend that microstamping is unproven and unreliable, and that the courts should therefore invalidate the law. (Slip Op. 5-6.) They do not, however, advance any constitutional claim. They instead argue that the law must be invalidated based on a maxim of jurisprudence, Civil Code section 3531, which states that "[t]he law never requires impossibilities." The Court of

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

Appeal agreed, denying the State's request for judgment on the pleadings and remanding for a trial on the feasibility of the technology.

This Court should grant review to settle the important legal questions presented by this matter. (Cal. Rules of Court, rule 8.500(b)(1).) The case involves a question of statewide significance—the validity of a law designed to bring to market cutting-edge microstamping technology that will help deter and solve crimes. The novel rule announced by the Court of Appeal not only threatens to invalidate this gun safety law, but it may also invite freestanding, non-constitutional "impossibility" claims in other contexts. Such judicial second-guessing of legislative determinations without the deference that traditionally accompanies judicial review of statutes violates settled separation of powers principles. And it contravenes this Court's precedent holding that the maxims of jurisprudence are used by courts to discern legislative intent, not to nullify legislative actions.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

In 1999, the Legislature passed the Unsafe Handgun Act to bring uniformity to the rules governing the sale of handguns in the State.[2] (Former §§ 12125-12233, repealed by Stats. 2010, ch. 711, § 4, reenacted without substantial change at § 16000, et seq. [Deadly Weapons Recodification Act of 2010] by Stats. 2010, ch. 711, § 6; *Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 912 (*Fiscal*).) The law establishes a set of quality and safety standards for handguns in California. (*Fiscal, supra*, 158 Cal.App.4th at p. 912.) Models that do not satisfy the statutory requirements in place at the time they are proffered for

[2] Handguns are firearms that can be concealed on the person and include pistols, revolvers, and Derringers. (§ 16640, subd. (a).)

testing and certification may not be manufactured, imported, or sold in the State. (§ 32000.) Those that pass a test showing they satisfy the then-existing requirements are placed on a roster of handguns certified for sale. (§ 32015; Cal. Code Regs., tit. 11, § 4070.) There are over 730 models of handguns, including hundreds of semiautomatic pistols, currently on the roster that may be sold in the State.[3] (See <http://certguns.doj.ca.gov> [as of Jan. 9, 2017].) Manufacturers may keep their handguns on the approved list by paying a $200 annual roster maintenance fee. (Cal. Code Regs., tit. 11, §§ 4071-4072.)

The Crime Gun Identification Act of 2007 (Stats. 2007, ch. 572, § 1) amended the Unsafe Handgun Act to require that any semiautomatic pistol proffered for certification after the effective date of the Act must come equipped with technology, commonly known as "microstamping technology," that imprints microscopic identifying information on fired cartridge cases. (§ 31910, subd. (b)(7).)[4] This requirement does not apply to semiautomatic pistols that were already on the roster of approved handguns at the time the law went into effect. (*Ibid.*)

The Legislature decided to require microstamping technology in newly listed semiautomatic pistols after considering evidence showing its potential to help law enforcement officials solve murders, drive-by shootings, and other handgun-related crimes, and to help deter gun trafficking. (See, e.g., Respondent's Appendix (RA) 13 [Assembly

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[3] "Semiautomatic pistol" means a pistol that can fire a fixed cartridge, extract and eject the fired cartridge, and load a fresh cartridge into the chamber, each time the trigger is pulled. (§ 17140.)

[4] The law was originally codified in section 12126 and has since been moved to section 31910, subdivision (b)(7). (See Stats. 2010, ch. 711, § 6.) The full text of section 31910, subdivision (b)(7) is attached as Exhibit B.

Committee on Public Safety Report].) Developed by inventor Todd Lizotte of NanoMark Technologies, microstamping works by using special equipment to etch the internal working parts of a semiautomatic pistol with unique characters—letters, numbers, graphics, symbols—that are not visible to the naked eye. (See, e.g., RA 35-37; 6 Joint Appendix (JA) 1120.) Mr. Lizotte testified before the Assembly Public Safety Committee and responded to questions from staff of the Senate Public Safety Committee, and a compilation of the legislative history contains a slide presentation on his technology. (See RA 127-139; RA 90-91; RA 38.) A Senate Committee on Public Safety Analysis also referred to NanoMark's website, which explained that when a semiautomatic pistol with the technology is fired, the gun imprints identifying information onto the cartridge case. (See RA 35-36.) A microstamped cartridge casing found at a crime scene would allow police to identify the pistol used in the crime. (RA 35-37.)

Numerous governmental entities, political leaders, and law enforcement groups, including the chiefs of over 60 police departments, encouraged the Legislature to adopt the law. (See 5 JA 873-875; RA 13-15; RA 41-42.)

Opponents of the law raised several objections, including claims that the technology was not feasible. (See, e.g., RA 43; RA 48-55.) Appellants National Shooting Sports Foundation, Inc. (NSSF) and Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI), industry trade groups, were among those that voiced feasibility concerns to the Legislature and the Governor. NSSF sent letters to the Governor, arguing that microstamping "does not function reliably" (RA 95) and voicing what it viewed as a "serious question about whether manufacturers can satisfy this requirement" (RA 96). SAAMI sent several letters to the law's author, referring to a study purportedly showing that past examples of cartridge-

case microstamps were "illegible and non-reproducible" and that new attempts to microstamp cartridge cases using two versions of a popular pistol "failed almost 50% of the time." (RA 19; see also RA 24-28; RA 50-55; RA 90-94.)

The Legislature took account of these objections, considering arguments raised by NSSF, SAAMI, and the law's other opponents. (RA 37-43; see also RA 74-76.) For instance, the Senate Committee on Public Safety acknowledged that the "most significant question regarding the efficacy of the technology is whether the stamp would actually work the way the manufacturer claims; that is, would the stamp be legible under most real-life circumstances?" (RA 37.) The Legislature nevertheless proceeded to enact the law.

Because the microstamping technology was then subject to patent, the law provided that it would not to go into effect until the California Department of Justice (DOJ) certified that microstamping technology was "available to more than one firearms manufacturer unencumbered by any patent restrictions." (§ 31910, subd. (b)(7)(A).) DOJ issued that certification on May 17, 2013. (1 JA 18 and attached as Exhibit C.)

II. PROCEDURAL HISTORY

NSSF and SAAMI (together NSSF) filed a lawsuit on behalf of their members in Fresno County Superior Court challenging the microstamping law. (1 JA 9-18.) The complaint requested a judicial declaration that the microstamping law is invalid in all its applications, based on an allegation that it is impossible to implement the technology. (1 JA 14-17.) At several points before the trial court, NSSF disclaimed any constitutional challenge to the statute and clarified that it was basing its claim entirely on the maxim, codified since 1872 in the Civil Code, that "[t]he law never requires

impossibilities."[5] (Civ. Code, § 3531; see, e.g., 1 JA 93; 1 JA 95 ["there is no need to discuss the Second Amendment or for the Court to resolve any phantom Second Amendment claims, because plaintiffs are not advancing any claims premised on the Second Amendment"].)

The State moved for judgment on the pleadings, on the ground that the claim violated the separation of powers doctrine by asking the court to revisit factual and policy determinations already made by the Legislature. (1 JA 127-147.) The trial court granted the motion, ruling that "Plaintiffs' concerns about inability to comply with the statute are for the legislature." (6 JA 1170.) NSSF appealed. (6 JA 1192.)

The Court of Appeal reversed. Its published decision discusses the nature of the separation of powers, noting that the judiciary does "not sit as a superlegislature to review the wisdom or desirability" of statutory enactments and that courts must generally defer to the factual determinations underlying statutes unless they are "palpably arbitrary." (Slip Op. 7.) It reasons, however, that the judiciary can "invalidate legislation if there is some overriding constitutional, statutory or charter provision." (Slip Op. 8, citing *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898.) And it concludes that Civil Code section 3531 is such an "overriding . . . statutory" proscription, sufficient to invalidate a later-enacted statute. (Slip Op. 8.) Reasoning that NSSF's allegations of impossibility must be accepted as true on a motion for judgment on the pleadings, and that it would be "illogical" to impose an impossible

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[5] While this case was proceeding, a federal district court rejected a Second Amendment challenge to the Unsafe Handgun Act, which included a challenge to the microstamping law. (See *Peña v. Lindley* (E.D.Cal. Feb. 26, 2015, 2:09-CV-01185-KJM-CKD) 2015 WL 854684, at *11-14, app. pending (9th Cir. Mar. 11, 2015) Case No. 15-15449 [oral argument set for Mar. 16, 2017].)

requirement, the court holds that NSSF has a "right" to have trial on its claim, with the trier of fact assessing whether or not it is possible for a manufacturer to implement the microstamping technology and secure California certification for a new handgun model. (Slip Op. 8.) The decision remands the matter for trial.

The Court of Appeal denied the State's petition for rehearing on December 15, 2016.

ARGUMENT

Preventing and solving handgun crimes is a matter of statewide importance. Handguns are used in roughly 50 percent of homicides where the type of weapon is identified.[6] And around 40 percent of homicides remain unsolved.[7] Microstamping promises to greatly assist law enforcement in solving murders, drive-by shootings, and other handgun crimes, by allowing police to track a gun's origin in the instances where fired cartridge cases are found on scene. (See, e.g., RA 13; RA 42.) It also has the potential to deter gun crimes and gun trafficking, as use of marked guns will not be anonymous. (See, e.g., RA 13.) Without this Court's intervention, the microstamping law faces invalidation in the event that the trial court disagrees with the Legislature's considered determination that manufacturers are capable of implementing the technology and moving it to market.

Review is also necessary to clarify and settle the law concerning the proper role of courts where a challenger asserts that complying with a

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[6] See DOJ, *Homicide in California* (2014) at p. 27, Table 21, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/homicide/hm14/hm14.pdf >[as of Jan. 9, 2017].

[7] See DOJ, *Crime in California* (2015) at p. 15, Table 15, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd15/cd15.pdf> [as of Jan. 9, 2017].

statute is a factual impossibility—a claim that, if accepted as viable, could open the door to a whole new category of non-constitutional facial challenges.

NSSF asked the trial court to invalidate the 2007 microstamping statute in all its applications based on another statute—specifically, an 1872 Civil Code provision reciting a maxim of jurisprudence that the law does not require "impossibilities." (See 1 JA 16-17; 1 JA 93.) The Court of Appeal held that the judiciary can invalidate a later-enacted statute based on this earlier "statutory proscription." (Slip Op. 8.) But that is not how the system of checks and balances works.

As this Court has held, the Legislature exercises plenary power to enact law, subject only to state and federal constitutional constraints.[8] Legislative power by definition resides in the Legislature, and

> it is well established that the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution. . . . [P]ursuant to that authority, [t]he Legislature has the *actual* power to pass any act it pleases, subject only to those limits that may arise elsewhere in the state or federal Constitutions.

(*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 498, citations and quotation marks omitted.) A non-constitutional facial challenge to a statute of the sort that NSSF has alleged must fail as a matter of law because "under the doctrine of separation of powers neither the trial nor appellate courts are authorized to 'review' legislative determinations. The only function of the courts is to determine whether the exercise of

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[8] To reiterate, NSSF has disclaimed any constitutional challenge—for example, that declining to add non-compliant semiautomatic pistols to the list violates the Second Amendment, that the law is so irrational as to violate the Due Process Clause, or that it is impossible to comply with some federal law and the state microstamping law such that the state law should be preempted. (See, e.g., 1 JA 95.)

legislative power has exceeded constitutional limitations." (See *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462.)

Even if NSSF were correct that implementation of microstamping law is currently infeasible as a practical matter, absent an alleged constitutional violation, NSSF's recourse lies not in the courts, but in the political process.[9] (See, e.g., *Werner v. Southern Cal. Associated Newspapers* (1950) 35 Cal.2d 121, 130 ["it is better that [a law's] defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people," citation and quotation marks omitted]; *Vance v. Bradley* (1979) 440 U.S. 93, 97 ["The Constitution presumes that . . . improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted"].)

The separation of powers problem raised by NSSF's freestanding impossibility claim is highlighted by considering the difference in the factfinding processes used by courts and by the Legislature. The courts' factfinding tools rely on the adversarial process, and are limited by the parties before them, the parties' resources, and the rules of evidence, discovery, and personal jurisdiction. And the outcome in litigation may

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[9] Before the Court of Appeal, the State contended that a manufacturer could comply with the statute by placing two microstamps on the firing pin, which NSSF admitted was technically possible. (6 JA 963; 6 JA 966; Slip Op. 9.) The Court of Appeal rejected that argument as a matter of statutory construction. (Slip Op. 9-10.) That statutory ruling is not the basis for this petition for review.

turn on which party bears the burdens of proof and persuasion.[10] The Legislature, by contrast, has none of these limitations, and is free to make factual or probability determinations and policy decisions that would not be open to a court. Putting such legislative determinations on trial in the courts would interfere substantially with the Legislature's prerogatives.

To be clear, the State does not contend that any principle prevents the courts from ruling on the merits of a properly alleged constitutional challenge. Indeed, that is the essence of judicial review. But had NSSF brought a constitutional challenge, it would have had to contend with established precedent that shows appropriate respect for legislative determinations. Under rational basis review, for example, "a legislative choice is *not subject to courtroom factfinding* and may be based on rational speculation unsupported by evidence or empirical data." (*Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1427, citation and quotation marks omitted; italics added.) In that scenario, NSSF would not, as the Court of Appeal held, have a "right" to present evidence at a trial. (See Slip Op. 8.) Its claim would have failed as a matter of law on even a glancing review of the record, which shows that the Legislature was attempting to address an important societal problem, that microstamping will help address that problem, and that the Legislature had heard and rejected NSSF's concerns about the microstamping law's feasibility. (See, e.g., RA 13; RA 37-38.)

Finally, review is also warranted to ensure that the maxims of jurisprudence are put to their proper function and not used in a manner that the Legislature never intended. By their terms, the maxims set out in the Civil Code are an aid in the "just application" of the law, but do not "qualify any of the . . . provisions of [the Civil] code" or, by implication,

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[10] The Court of Appeal did not address how trial on "impossibility" might proceed as a practical matter.

other statutes. (See Civ. Code, § 3509.) This Court held long ago that a statute "may not be nullified or defeated by a maxim." (*People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 476; *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012 [collecting cases holding that maxims may not be applied in a manner that would "frustrate the intent underlying the statute"].)

The Court of Appeal's contrary and novel approach sets a troubling precedent. It creates the potential for "impossibility" lawsuits in other areas where regulated industries may desire to avoid requirements that they perceive as costly or difficult—they will be able to litigate rather than innovate. For instance, lawmakers and regulators often use technology-forcing standards in the environmental context. These standards "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 466, quotation marks omitted; *ibid.* ["the principle of technology-forcing is based on the premise that because pollution is a negative externality, industry generally has insufficient incentive to develop or adopt new pollution control technology in the absence of regulation"].)[11] Citing the Court of Appeal's decision, polluters faced with compliance costs might refuse to innovate and upgrade, instead

[11] Indeed, even if NSSF were correct that microstamping is currently infeasible as a practical matter, requiring implementation of the technology as a condition for certifying *new* handgun models in California could be viewed as technology-forcing in just this sense. The State argued to the Court of Appeal that it is not "impossible" for a manufacturer to comply with a statute barring sale of products that do not meet a statutory standard, because it is always possible to refrain from selling non-complying goods. The Court of Appeal dismissed that argument, stating only that withholding certain guns from the California market would "not provide the relief appellants are requesting." (Slip Op. 11.)

funding "impossibility" challenges through their trade groups. And regulated entities seeking to invalidate statutes might well test additional novel claims based on other maxims. (See, e.g., Civ. Code, § 3533 ["[t]he law disregards trifles"]; *id.*, § 3532 [the law "neither does nor requires idle acts"].)

CONCLUSION

This Court should grant review to uphold the Legislature's determination that bringing microstamping technology to market is in the public's best interest, to settle the separation of powers problem created by the Court of Appeal's decision, and to clarify and settle the proper application and limited use of the maxims of jurisprudence.

Dated: January 9, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Review uses a 13 point Times New Roman font and contains 3,355 words.

Dated: January 9, 2017

KATHLEEN A. KENEALY
Acting Attorney General of California

FOR

NELSON R. RICHARDS
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EXHIBIT A

Filed 12/1/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

NATIONAL SHOOTING SPORTS FOUNDATION, INC., et al., Plaintiffs and Appellants, v. STATE OF CALIFORNIA, Defendant and Respondent.	F072310 (Super. Ct. No. 14CECG00068) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Lewis Brisbois Bisgaard & Smith, Daniel C. DeCarlo and Lance A. Selfridge; National Shooting Sports Foundation, Inc. and Lawrence G. Keane for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Douglas J. Woods, Assistant Attorney General, Tamar Pachter, Nelson R. Richards and Emmanuelle S. Soichet, Deputy Attorneys General, for Defendant and Respondent.

Caldwell Leslie & Proctor, Michael R. Leslie, Andrew Esbenshade and Amy E. Pomerantz as Amicus Curiae on behalf of Defendant and Respondent.

-ooOoo-

Penal Code section 31910, subdivision (b)(7)(A), provides that, commencing January 1, 2010, a semiautomatic pistol is an "'unsafe handgun'" if "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 ...." Appellants, National Shooting Sports Foundation, Inc. (NSSF) and Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI), filed the underlying action for declaratory relief seeking to enjoin this statute on the ground that it is impossible to comply with these dual placement microstamping requirements.

Respondent, the State of California, moved for judgment on the pleadings. The trial court granted this motion without leave to amend on the ground that the separation of powers doctrine precluded appellants' action.

Appellants acknowledge that the separation of powers doctrine generally prohibits a court from invalidating duly enacted legislation. However, appellants argue, the doctrine does not apply where the legislation is subject to a statutory proscription. According to appellants, Penal Code section 31910, subdivision (b)(7)(A), is subject to the statutory proscription set forth in Civil Code section 3531.

Civil Code section 3531 provides that "[t]he law never requires impossibilities." Appellants' complaint alleges that it is impossible for a firearm manufacturer to implement microstamping technology in compliance with Penal Code section 31910, subdivision (b)(7)(A), because no semiautomatic pistol can be so designed and equipped.

Because judgment was granted on the pleadings, we must accept the truth of the complaint's properly pleaded facts. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298 (*Dunn*).) Accordingly, 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. We also reject respondent's position that

stamping the characters in two places on the firing pin would comply with the statute. Appellants have the right to present evidence to attempt to prove their claim. Therefore, we will reverse the judgment and remand the matter for further proceedings.

BACKGROUND

1. *The parties.*

Appellant NSSF is a nonprofit trade association for firearms, ammunition, hunting and recreational shooting sports industries. Its mission is to promote, protect and preserve hunting and shooting sports. NSSF's members include manufacturers, distributors, and retailers of semiautomatic pistols and other shooting and hunting products and services, as well as public and private shooting ranges, sportsmen's organizations, and individual hunters and target shooters.

Appellant SAAMI is a nonprofit trade association whose mission is to develop and publish industry recommended practices and voluntary standards pertaining to the safety, interchangeability, reliability and quality of semiautomatic pistols, other firearms and ammunition. SAAMI also provides assistance and advice to government agencies and promotes safe and responsible use and ownership of semiautomatic pistols, other firearms and ammunition. SAAMI members include manufacturers of semiautomatic pistols who sell products in California, either directly to licensed firearms retailers or to licensed wholesale firearms distributors. Virtually all new firearms sold in the United States adhere to the SAAMI standards.

2. *California regulation of handgun sales.*

In 1999, California enacted the Unsafe Handgun Act (UHA). This act uniformly bans the sale of a class of low cost, cheaply made handguns known as "Saturday Night Specials." Additionally, the UHA establishes quality and safety standards for all handguns sold in the state. (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 912 (*Fiscal*).)

The California Department of Justice is charged with compiling and maintaining a roster of handguns that have been tested and determined not to be unsafe. Only handguns on this roster may be manufactured, imported or sold in the state. (*Fiscal, supra,* 158 Cal.App.4th at p. 912; Pen. Code, § 32015.) Anyone who violates the UHA is subject to criminal penalties, including imprisonment in a county jail for up to one year. (Pen. Code, § 32000, subd. (a).)

The issue of microstamping semiautomatic pistols was first introduced in the California Legislature in February 2005 through Assembly Bill No. 352. This bill proposed that a semiautomatic pistol, not already listed on the approved roster, would be deemed an unsafe handgun if not "designed and equipped 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 firearm is fired." (Assem. Bill No. 352 (2005-2006 Reg. Sess.) § 1.) Assembly Bill No. 352 ultimately "died in conference" in November 2006.

A bill requiring microstamping of semiautomatic pistols was introduced again in February 2007. As originally introduced, Assembly Bill No. 1471 proposed the same single placement microstamping that was contained in Assembly Bill No. 352.

Supporters of Assembly Bill No. 1471 argued that microstamping would provide law enforcement with evidence to help investigate, arrest and convict more people who use semiautomatic handguns in crimes. Supporters further claimed that the bill offered a cost-effective and tamper-resistant technology that would help police solve murders and reduce handgun trafficking.

Those who opposed Assembly Bill No. 1471 argued that the technology had not been shown to work under actual field conditions and thus mandating its implementation was excessively premature. More importantly, concerns were raised regarding the ability of criminals to defeat a pistol's microstamping features by defacing a single microstamp

placed on the firing pin. Both the Governor's Office of Planning and Research and the Senate Republican Office of Policy noted in 2007 reports that criminals could easily defeat the intended identification benefit. Firing pins can be defaced by either mechanical means or by hand and are easy to remove and replace.

Thereafter, Assembly Bill No. 1471 was amended to require that the microscopic array of characters be etched or imprinted "*in two or more places on* the interior surface or internal working parts of the pistol." (Assem. Amend. to Assem. Bill No. 1471 (2007-2008 Reg. Sess.) April 10, 2007.) Later analysis of this amendment suggests that the intent was to have a second microstamp placed on a surface other than the firing pin. For example, the September 2007 analysis of the Senate Rules Committee states that the microstamping 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." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1471, Sept. 11, 2007.)

The law was passed by the Legislature in September 2007 and signed by the Governor in October 2007. However, it was not to go into effect until the Department of Justice certified that the microstamping technology was available to more than one firearms manufacturer and unencumbered by any patent restrictions. (Pen. Code, § 31910, subd. (b)(7)(A).) The Department of Justice issued the required certification on May 17, 2013.

3. *The underlying proceedings.*

Appellants filed their complaint against respondent asserting a single cause of action for declaratory and injunctive relief. Appellants alleged 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." Appellants further claimed that "[s]cientific literature highlights the existence of the aforementioned actual controversy regarding the unproven and unreliable firearm microstamping technology" and provided specific examples to support their position.

Respondent demurred to the complaint on the grounds that appellants did not have standing and did not assert that the statute was unconstitutional. The trial court overruled the demurrer finding that appellants had associational standing and had sufficiently alleged a viable cause of action for declaratory relief.

Respondent answered the complaint and thereafter moved for judgment on the pleadings. Respondent argued that, because appellants declined to assert a constitutional challenge, their claim was precluded under the separation of powers doctrine. The trial court agreed and granted judgment on the pleadings without leave to amend.

DISCUSSION

1. *Standard of review.*

A motion for judgment on the pleadings is the equivalent of a general demurrer but is made after the time for a demurrer has expired. (*Alterra Excess & Surplus Ins. Co. v. Snyder* (2015) 234 Cal.App.4th 1390, 1400 (*Alterra*).) Accordingly, we treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of law. (*Dunn, supra,* 135 Cal.App.4th at p. 1298.) Further, the grounds for the motion must appear on the face of the complaint or be based on facts capable of judicial notice. (*Alterra, supra,* 234 Cal.App.4th at p. 1400.) Our standard of review is de novo. (*Ibid.*)

2. *The separation of powers doctrine does not bar appellants' action.*

California's system of state government divides power among three coequal branches; legislative, executive, and judicial. (*People v. Bunn* (2002) 27 Cal.4th 1, 14 (*Bunn*).) Those charged with the exercise of one power may not exercise any other. Nevertheless, the branches share common boundaries and no sharp line between their operations exists. Indeed, this system assumes a certain degree of mutual oversight and influence. (*Ibid.*)

Despite this interdependence, each branch is vested with "certain 'core' or 'essential' functions that may not be usurped by another branch." (*Bunn, supra,* 27 Cal.4th at p. 14, citations omitted.) The Legislature's essential function is making law by statute which "embraces the far-reaching power to weigh competing interests and determine social policy." (*Id.* at pp. 14–15.) In contrast, the essential power of the judiciary is to resolve specific controversies between parties and, in doing so, interpret and apply existing laws. (*Id.* at p. 15.)

"The separation of powers doctrine protects each branch's core constitutional functions from lateral attack by another branch." (*Bunn, supra,* 27 Cal.4th at p. 16.) Accordingly, with limited exceptions, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations. (*Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1426.)

The courts must also keep in mind that factual determinations necessary to perform the legislative function are of a peculiarly legislative character. Therefore, "'[i]f the validity of a statute depends on the existence of a certain state of facts, it will be presumed that the Legislature has investigated and ascertained the existence of that state of facts before passing the law.'" (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 511.) Thus, 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. (*Ibid.*)

Nevertheless, the judiciary can invalidate legislation if there is some overriding constitutional, statutory or charter proscription. (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 915.) Appellants argue such a statutory proscription exists here because it is impossible to comply with Penal Code section 31910, subdivision (b)(7)(A), and, under Civil Code section 3531, "[t]he law never requires impossibilities."

In *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, the court discussed impossibility of performance as a defense to a state mandate compelling counties to contribute to welfare grants. The appeal followed a hearing in the trial court where testimony was given and factual findings were made. Although the court concluded the county had not demonstrated it was impossible to comply with the law, it acknowledged that, consistent with Civil Code section 3531, "the law recognizes exceptions to statutory requirements for impossibility of performance." (*Board of Supervisors v. McMahon, supra*, at p. 300.)

As noted above, at this stage in the proceedings, we 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). It would be illogical to uphold a requirement that is currently impossible to accomplish. Accordingly, 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 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.

3. *The public benefit exemption does not preclude appellants' complaint.*

Civil Code section 3423, subdivision (d), and Code of Civil Procedure section 526, subdivision (b)(4), provide that an injunction cannot be granted to prevent the execution of a public statute, by officers of the law, for the public benefit. However, these provisions do not bar judicial action where the invalidity of the statute is shown. (*Financial Indem. Co. v. Superior* Court (1955) 45 Cal.2d 395, 402; *Conover v. Hall* (1974) 11 Cal.3d 842, 850.) Since appellants are challenging Penal Code section 31910, subdivision (b)(7)(A), on the ground that it is invalid due to impossibility of performance, the public benefit exemption does not apply.

4. *Respondent's alternative compliance suggestions lack merit.*

As discussed above, Penal Code section 31910, subdivision (b)(7)(A), requires a semiautomatic pistol to have a microscopic array of characters etched or otherwise imprinted in "two or more places on the interior surface or internal working parts of the pistol." Respondent argues that gun manufacturers can comply with this section by stamping the characters in two places on the firing pin.

When a statute is clear and unambiguous, there is no need to construe its meaning. However, where the provisions are ambiguous or conflict, the court must engage in statutory construction. (*Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 408.) Here, we must determine what the Legislature meant by "two or more places."

In construing a statute, the court's fundamental task is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1064.) To begin, we examine the language of the statute, but do not give it a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. Further, we do not construe statutes in isolation. Rather every statute must be read with reference to the entire scheme of law. At the same time, we must remain cognizant of "'the object to be achieved and the evil to be prevented by the

legislation. [Citation.]'" (*Id.* at pp. 1064–1065.) The legislative history may be considered in determining legislative intent. (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 948 (*Jevne*).)

First, the language "two or more places" suggests microstamping must be on two or more different parts of the pistol rather than two stamps on the same part. Additionally, the legislative history indicates that was the Legislature's intent.

As outlined above, when this law was being considered, the ability of criminals to easily defeat the microstamping by defacing or removing the firing pin was raised as a concern. Thereafter, the bill was amended to require the dual stamping. Later analyses of the amendment indicate that the intent was to have a second microstamp placed on a surface other than the firing pin. For example, the September 2007 Senate Rules Committee analysis describes the microstamping technology as "engraving microscopic characters onto the firing pin *and other interior surfaces*, which would be transferred onto the cartridge casing when the handgun is fired." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1471, Sept. 11, 2007, italics added.) This is a proper source of legislative history. (*Jevne, supra,* 35 Cal.4th at p. 948.)

Based on this history, it is apparent that the object the Legislature intended to achieve by amending the statute to require dual microstamping was to hinder criminals from defeating the process by defacing or removing the firing pin. Thus, 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.

Respondent further asserts that appellants' members can comply with the law by not manufacturing or selling new-model handguns in California. Respondent notes that the law does not compel these members to do anything.

However, this solution does not provide the relief appellants are requesting. They are seeking a declaration that the statute is invalid because it is impossible to implement the dual placement microstamping requirement. Such a declaratory relief action is a proper way to challenge the legislation. (*La Franchi v. City of Santa Rosa* (1937) 8 Cal.2d 331.)

5. *Appellants have associational standing.*

An association that does not have standing in its own right may nonetheless have standing to bring a lawsuit on behalf of its members. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.) "Associational standing exists when: '(a) [the association's] members would otherwise have standing to sue in their own right; (b) the interests [the association] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" (*Id.* at p. 1004.)

Respondent does not dispute that appellants meet the first two requirements for associational standing, i.e., appellants' members will be adversely affected by the dual microstamping requirement if it is impossible to comply as alleged and the interests appellants seek to protect are germane to their organizational purpose. Rather, respondent asserts that appellants do not have standing because a court must consider individual attempts to comply with Penal Code section 31910, subdivision (b)(7)(A), to determine whether substantial compliance is possible. Therefore, respondent asserts, participation by appellants' members to show what steps they have taken to comply is required.

However, appellants' position is that it is physically impossible to comply with the dual microstamping requirement using current technology. At this stage in the proceeding, we must accept that allegation as true. It is unreasonable to require an individual to attempt what is impossible to accomplish. Accordingly, substantial

compliance is not a consideration. Therefore, standing to pursue this action does not require the participation of appellants' individual members.

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings. Appellants to recover their costs on appeal.

LEVY, Acting P.J.

WE CONCUR:

GOMES, J.

FRANSON, J.

EXHIBIT B

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 6. Control of Deadly Weapons (Refs & Annos)
Title 4. Firearms (Refs & Annos)
Division 10. Special Rules Relating to Particular Types of Firearms or Firearm Equipment (Refs & Annos)
Chapter 4. Handguns and Firearm Safety (Refs & Annos)
Article 4. "Unsafe Handgun" and Related Definitions (Refs & Annos)

West's Ann.Cal.Penal Code § 31910

§ 31910. Unsafe handgun defined

Effective: January 1, 2012
Currentness

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:

(a) For a revolver:

(1) It does not have a safety device that, either automatically in the case of a double-action firing mechanism, or by manual operation in the case of a single-action firing mechanism, causes the hammer to retract to a point where the firing pin does not rest upon the primer of the cartridge.

(2) It does not meet the firing requirement for handguns.

(3) It does not meet the drop safety requirement for handguns.

(b) For a pistol:

(1) It does not have a positive manually operated safety device, as determined by standards relating to imported guns promulgated by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives.

(2) It does not meet the firing requirement for handguns.

(3) It does not meet the drop safety requirement for handguns.

(4) Commencing January 1, 2006, for a center fire semiautomatic pistol that is not already listed on the roster pursuant to Section 32015, it does not have either a chamber load indicator, or a magazine disconnect mechanism.

(5) Commencing January 1, 2007, for all center fire semiautomatic pistols that are not already listed on the roster pursuant to Section 32015, it does not have both a chamber load indicator and if it has a detachable magazine, a magazine disconnect mechanism.

(6) Commencing January 1, 2006, for all rimfire semiautomatic pistols that are not already listed on the roster pursuant to Section 32015, it does not have a magazine disconnect mechanism, if it has a detachable magazine.

(7)(A) Commencing January 1, 2010, for all semiautomatic pistols that are not already listed on the roster pursuant to Section 32015, it is not designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired, provided that the Department of Justice certifies that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions.

(B) The Attorney General may also approve a method of equal or greater reliability and effectiveness in identifying the specific serial number of a firearm from spent cartridge casings discharged by that firearm than that which is set forth in this paragraph, to be thereafter required as otherwise set forth by this paragraph where the Attorney General certifies that this new method is also unencumbered by any patent restrictions. Approval by the Attorney General shall include notice of that fact via regulations adopted by the Attorney General for purposes of implementing that method for purposes of this paragraph.

(C) The microscopic array of characters required by this section shall not be considered the name of the maker, model, manufacturer's number, or other mark of identification, including any distinguishing number or mark assigned by the Department of Justice, within the meaning of Sections 23900 and 23920.

Credits

(Added by Stats.2010, c. 711 (S.B.1080), § 6, operative Jan. 1, 2012. Amended by Stats.2011, c. 296 (A.B.1023), § 242.)

West's Ann. Cal. Penal Code § 31910, CA PENAL § 31910
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

End of Document

EXHIBIT C

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
ROCHELLE C. EAST
CHIEF DEPUTY ATTORNEY GENERAL, LEGAL AFFAIRS

CERTIFICATION UNDER CALIFORNIA PENAL CODE § 31910, SUBDIVISION (b)(7)(A)

Under California Penal Code § 31910, subdivision (b)(7)(A), a semiautomatic pistol not already listed on the firearm roster pursuant to California Penal Code § 32015 is an "unsafe handgun" unless it is "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."

The California Department of Justice has conducted a review of the known and available patent restrictions applicable to the microscopic-imprinting technology described in § 31910, subdivision (b)(7)(A). Based on this review, the Department certifies that, as of May 17, 2013, this technology is available to more than one manufacturer unencumbered by any patent restrictions.

Rochelle C. East
Chief Deputy Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **National Shooting Sports Foundation v. State of California (APPEAL)**

No.: _____

I declare:

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

On January 9, 2017, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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1130 O Street
Fresno, CA 93721-2220

Fifth District Court of Appeal
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Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 9, 2017, at San Francisco, California.

A. Bermudez
Declarant

A. Bermudez
Signature

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