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.

ANSWER TO PETITION FOR REVIEW

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

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Respondent, the State of California, has petitioned for review of the published decision of the Fifth Appellate District of the Court of Appeal. Respondent's petition for rehearing was denied. Appellants, National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc., both of which are non-profit trade associations of the firearms industry, hereby answer respondent's petition for review.

I. ISSUES PRESENTED.

Respondent presents the following issue: 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?

Appellants present the following, additional issue: Should this Court await the development of a complete factual record following summary judgment or trial before accepting review of a case in which appellants allege the factual impossibility of complying with a statute the enforcement of which they seek to enjoin?

II. REASONS FOR DENYING REVIEW.

Review of the opinion of the Court of Appeal is not necessary to settle an important question of law. The Court of Appeal correctly determined that the separation of powers doctrine is not an impediment to the prosecution of appellants' action, and Civil Code section 3509 is likewise not an impediment to the prosecution of appellants' action. Penal Code section 31910, subdivision (b)(7)(A), cannot be saved from injunction by the law applicable to technology-forcing standards, and the opinion of the Court of Appeal does not open the floodgates to a new category of non-constitutional challenges to enacted legislation. Finally, this Court should await the development of a complete factual record following summary judgment or trial before accepting review of this case.

III. APPELLANTS' STATEMENT OF THE CASE.

The issue of microstamping semi-automatic pistols, around which this litigation revolves, 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 respondent's roster of approved handguns 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 single 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; emphasis added.) 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,

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[1] The microstamping statute that was 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; emphasis added.)[2] The legislative history reveals no contrary intention by the Legislature to permit both microstamps to be placed on the pistol's firing pin.

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

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[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].)

On or about May 13, 2013, as contemplated by the statute, 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. (JA 781, 787-788, 839.)

Microstamped characters that identify the make, model, and serial number of the pistol (a "microstamped alpha numeric code") can be etched or imprinted on the tip of a semi-automatic 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.) 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.

IV. PROCEDURAL HISTORY.

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.*) Appellants allege that respondent contends to the contrary and therefore seek a judicial declaration of the parties' respective rights and duties with respect to this controversy. (JA 13, 15.)

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.)

On July 6, 2015, the trial court issued an order granting respondent's motion for judgment on the pleadings without leave to amend. (JA 1139-1147.) On August 7, 2015, appellants filed their notice of appeal from the judgment of the trial court. (JA 1192-1194.) In its published opinion dated December 1, 2016, the Court of Appeal reversed the trial court, holding that

> 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.

(Slip Op. 8.) Thus, because the appeal arose from a pleading motion, the Court of Appeal's opinion is firmly grounded in the need for a factual record in order to resolve this litigation.[3]

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[3] The Court of Appeal added that

> [b]ased on this [legislative] 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.

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

V. ARGUMENT.

A. REVIEW OF THE OPINION OF THE COURT OF APPEAL IS NOT NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW.

As noted above, appellants seek an order enjoining the enforcement of Penal Code section 31910, subdivision (b)(7)(A), on the primary factual ground that its dual placement microstamping requirement imposes an obligation with which appellants' members cannot possibly comply. Respondent by means of its motion for judgment on the pleadings sought to avoid that factual determination by arguing that appellants' action violated the separation of powers doctrine, an argument that the Court of Appeal forcefully rejected in its opinion. The separation of powers doctrine is based on established law, and thus affords no ground for review under California Rules of Court, rule 8.500(b)(1). This Court should accordingly decline review until it receives a record developed after summary judgment or trial that addresses the primary factual ground underlying this entire

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(Slip Op. 10.) Respondent does not base its petition for review on that statutory ruling. (Pet. 13.)

litigation. Review at the present stage of this litigation would be premature.[4]

1. The Court of Appeal Correctly Determined that the Separation of Powers Doctrine Is Not an Impediment to the Prosecution of Appellants' Action.

Citing *Howard Jarvis Taxpayers Association v. Padilla* (2016) 62 Cal.4th 486, 498, respondent argues that the Legislature possesses plenary legislative authority. (Pet. 12.) Aside from that truism, 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* (1975) 13 Cal.3d 898, 915; emphasis added.) This Court's decision in *Cooper* remains good law to this day, and has never been overruled or questioned.

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[4] Respondent argues that microstamping promises to assist law enforcement in solving crimes (Pet. 11), and appellants certainly support reasonable efforts to suppress crime. But if it is in fact impossible as appellants allege to comply with the dual placement microstamping requirements of Penal Code section 31910, subdivision (b)(7)(A), then the statute is useless as a crime fighting tool in any event, because no microstamping of any semi-automatic pistols will ever take place. Only the development of a complete factual record after summary judgment or trial will reveal whether section 31910, subdivision (b)(7)(A), actually has any crime fighting potential.

The Court of Appeal thus correctly cited *Cooper* in finding that appellants can rely on Civil Code section 3531, which provides that "[t]he law never requires impossibilities," in support of their claim that Penal Code section 31910, subdivision (b)(7)(A), should be enjoined because it requires impossible compliance. (Slip Op. 8.) The Court of Appeal also correctly followed *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 300, which found that, consistent with section 3531, "the law recognizes exceptions to statutory requirements for impossibility of performance." Thus, if this Court were to accept respondent's position, it would need to overrule not only *McMahon*, but also its own decision in *Cooper*. Respondent accordingly seeks a draconian remedy that disregards forty-two years of established law.

The *McMahon* court did not enjoin the enforcement of the section of the Welfare and Institutions Code that was at issue because the court found that the plaintiff county had failed to prove that it was impossible to comply with that section. (Id. at pp. 300-301, 303.) Nevertheless, the *McMahon* court devoted significant effort to performing an impossibility analysis, because it recognized that in accordance with established law, impossibility of compliance, if proved, is a defense to statutory enforcement. (*Ibid.*) Indeed, several cases from California's sister jurisdictions have enjoined statutes upon findings that statutory compliance was impossible. (*See, e.g., Buck v. Harton* (M.D. Tenn. 1940) 33 F.Supp. 1014, 1018-1019, 1021

(statute requiring that the price for performance of musical compositions be fixed upon a per piece basis that could not be ascertained enjoined on ground of impossible compliance); *Gigliotti v. New York, Chicago & St. Louis Railroad Co.* (1958) 107 Ohio App. 174, 177-178, 181 (statute requiring train engineers to sound their train's whistle at a non-existent location enjoined on ground of impossible compliance); *Ivaran Lines, Inc. v. Farovi Shipping Corp.* (Fla.App.1984) 461 So.2d 123, 124-126 (statute requiring shippers to obtain non-existent certificates of compliance before shipping automobiles abroad enjoined on ground of impossible compliance).)

Respondent cites *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462 for the proposition the judiciary's only function is to determine whether the exercise of legislative power has exceeded constitutional limitations. (Pet. 12-13.) But *Lockard* was decided long before *Cooper*, and in any event, *Lockard* itself recognizes that that the judiciary has the right to inquire whether legislation under consideration is "arbitrary or unreasonable," and to set it aside if it "is clearly and palpably wrong." (*Id.* at p. 461.) By alleging in this litigation that Penal Code section 31910, subdivision (b)(7)(A), requires impossible compliance, appellants have indeed alleged that the statute is arbitrary and unreasonable, as well as clearly and palpably wrong.

Respondent suggests that the judiciary is not competent to perform the impossibility analysis required to determine the enforceability of Penal Code section 31910, subdivision (b)(7)(A). Specifically, respondent asserts that "[t]he 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.... The Legislature, by contrast, has none of these limitations." (Pet. 13-14; emphasis added.) In so doing, respondent denigrates the ability of the judiciary to reach correct decisions regarding the factual disputes present in any litigation. Appellants have no such reservations concerning the competence of the judiciary, and have readily submitted their dispute over Penal Code section 31910, subdivision (b)(7)(A), to judicial oversight.

Citing *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, respondent asserts that under constitutional analysis, legislation may be based on rational speculation. (Pet. 14.) *Stinnett* is inapposite from the outset because appellants have not raised a constitutional challenge to the enforceability of Penal Code section 31910, subdivision (b)(7)(A), seeking instead to proceed on a theory of declaratory and injunctive relief based on impossible compliance. (JA 13.) But even if appellants had raised a constitutional challenge to the statute, *Stinnett* recognizes that a "wholly arbitrary act" cannot withstand due process analysis. (*Id.* at pp. 146-1427.)

Thus, even the "glancing review of the record" that respondent mentions (Pet. 14) would reveal, as the Court of Appeal 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," because "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." (Slip Op. 10.) Appellants allege that it is impossible to comply with such a dual placement microstamping requirement. (JA 13.) Accordingly, accepting appellants' allegations as true, which a court must do in determining a motion for judgment on the pleadings (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298), demonstrates that Penal Code section 31910, subdivision (b)(7)(A), would not even survive the constitutional analysis employed in *Stinnett*.[5]

2. Civil Code Section 3509 Is Not an Impediment to the Prosecution of Appellants' Action.

Civil Code section 3509 provides that "[t]he maxims of jurisprudence hereinafter set forth are intended not to qualify any of the

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[5] It warrants mention that on remand, appellants would have the right to seek to amend their complaint to add a due process claim under Article I, Section 7, of the California Constitution, which would forever remove any basis for respondent's specious separation of powers argument.

foregoing provisions of this code [*i.e.*, the Civil Code, in which it is contained], but to aid in their just application." Respondent asserts without citation to authority that section 3509 also applies "by implication" to statutes contained in other codes. (Pet. 14-15.)

Several cases contradict respondent's view of the breadth of section 3509. In *McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, the court recognized the important role that a codified equitable maxim, Civil Code section 3517, would play in determining whether a statute of limitations should be enforced, declaring that "[p]rinciples of equity have long been enshrined as a ***vital*** part of California's jurisprudence." (*Id.* at pp. 131, 135, 142; emphasis added.) 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.)

All of the foregoing cases involved the application of codified, equitable maxims to statutes contained in codes other than the Civil Code. Civil Code section 3509 did not restrict those courts from relying on the maxims at issue for that purpose, nor does it restrict the judiciary from applying Civil Code section 3531 to the determination of appellants' impossible compliance claim. In that regard, it is important to note that the court in *Board of Supervisors v. McMahon*, *supra*, certainly did not feel itself constrained by section 3509 from performing an impossibility analysis in reliance on section 3531. (219 Cal.App.3d at pp. 300-301, 303.)

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. (Pet. 15.) That case, however, was decided long before *McMahon*, and as just noted, the *McMahon* court did not feel constrained by either section 3509 or the *One 1940 Ford* case. Moreover, *One 1940 Ford* 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 the statutory compliance at issue in *One 1940 Ford* was found to be plainly possible. (*Id.* at p. 477.)[6]

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[6] 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. (Pet. 15.) *Moore* adds little to the

3. Penal Code Section 31910, Subdivision (b)(7)(A), Cannot Be Saved from Injunction by the Law Applicable to Technology-Forcing Standards.

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, "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.'" (Pet. 15; 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.)

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present analysis, because it contains only a passing reference in dicta to maxims, none of which were at issue in the case. (*Id.* at p. 1012.)

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 Attorney General. Third, appellants do not allege, and respondent does not argue, that any study has ever been conducted showing any reasonable anticipation the 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.

The technology-forcing statutory standards that *American Coatings* court found acceptable were therefore specific to the pollution control industry, and the court did not declare otherwise. Accordingly, absent any showing that the factors on which the *American Coatings* court based its decision apply also to the firearms industry, the case has no persuasive value in this litigation. Rather, the 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. Until that record is developed, review of this litigation by this Court would be premature.[7]

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[7] That respondent would even make an argument relying on technology-forcing standards under the circumstances of this litigation is a tacit admission that respondent in fact is not aware of any expert evidence tending to show that dual placement microstamping technology can ever be developed for semi-automatic pistols. Furthermore, appellants merely ask that the enforcement of Penal Code section 31910, subdivision (b)(7)(A), be enjoined. (JA 16.) Respondent suggests that appellants actually seek to have the statute "removed" (Pet. 13), but enjoining a statute is not the same as "removing" it. If dual placement microstamping technology ever 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.

4. The Opinion of the Court of Appeal Does Not Open the Floodgates to a New Category of Non-Constitutional Challenges to Enacted Legislation.

In the latest iteration of the overused floodgates argument, respondent expresses purported concern that a new category of non-constitutional challenges to enacted litigation will result if the opinion of the Court of Appeal is allowed to stand. (Pet. 6, 15.) In fact, there is nothing radically novel about the opinion of the Court of Appeal. The Court of Appeal simply applied the separation of powers standard recognized long ago by this Court in *City & County of San Francisco v. Cooper*, *supra*, whereby enacted legislation may be challenged by statutory and charter proscriptions, as well as constitutional proscriptions. (13 Cal.3d at p. 915.) Likewise, by remanding this litigation for trial, to allow appellants the opportunity to prove their allegation that Penal Code section 31910, subdivision (b)(7)(A), requires impossible compliance, the Court of Appeal merely followed *Board of Supervisors v. McMahon*, *supra*, which found that, consistent with Civil Code section 3531, the law recognizes exceptions to statutory requirements for impossibility of performance." (219 Cal.App.3d at p. 300.) Indeed, there are only a few cases nationwide wherein the enforcement of statutes has been enjoined on the ground that the statutes required impossible compliance. (*See*, *Buck v. Harton*, *supra*, 33 F.Supp. at pp. 1018-1019, 1021; *Gigliotti v. New York, Chicago & St. Louis Railroad Co.*, *supra,* 107 Ohio App. at pp. 177-178, 181; *Ivaran*

Lines, Inc. v. Farovi Shipping Corp., *supra*, 461 So.2d 123 at pp. 124-126.) The fact that such cases are so rare reveals respondent's floodgates argument for the red herring that it is.[8]

B. THIS COURT SHOULD AWAIT THE DEVELOPMENT OF A COMPLETE FACTUAL RECORD FOLLOWING SUMMARY JUDGMENT OR TRIAL BEFORE ACCEPTING REVIEW OF THIS CASE.

The material previously addressed in this answer to respondent's petition amply demonstrates why it would be premature for this Court to accept review of this case now. The court in *McMahon* performed an extensive factual analysis of the defendant's claim of impossible statutory performance without trying to short circuit the process by granting a pleading motion. Appellants' claim, like the claim of the defendant county in *McMahon*, is fundamentally fact based, as respondent's own counsel

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[8] 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. (Pet. 15.) Respondent's suggestion is illusory, 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. The cases just cited, *Buck*, *Gigliotti* and *Ivaran Lines*, 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. (Slip Op. 11.)

admitted at the hearing on respondent's motion in the trial court for judgment on the pleadings. As respondent's counsel stated, ***"[t]he Court's analysis in McMahon shows that the application of the equitable doctrine of impossibility is fundamentally a fact-based analysis."*** (RT 7:21-23.) This Court should take respondent's counsel at his word, as the Court of Appeal did.

Respondent implies that this case not appropriate for remand because Court of Appeal did not address how a trial on the impossibility issue might proceed. (Pet. 14.) Again, *McMahon* provides the roadmap that respondent seeks, by focusing on the factual nature of the inquiry. Specifically, in this case, the trial would proceed through the expert testimony of persons with knowledge of the state of microstamping technology as it applies to semi-automatic pistols. The scope of the trial in this case will accordingly be narrow.

Appellants rely on the testimony 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.) Mr. Tulleners flatly states in his declarations, supported by pages of explanations referring to all of the parts of a semi-automatic pistol that can accept a microstamped imprint, that it is "***not possible under the current state of firearms micro serial number***

technology to etch or otherwise to imprint, on any interior surface or internal working part of a semi-automatic pistol other than its firing pin, a microscopic array of characters that identify the make, model and serial number of the pistol, and that can be transferred by imprinting on each cartridge case when the pistol is fired." (JA, 10-14, 772; emphasis added.) Respondent has no contrary expert testimony, which explains why respondent has so desperately sought to derail appellants' case through reliance on legal technicalities.

In this fashion, the record developed after summary judgment or trial will show the actual state of the existing technology, and thus will also show whether appellants' allegations that dual placement microstamping is impossible are factually correct. Review of this case by this Court might conceivably be appropriate at some future time, depending on the developments in this litigation. But review should not be accepted now simply on the basis of a judgment resulting from a pleading motion, without the factual record necessary to achieve a reasoned resolution of this very important dispute.

VI. CONCLUSION.

For the foregoing reasons, appellants respectfully request that this Court deny respondent's petition for review.

DATED: January 26, 2017.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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

This answer contains 5,557 words as counted by the Microsoft Word 2010 word processing program that was used to generate the answer.

DATED: January 26, 2017.

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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 January 26, 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):

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Superior Court of the State of California
County of Fresno
The Honorable Donald S. Black
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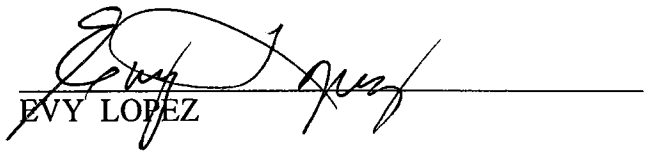
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 26, 2017, at Los Angeles, California.



EVY LOPEZ