

**In the Supreme Court of the State of California**

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

**Plaintiffs and Appellants,**

**v.**

**STATE OF CALIFORNIA,**

**Defendant and Respondent.**

Case No. S239397

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

**REQUEST FOR JUDICIAL NOTICE**

**SUPREME COURT  
FILED**

**JUN 21 2017**

**Jorge Navarrete Clerk**

**Deputy**

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## REQUEST FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452 and 459, and California Rules of Court, rules 8.252(a) and 8.520(g), respondent the State of California hereby requests that this Court take judicial notice of the transcript of the oral argument held on November 11, 2016 in the Fifth District Court of Appeal in *National Shooting Sports Foundation, Inc., et al. v. State of California*, Case No. F072310. A true and correct copy of this transcript is attached hereto as **Exhibit A**.

The Court should take judicial notice of this transcript pursuant to Evidence Code sections 452 and 459. Section 452(d) provides that judicial notice may be taken of “[r]ecords of ... any court of this state,” and section 459 provides that a “reviewing court may take judicial notice of any matter specified in Section 452.” This Court has previously taken judicial notice of transcripts of California court proceedings. (See, e.g. *People v. Lawley* (2002) 27 Cal.4th 102, 116, fn. 2; *In re Pipinos* (1982) 33 Cal.3d 189, 204.) This transcript is relevant because it demonstrates that plaintiffs National Shooting Sports Foundation, Inc. and Sports Arms and Ammunition Manufacturers’ Institute, Inc. are not challenging the law at issue in this case on constitutional grounds. (See Respondent’s Opening Brief on the Merits p. 19; Evid. Code, § 350 [“No evidence is admissible except relevant evidence”]; see also Cal. Rules of Court, rule 8.252(a)(2)(A).)

This transcript was not presented to the trial court. (Cal. Rules of Court, rule 8.252(a)(2)(B).) The transcript relates to proceedings occurring after the trial court entered judgment, but before the Court of Appeal filed its opinion reversing the trial court’s decision. (*Id.*, rule 8.252(a)(2)(D).)



**CONCLUSION**

The State respectfully requests that this Court grant its request for judicial notice.

Dated: June 21, 2017

Respectfully submitted,

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# **EXHIBIT A**





IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

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

November 16, 2016

2424 Ventura Street  
Fresno, CA 93721

The above-entitled matter came on for hearing  
pursuant to notice at 9:00 a.m.

BEFORE: Acting Presiding Justice Levy  
Justice Gomes  
Justice Franson

Official Transcriber: Rosalie DeLeonardis

A P P E A R A N C E S

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I N D E XWITNESSESPageFor the Plaintiffs and Appellants

NONE

For the Defendant and Respondent

NONE

Adjournment

53

Certification of Transcript

54

E X H I B I T S

IDENTIFIED    RECEIVED

For the Plaintiffs and Appellants:

NONE

For the Defendant and Respondent:

NONE

P R O C E E D I N G S

NOVEMBER 16, 2016

FRESNO, CALIFORNIA

9:00 A.M.

1  
2  
3  
4           **JUSTICE:** And at this time the Court will call Case  
5 Number F072310, *National Shooting Sports Foundation, et al.*  
6 *v. State of California.*

7           And, counsel, if you can please state your  
8 appearances for the record.

9           **MR. SELFRIDGE:** Good morning, your Honors. Lance  
10 Selfridge, appearing on behalf of the Appellants, National  
11 Shooting Sports Foundation, Incorporated, and Shooting Sports  
12 and Ammunition Manufacturers' Institute, Incorporated.

13           **MR. KEANE:** Lawrence Keane for the Appellants.

14           **JUSTICE:** Thank you. And is Mr. Selfridge going to  
15 be arguing solo here?

16           **MR. SELFRIDGE:** Yes, your Honor, I will be arguing  
17 solo.

18           **JUSTICE:** Okay. Thank you. Counsel?

19           **MR. RICHARDS:** Good morning. Nelson Richards for  
20 Respondent, State of California.

21           **MR. ESBENSHADE:** Morning. Andrew Esbenshade on  
22 behalf of the Office of the Los Angeles City Attorney as  
23 Amicus Curiae.

24           **JUSTICE:** Great. Thank you all very much. It's a  
25 very interesting case and the Court has spent a significant

1 amount of time on this case, and we appreciate your excellent  
2 briefing and the arguments.

3 And at this time, Mr. Selfridge, you may proceed.  
4 And if you'd like me to tell you when you have a certain  
5 amount of time left, I'd be happy to do so. There is a clock  
6 there on the podium.

7 **MR. SELFRIDGE:** Your Honor, I do plan to reserve ten  
8 minutes of my time for rebuttal, so when I hit the 20-minute  
9 mark, I would appreciate the Court's courtesy in letting me  
10 know?

11 **JUSTICE:** Very well.

12 **MR. SELFRIDGE:** This clock is going to count down  
13 correctly --

14 **JUSTICE:** Yes.

15 **MR. SELFRIDGE:** -- correct? Good morning, and may it  
16 please the Court, appellants seek by this case to enjoin the  
17 enforcement of Penal Code Section 31910, subdivision  
18 (b)(7)(A). That statute requires that all semiautomatic  
19 pistols be imprinted in two or more places with a microscopic  
20 array of characters that identify the make, model, and serial  
21 number of the pistol, and that must transfer upon firing.  
22 For shorthand, I'll call that process dual placement  
23 microstamping from now on.

24 By its very nature as a firearms case, this case is a  
25 matter of public importance, but the case presents itself to

1 this Court now in a much more limited mundane fashion. The  
2 case arrives here on appeal from a judgment of dismissal  
3 following an order of the trial court granting respondent's  
4 motion for judgment on the pleadings without relief to amend.

5 The issue to be decided now is not whether  
6 respondent's policy for semiautomatic pistols is wise, or  
7 even whether appellants will be able to prove the allegations  
8 of their complaint. The issue to be decided now is simply  
9 whether appellants have alleged a cause of action for  
10 declaratory relief. The trial court thought not.  
11 Appellants' respectfully disagree.

12 Appellants allege that is not possible for  
13 manufacturers of semiautomatic pistols to comply with a dual  
14 placement microstamping requirements that the statute  
15 imposes. Specifically, appellants allege that while it is  
16 sometimes possible to imprint a microstamp on the tip of a  
17 pistols firing pin that will transfer upon firing, it is not  
18 possible under the current state of micro engraving  
19 technology to imprint a microstamp on any other surface or  
20 part of a semiautomatic pistol that will transfer upon  
21 firing.

22 **JUSTICE:** Mr. Selfridge, has any manufacturer  
23 attempted to comply with a dual microstamping requirement?

24 **MR. SELFRIDGE:** No manufacturer has submitted a  
25 semiautomatic pistol for certification under the State's

1 program for the reason that they cannot possibly microstamp a  
2 pistol in the dual placement manner that the statute  
3 requires.

4           Civil Code Section 3531 declares unequivocally that  
5 the law never requires impossibilities. Never. Based on  
6 Section 3531, the Court in *Board of Supervisors vs. McMahon*,  
7 which is cited at length in all of the briefs, declared  
8 justice unequivocally that the law recognizes exceptions to  
9 statutory requirements for impossible performance.

10           But the *McMahon* court did not just give lip service  
11 to the defense of impossible performance. It also conducted  
12 a detailed impossibility analysis before holding against the  
13 County of Butte, precisely because the county had not shown  
14 that the statute it -- it contested required impossible  
15 performance. The *McMahon* court recognized that impossibility  
16 of performance is a valid defense to statutory enforcement,  
17 and no published decision has ever contradicted *McMahon* in  
18 doing so.

19           Despite that, the trial court ignored *McMahon's*  
20 holding when it granted respondent's motion for judgment on  
21 the pleadings, and instead relied on *McMahon's* dissenting  
22 opinion, which of course is not the law.

23           **JUSTICE:** Are you just simply asking to go back and  
24 have your day in court for a factual determination by a trier  
25 of fact?



1           **MR. SELFRIDGE:** Your Honor, that is exactly what we  
2 are asking.

3           **JUSTICE:** From what I understand from reading the  
4 record, there were cross motions for summary judgment pending  
5 when this court order came down.

6           **MR. SELFRIDGE:** That is correct. They remain pending  
7 and in limbo at this moment.

8           **JUSTICE:** If it went back down to the trial court,  
9 would those motions be reactivated, that determination be  
10 made or not made based upon --

11           **MR. SELFRIDGE:** I would think so, your Honor. I  
12 would expect the trial court to schedule a case management  
13 conference, and to be apprised of the fact that these motions  
14 remain pending, and then to put them on the court's calendar  
15 for (inaudible).

16           And at that point then they would be opposed, replies  
17 would be written, hearing would be held, and at that point a  
18 factual record of some nature would be generated. The  
19 motions would either be granted or not. If they were not  
20 granted, then it would proceed to trial and a further  
21 factual -- (overlapping) --

22           **JUSTICE:** Would some difference have to be given to  
23 the Department of Justice's certification of the fact that  
24 compliance could be made by the manufacturers?

25           **MR. SELFRIDGE:** No, that's not actually what was

1 certified, your Honor. I'm looking for the statute, so --  
2 here it is. What the Department of Justice certified is that  
3 the technology is available to more than one manufacturer,  
4 unencumbered by any patented restrictions.

5 **JUSTICE:** Right.

6 **MR. SELFRIDGE:** It was primarily a patent concern  
7 that the Department of Justice was concerned with. They did  
8 not want to have a sole source technology.

9 **JUSTICE:** Thank you.

10 **MR. SELFRIDGE:** Thank you for the question.

11 A cause of action for declaratory relief requires  
12 only that an actual controversy exist between the parties  
13 relating to their respective legal rights and duties. Here  
14 respondent insists on compliance with dual placement  
15 microstamping requirements that appellants contend cannot  
16 possibly can be -- cannot possibly be complied with, and thus  
17 need not be complied with under *McMahon*.

18 Respondent has underscored its insistence on  
19 compliance by codifying the dual placement microstamping  
20 requirements in the penal code, the violation of which would,  
21 of course, subject manufacturers of semiautomatic pistols to  
22 criminal sanctions.

23 There could not be a clearer case of an actual  
24 controversy relating to the parties' respective legal rights  
25 and duties. For that reason, appellants have alleged that

1 proper cause of action for declaratory relief by satisfying  
2 the elements of that cause of action.

3 But in its motion for judgment on the pleadings,  
4 respondents -- respondents challenged appellants' declaratory  
5 relief action on the ground that it violates the separation  
6 of powers doctrine. According to that doctrine, as  
7 interpreted by the controlling case of *City and County of*  
8 *San Francisco v. Cooper*, which is also cited at length in the  
9 briefs, the judiciary has no authority to invalidate dually  
10 enactable legislation unless the legislation is subject to  
11 constitutional, statutory, or charter proscription.

12 Respondent inserts that the separation of powers  
13 doctrine applies here because appellants admit that they do  
14 not raise a constitutional challenge to Penal Code Section  
15 31910, subdivision (b)(7)(A). But constitutional statutory  
16 and charter proscriptions all have equal dignity for purposes  
17 of the separation of powers doctrine.

18 Thus, Civil Code Section 3531, which declares  
19 absolutely that the law never requires impossibilities is a  
20 statutory proscription to the enforcement of Penal Code  
21 Section 31910, subdivision (b)(7)(A) as the appellants  
22 allege.

23 It is the same statute upon which the *McMahon* court  
24 based its impossibility analysis, and the *McMahon* court  
25 certainly did not consider it self-constrained by the

1 separation of powers doctrine from performing that analysis.

2           Moreover, there is nothing new or novel about this,  
3 about a court's reliance upon a codified maxim to invalidate  
4 the stature. Appellant cited several such cases in their  
5 briefs where, of course, relied on codified maxims to  
6 invalidate statutes.

7           **JUSTICE:** Counsel, is the impossibility required  
8 here, just alleged, but is impossibility would be required  
9 under current technology and limitations, or for all times?

10           **MR. SELFRIDGE:** Under current technology and  
11 limitations, your Honor. Let me simply provide an example.  
12 500 years ago, Leonardo DaVinci developed a design for a  
13 helicopter. It is the same design and theory upon which  
14 helicopters operate today. Obviously, that is a possible  
15 technology today.

16           But 500 years ago, during the Italian renaissance, it  
17 was impossible to manufacture an engine that produced enough  
18 force to create a downdraft sufficient to elevate a  
19 helicopter. In 1400 or 1500 A.D., that technology was  
20 impossible, and no one would have said otherwise. That's the  
21 situation that we have now.

22           At some time in the future, based upon some  
23 technology not yet imagined by some creative mind, perhaps  
24 somebody will figure out how to -- how to manufacture a  
25 semiautomatic pistol employing dual placement microstamping,

1 but it cannot be done today.

2           And -- and I should mention too, your Honor, this is  
3 a pleading motion that this appeal arises from, but we have  
4 to keep in mind that due to the unusual posture of this case  
5 where the motion for summary -- sorry, the motion for  
6 judgment on the pleadings was brought late after a motion for  
7 preliminary injunction had been heard.

8           There is something of a record already. And in that  
9 record, is the declaration of one Frederick Tolenhurst  
10 (phonetic), who once worked in two of -- matter of fact, once  
11 managed two of respondent's laboratories, who has testified  
12 in his declarations, under oath of course, that it is not  
13 possible to do that. That is uncontradicted.

14           Nowhere in the trial court was a contrary declaration  
15 submitted, nor has there been any indication in any of the  
16 briefs filed by respondent or amicus curiae that it is  
17 possible to microstamp a -- a -- a pistol using the process  
18 of dual placement microstamp.

19           **JUSTICE:** I have just one comment. My rudimentary  
20 understanding of helicopters is that it's not the downdraft  
21 that makes it works. It's the lift.

22           **MR. SELFRIDGE:** Well, it's a good thing I'm not  
23 piloting one. I think I belong here and not behind the  
24 stick.

25           Let's return to *McMahon* for a moment. *McMahon's*

1 footnote 11 states that because of the court's decision, the  
2 court need not reach any separation of powers issues.  
3 Respondent and the trial court rely on that footnote, but  
4 they do so without any good reason.

5 All that the *McMahon* court was saying in footnote 11  
6 is that after performing its impossibility analysis, and  
7 having found no factual basis to enjoin the statute at issue  
8 because it did not require impossible compliance, there was  
9 no reason to consider the separation of powers doctrine  
10 because only the issuance of an injunction might possibly  
11 have violated that doctrine.

12 If conversely the *McMahon* court had issued an -- an  
13 injunction upon the finding impossibility, then the *Cooper*  
14 case would have required a finding that Civil Code Section  
15 3531 operated as a statutory proscription of the separation  
16 of powers doctrine. In that event the *McMahon* case, in  
17 effect, would have become this case.

18 While the *McMahon* court did not actually invalidate  
19 the statute at issue because the county failed the  
20 impossibility test that the court performed, other cases from  
21 across the nation have invalidated statutes on the ground that  
22 they did require impossible compliance. A number of those  
23 cases are cited in the appellants' briefs. In particular, I  
24 would direct the Court to pages 28 and 29 of appellants'  
25 opening brief.

1           The important point to note from *McMahon's* treatment  
2 of the impossibility issue, and from the treatment of the  
3 impossibility issued by the cases from California's sister  
4 jurisdictions, is that impossibility presents a factual issue  
5 which must be decided by the trier of fact, not a legal issue  
6 that can be determined on a pleading motion.

7           The impossibility of compliance that appellants have  
8 alleged is thus the ultimate fact that supports appellants  
9 cause of action for declaratory relief.

10           Respondent's own counsel forthrightly acknowledged  
11 the factual nature of the impossibility defense to statutory  
12 compliance while arguing in support of respondent's motion  
13 for judgment on the pleadings in the trial court. Because  
14 impossibility presents a factual issue, it cannot be resolved  
15 on a pleading motion such as that, which has generated this  
16 appeal.

17           By properly alleging the actual controversy between  
18 the parties as to whether Penal Code Section 31910,  
19 subdivision (b)(7)(A), requires impossible compliance,  
20 appellants have done all that they need to do under their  
21 cause of action for declaratory relief to advance to trial,  
22 or at least to the cross motion for summary judgment that  
23 were pending when respondent's motion for judgment on the  
24 pleadings was mistakenly granted.

25           Both respondent and amicus curiae argue in their

1    respective briefs that there are ways for the manufacturers  
2    of semiautomatic pistols to comply partially with the  
3    statutes dual placement microstamping requirements.  
4    Initially that would violate the statute.

5           Dual placement microstamping is dual placement  
6    microstamping. You either put it in two places or you don't.  
7    And if you don't, you haven't complied. But it's not  
8    necessary to consider any issue of partial compliance now  
9    because impossibility, as we've been discussing, is a factual  
10   issue, and no sufficient factual record has yet been  
11   developed with respect to respondent's motion for judgment on  
12   the pleadings.

13           So while it does not matter for purposes of  
14   determining the pleading motion that -- underlying this  
15   appeal, nevertheless, both methods of partial compliance that  
16   respondents and amicus curiae suggest are illusory.

17           First they suggest that manufacturers could comply by  
18   imprinting microstamps on the firing pins of semiautomatic  
19   pistols, but -- I should say by imprinting both microstamps  
20   on the firing pins of semiautomatic pistols -- but any such  
21   purported compliance would not meet the requirement that  
22   semiautomatic pistols be microstamped in two places. In  
23   other words, it would violate the statute.

24           The legislative history uniformly states that the  
25   second place to be microstamped must be some surface or part



1 of a semiautomatic pistol other than the firing pin.

2 Respondent has never been able to rebut appellants'  
3 contention that the legislative history can be interpreted --  
4 can only be interpreted in this way, and thus Penal Code  
5 Section 31910, subdivision (b)(7)(A), has never reflected the  
6 legislature's intent.

7 Second, respondent and amicus curiae suggest that  
8 manufacturers could comply with these statutes, dual placement  
9 microstamping requirements, by the simple expedient of just  
10 not shipping any semiautomatic pistols into California for  
11 sale. That is not statutory compliance, your Honors. That  
12 is statutory avoidance.

13 It would deny appellants' manufacturing members of  
14 the right to engage in commerce that would be lawful, but for  
15 the impossible dual placement microstamping requirements with  
16 which they cannot possibly comply.

17 That suggestion would also prevent the courts of this  
18 state from ever invalidating any statute requiring impossible  
19 compliance regardless of how properly arbitrary the  
20 requirements of the statute were.

21 The partial compliant arguments that respondents and  
22 amicus curiae make are simply counterintuitive. Prior to the  
23 certification of Penal Code Section 31910, subdivision  
24 (b)(7)(A), the annual market for semiautomatic pistols in  
25 California was worth approximately \$183 million. That is not

1 surprising because California is the largest statewide market  
2 in the nation.

3 And no industry in the exercise of rational business  
4 sense with would sacrifice so much valuable business by  
5 refusing to comply with statutory requirements with which it  
6 had the ability to comply.

7 And, hence, back to the Court's question, that is why  
8 no pistols have been submitted for certification to one of  
9 the state's laboratories.

10 The point strenuously advanced by respondent that no  
11 manufacturer has submitted a single microstamp pistol for  
12 certification by a state sanctioned laboratory proves only  
13 that it is not possible to microstamp a pistol in such a way  
14 as to make the pistol compliant with the statues dual  
15 placement microstamping requirements.

16 But in the final analysis, your Honors, this appeal  
17 presents a simple pleading issue. Appellants' contend that  
18 they have properly alleged their cause of action for  
19 declaratory relief, and that they should have the opportunity  
20 to prove, either at trial or through the pending motions for  
21 summary judgment, that it is indeed impossible to comply with  
22 the dual placement microstamping requirements of Penal Code  
23 Section 31910, subdivision (b)(7)(A), as they allege.

24 To proceed through a determination of this case on  
25 its merits, appellants need only allege the ultimate fact of

1 impossible compliance, and they have plainly done that. They  
2 have satisfied the element of the cause of action for  
3 declaratory relief that they assert.

4 If appellants are successful at trial or upon summary  
5 judgment, then California law will allow the trial court to  
6 enjoin the enforcement of that statute.

7 And if there are no further questions from the Court  
8 at this point, I will yield the floor.

9 **JUSTICE:** Thank you, Mr. Selfridge.

10 **MR. SELFRIDGE:** Thank you, your Honors.

11 **JUSTICE:** Mr. Richards?

12 **MR. RICHARDS:** Good morning. May it please the  
13 Court. Appellants asked this Court to invalidate  
14 California's commonsense and gun microstamping law in all its  
15 applications, and enjoin state officials from enforcing that  
16 law. They do this --

17 **JUSTICE:** Well, is that what they're asking? Is that  
18 what they're really asking? They're asking, are they not,  
19 that because this was a judgment on the pleadings, we must  
20 accept as true their claim that it's impossible to microstamp  
21 a semiautomatic pistol in a place other than the firing pin,  
22 and ask for fact -- factual finding regarding that issue,  
23 which may or may not be able to be proved?

24 **MR. RICHARDS:** And the -- the ultimate endpoint of  
25 that inquiry would be to invalidate the law and all of its

1 application.

2 **JUSTICE:** If they prevail.

3 **MR. RICHARDS:** If they prevail, that is correct. And  
4 so we can look to that endpoint and see that that endpoint is  
5 -- the request is essentially a request to have the -- the  
6 statute invalidated in all its application to enjoin the  
7 state from enforcing the law, which is tantamount to a repeal  
8 of the law.

9 **JUSTICE:** But that's not the question before us.  
10 That's not our job. Isn't our job to decide if they made a  
11 proper allegation in their pleading?

12 **MR. RICHARDS:** Yes.

13 **JUSTICE:** And if they have, send it back down for  
14 factual evidentiary determination?

15 **MR. RICHARDS:** Your -- your job is to assess the --  
16 the pleadings, and -- and the state's position is, that as a  
17 matter of law, the pleadings are defective. This is not a  
18 factual --

19 **JUSTICE:** How are they defective?

20 **MR. RICHARDS:** Because they are challenging the  
21 legislatures policy determination that microstamping is  
22 possible. That is inherent in the -- in the statute itself.

23 The statute mandates that for all new semiautomatic  
24 pistols sold in the state, they comply with the microstamping  
25 requirement.

1           **JUSTICE:** And they said it's an impossibility, and we  
2 have to accept it for purposes of our hearing today that's  
3 true. Right?

4           **MR. RICHARDS:** And -- and what that does is that  
5 puts -- accepting that factual allegation is true, what's --  
6 what's the -- what's their alleg -- what's their complaint  
7 and their allegations in -- in contrast or in conflict with a  
8 legislatures determination that this technology is possible  
9 and is required.

10           **JUSTICE:** Well, if it's physically impossible to  
11 comply with the statute, how can the law be considered other  
12 than arbitrary or irrational?

13           **MR. RICHARDS:** That -- that is a possible theory on  
14 which they could have attacked the law. Arbitrary and  
15 irrational is a due process challenge to the law. And the --  
16 and the appellants' here have disavowed any constitutional  
17 challenge to the law.

18           They've had ample opportunity over the course of this  
19 case, in the complaint, in the various brief in the trial  
20 court, and their brief in -- brief in this case to -- to  
21 point out a constitutional problem, a second amendment --

22           **JUSTICE:** No, I --

23           **MR. RICHARDS:** -- challenge --

24           **JUSTICE:** -- understand. We --

25           **MR. RICHARDS:** -- or due process issue.

1           **JUSTICE:** -- (overlapping) constitutional challenge  
2 here?

3           **MR. RICHARDS:** Yes.

4           **JUSTICE:** But is it your position that the doctrine  
5 of impossibility does not apply to any statute passed by the  
6 legislature and signed by the governor?

7           **MR. RICHARDS:** It's the same position that the --  
8 that the doctrine impossibility cannot be used by courts to  
9 invalidate a statute in all its applications, which as I said  
10 earlier, would be tantamount to repealing that statute  
11 because that would encroach upon the legislatures authority  
12 under the constitution under Article III, Section 3 of the  
13 California Constitution.

14           **JUSTICE:** Clearly if -- if the legislature passes and  
15 the governor signs a statute that the judiciary ultimately  
16 finds unconstitutional, that's appropriate under the  
17 separation of powers, correct?

18           **MR. RICHARDS:** That is correct, that is the -- the  
19 concept, the principle of judicial review, which is limited  
20 to the review of statues for constitutional violations.

21           **JUSTICE:** So if the legislature passes and the  
22 governor signs a statute that it is ultimately found  
23 impossible to comply with, is it your position that the  
24 judicial branch does not have the authority to make that  
25 determination relating to impossibility?

1           **MR. RICHARDS:** It does not have the authority to  
2 evaluate that statute for impossibility outside the context  
3 of a constitutional challenge.

4           **JUSTICE:** Period?

5           **MR. RICHARDS:** Period. And that is in a nutshell  
6 the -- the principle of this case is distilled to its basics.  
7 There's no such thing as a nonconstitutional facial  
8 challenge. It just doesn't exist.

9           The appellants have cited no case from -- from this  
10 state, from any of the sister states, or from the federal  
11 courts where a court has invalidated a statute based on  
12 nonconstitutional grounds, invalidate a statute and all its  
13 application -- all its applications on nonconstitutional  
14 grounds. They've cited no case where that's happened.

15           They simply don't exist because that would violate  
16 the separation of powers doctrine. It's -- it's the court  
17 sitting as a super legislature deciding that the  
18 legislature's policy determinations are incorrect.

19           **JUSTICE:** So it's your position that Civil Code  
20 Section 3531 just doesn't apply in this case?

21           **MR. RICHARDS:** It doesn't apply in this case because  
22 it is a facial challenge to invalidate the law and all its  
23 applications. There may be scenarios where it could apply in  
24 an as-applied context, and that's what *McMahon* was, *McMahon*  
25 was an as-applied a -- assertion of -- of impossibility as a

1 defense to -- to -- to a statute, which, as appellants' point  
2 out, the Court rejected and there, again, are numerous  
3 problems with *McMahon* that make it in (inaudible) here, but  
4 the -- it could apply in certain context. Whether it applies  
5 here or not, I think is -- it's barred by the doctrine of  
6 separation of power.

7           So the -- what appellants' have done here is they've  
8 cited a series of cases and -- and -- and really misread and  
9 are asking this Court to misapply them. In the -- the two  
10 main cases, as the appellants mentioned in their opening, are  
11 the *Cooper* case and the *McMahon* case.

12           Now, *Cooper* is a separation of powers case, and it  
13 recognized that in the absence of the constitutional  
14 restriction that the courts cannot second guess a -- a -- the  
15 legislature's policy determination. This has been repeated  
16 in numerous cases. The *County of Mendocino* case that we  
17 cited in our brief, for example, this principle.

18           However, *Cooper* is different in that it was  
19 evaluating local ordinances. And in that context, the court  
20 said in the absence of some overriding constitutional,  
21 statutory, or charter proscription, the judiciary has no  
22 authority to invalidate the (inaudible) Act of legislation.

23           Now, the court thought this point was important  
24 enough to repeat it three times in its decision. So if you  
25 look at the case page 905, 915, and 918, it repeats this --



1 this -- the same language again and again. Two of those  
2 times the court makes clear that its holding is targeted at  
3 ordinances enacted by local governments.

4 On page 905 and 918 the court says in the absence of  
5 a constitutional, statutory, or charter provision prohibiting  
6 local legislative bodies from exercising legislative power,  
7 it's not only a legal strike, the judiciary has no authority  
8 to second-guess that.

9 And, again, on 918 it repeat -- they repeat that --  
10 that limiting language about local governments, which make  
11 sense because local governments can't enact ordinances that  
12 contradict state statutes, and that is a constitutional  
13 requirement, that's preemption. The *Fiscal* case that we  
14 cited in our brief has a pretty thorough discussion of that  
15 concept.

16 But Article 11 of the California Constitution, just  
17 like Article VI of the Federal Constitution, provides that  
18 statutes that conflict with the higher authority are invalid,  
19 that's a constitution analysis. And, again, appellants have  
20 cited no case from anywhere where the court has held a  
21 statute invalid because it conflicts with another statute  
22 that is not preempting that statute.

23 **JUSTICE:** Counsel, would it -- would it be your  
24 position, I assume, maybe I'm wrong, that the demur  
25 originally should not have been overruled?

1           **MR. RICHARDS:** The demur should -- the demur  
2 (inaudible) granted did not raise the separation of powers  
3 issue, and probably because there was some uncertainty about  
4 what the complaint was asserting. It was only after the  
5 demur process that it became clear that -- that there was a  
6 separate of powers issue that they were -- that the  
7 appellants, their plaintiffs, were not asserting any  
8 constitutional violation, and that's what really triggered  
9 the separation of powers problem, which lead to the motion  
10 for judgment on the pleading.

11           **JUSTICE:** And so that's why you didn't follow up on  
12 the overruling of the demur? It wasn't clear at that point?

13           **MR. RICHARDS:** And -- and I -- I don't believe we had  
14 any -- any way to seek review other than perhaps by an  
15 extraordinary writ, but we, you know, we -- we're -- we were  
16 confident at that we would be able to file a motion for  
17 judgment on the pleadings and -- and that it would be  
18 successful.

19           And, again, the -- the trial court was -- was --  
20 was -- was right when it said that the plaintiffs' concerns  
21 about their inability to comply, for the legislature, not for  
22 the courts to decide, that -- that conclusion was -- was  
23 correct.

24           **JUSTICE:** So the legislature has all the power?

25           **MR. RICHARDS:** No. No.

1           **JUSTICE:** Has all powers to -- they -- we -- I guess  
2 it's your position, correct me if I'm wrong, that -- that --  
3 that we must defer to the findings of the legislature at all  
4 times, even a nonconstitutional challenge?

5           **MR. RICHARDS:** In a nonconstitutional challenge, yes.  
6 In part because there is no such thing as a facial  
7 nonconstitutional challenge. This case is sui generis.  
8 There's no other case that we've been able to find and  
9 appellants have been able to find where a court has  
10 invalidated the statute on nonconstitutional grounds.  
11 They -- they just don't exist because, for the very practical  
12 reason, that they would run up against this problem with  
13 separation of powers.

14           And we cited, for example, the *Montesano's* (phonetic)  
15 case in our brief that says that the -- the authority to  
16 repeal a statute is a legislative function, and as -- and  
17 invalidated in the statute and all its applications and  
18 enjoin the state from enforcing it, as I said earlier, this  
19 tantamount to repeal, and that would -- that would transgress  
20 the legislatures authority to -- to make policy  
21 determinations.

22           **JUSTICE:** Back to my -- back to my original asking  
23 about the demur. So you were confident that you would win  
24 on -- judgment on the pleadings?

25           **MR. RICHARDS:** Yes -- (overlapping) --

1           **JUSTICE:** You -- you trusted -- you trusted your  
2 legal position in the trial court?

3           **MR. RICHARDS:** Once -- once it became clear that the  
4 separation of powers issue was present, we were -- we were  
5 confident that we could resolve the matter that way rather  
6 than by seeking an extraordinary writ, and so that -- that --  
7 seeking -- seeking an extraordinary writ is quite difficult,  
8 so --

9           **JUSTICE:** But you knew what would happen after, if  
10 you -- if you won the -- in the trial court judgment on the  
11 pleading?

12           **MR. RICHARDS:** Yeah.

13           **JUSTICE:** I mean, you had a pretty good idea. You're  
14 in the business.

15           **MR. RICHARDS:** Yes. And the arguments that are being  
16 made are no -- are no surprise, that -- that is -- that is  
17 true. And the appellants have framed this is they want their  
18 day in court, they want their ability to -- to have a factual  
19 hearing on this, but that -- that very request itself  
20 transgresses this -- the legislature's authority because you  
21 have a single trial court judge who's limited by the court's  
22 scheduling and funding, limited by its jurisdiction, limited  
23 by the rules of evidence, and the rules of procedure, sitting  
24 in judgment of the factual determinations that the  
25 legislature made that was bound by none of those things.

1           And that is -- that is -- that is a problem with --  
2 with what the appellants' want. They want a single judge to  
3 decide what the legislature concluded was possible was not  
4 possible, and that is -- that type of conflict is -- is at  
5 the heart of the separation of powers doctrine. I think,  
6 again, the -- the *Cooper* case is instructive because of  
7 really wonderful discussion of the history of this juris  
8 prudence.

9           Going back to the *Fletcher v. Peck* case in 1810,  
10 Justice Marshall's decision, it said that the court wouldn't  
11 hear a challenge to a Georgia statute based on allegations  
12 that that statute was enacted by -- by means of bribery, so  
13 this goes back to 1810.

14           The California Supreme Court followed *Fletcher v.*  
15 *Peck* in 1855 in the *People v. Bigler* case where it was  
16 alleged that General Vallejo had bribed the legislature to  
17 move the state capital from San Jose to Vallejo, and there  
18 the Supreme Court said, no, we're not going to dig into this,  
19 we're not going to -- we're not going to accept these  
20 allegations.

21           And in a sense, the challenge here, while slightly  
22 different, is very similar. It's a request that the court  
23 dig into the legislatures conclusions and the reasons for  
24 making those decisions and second-guess and reevaluate those,  
25 and that just doesn't happen. It's not permitted by the

1 constitution. It's not permitted by the separation --

2           **JUSTICE:** Is your distinction between a legislative  
3 act and a board of supervisors or a lesser legislative body,  
4 or is the analysis the same, it must be a constitutional  
5 challenge?

6           **MR. RICHARDS:** Yes.

7           **JUSTICE:** And not impossibility?

8           **MR. RICHARDS:** Yes.

9           **JUSTICE:** What was the political posture of the  
10 *McMahon* case, the -- the factual determination?

11           **MR. RICHARDS:** The procedural posture of *McMahon*?

12           **JUSTICE:** Yeah.

13           **MR. RICHARDS:** It was an appeal from a -- a -- I  
14 believe a grant of a preliminary injunction, so it was an  
15 interlocutory appeal from the trial granting an  
16 interlocutory -- granting a preliminary injunction saying  
17 that the County of Butte did not have to pay into a federal  
18 welfare program for --

19           **JUSTICE:** And there was evidence introduced and  
20 factual determinations made?

21           **MR. RICHARDS:** Um --

22           **JUSTICE:** Or not made -- or not proven, I guess.

23           **MR. RICHARDS:** I'm -- I'm -- I'm not -- I'm not  
24 aware, I don't recall what happened exactly in the -- in the  
25 trial court in *McMahon*, other than the court of appeal noted

1 that there were several defects with the county's arguments,  
2 several which are present here.

3 For example, the court in *McMahon* faulted the County  
4 of Butte for asserting -- for asserting impossibility and  
5 seeking to have all of its compliance absolved when  
6 substantial compliance was possible. And that same defect,  
7 while separate from the separation of powers issue, is  
8 present in this case because the appellants have conceded  
9 they can partially comply, the partial compliance, the  
10 microstamping law is possible.

11 They said here today that they could put the fire --  
12 the microstamp on the firing pin of a gun. So they -- there  
13 are -- their theory has the same defect that the County of  
14 Butte's theory had in *McMahon*.

15 **JUSTICE:** But that wouldn't comply with the statute  
16 if it -- if both -- are you -- are you implying that they  
17 could put two microstamps on the pin; is that what you're  
18 saying?

19 **MR. RICHARDS:** That -- that is one way they could  
20 attempt to comply, and this gets to a bigger issue in the  
21 case that -- that -- that gets actually to the question that  
22 you asked of the appellants at the opening argument whether  
23 anyone has attempted to comply, and with respect, I don't  
24 think appellants answered your question. They said no one  
25 has submitted an application to the Department of Justice.

1 That does not answer the question has anyone attempted to  
2 comply.

3 In the trial court in their discovery they  
4 acknowledged that they didn't ask any of their manufacturing  
5 members whether they had attempted to comply, so we don't  
6 know what firearms manufacturers are capable of doing; what  
7 technology they have.

8 **JUSTICE:** But do you agree that, according to the  
9 statute, there would have to be a dual placement of the  
10 microstamping on the pin and at least one other place in the  
11 firearm?

12 **MR. RICHARDS:** I think that -- that -- that we would  
13 need firearms manufacturers to -- to submit -- to submit a --  
14 a firearms for -- for testing and -- so that the Department  
15 -- the Bureau of Firearms could evaluate the firearm for  
16 compliance with the -- with the law.

17 We know from the -- the regulations implementing the  
18 statute that all that's necessary to pass is that there be  
19 marks on the firearm after the -- the proscribed firing test  
20 that allow them to identify the -- the firearm from -- from  
21 the -- from the shell casing, so it needs to be one complete  
22 legible mark, either solo or in combination of the two, that  
23 will allow --

24 **JUSTICE:** Supposed to be two. The -- the -- the  
25 statute says two, correct?



1           **MR. RICHARDS:** Yes, but -- but -- but the -- the --  
2 the bureau has interpreted the statute as saying that there  
3 would need to be two, but to pass the test, make the gun  
4 lawful for sale in California, it would need to have one  
5 legible mark at the end so that -- the firearm could have two  
6 microstamps on it, but still pass the test if only one of  
7 those is generating a legible mark.

8           **JUSTICE:** Well, in the initial -- this legislation,  
9 as I know you're aware, it went through a number of  
10 iterations throughout a period of time. Initially there was  
11 just going to be one mark on the pin, and ultimately it was  
12 determined, because there was concern about defacing of the  
13 pin or removing the pin, that there needed to be another  
14 place where the marking microstamping would take place,  
15 correct?

16           **MR. RICHARDS:** Correct. And -- and that's something  
17 that would -- that would, I think, be developed through the  
18 process of -- of -- of firearm's manufacturers submitting --  
19 submitting a firearm for testing.

20           That process would also allow them to do what the  
21 *McMahon* court says was important and necessary for  
22 impossibility challenge of showing what steps they've taken  
23 to comply with the law. How hard have they tried to comply?  
24 What efforts have they've taken? What investigation have  
25 then done?

1           **JUSTICE:** But what --

2           **MR. RICHARDS:** Right now we have none of that.

3           **JUSTICE:** But what if it was determined -- that was  
4 impossible, that was not possible to achieve?

5           **MR. RICHARDS:** And this -- this gets back to Justice  
6 Gomes question to -- to the appellants, which is what if it  
7 were not possible under the current state of -- of  
8 technology, and -- and -- and there's -- there's two answers  
9 to that.

10           The first is, this is not unheard of in the context  
11 of legislation. What are called technology forcing or  
12 technology driving laws and regulations occur quite -- quite  
13 frequently, particularly in the context of environmental laws  
14 and regulation, and specifically with -- in the Clean Air Act  
15 and -- and the related statutory schemes implementing that.

16           So this idea that you can impose a requirement that  
17 isn't currently technologically possible, but that -- that  
18 will be is something that's recognized in the law. And under  
19 the appellants' theory, all those laws would be subject to  
20 challenge. All those attempts, the regulation would be  
21 subject challenge.

22           The second, and this is another way that this case  
23 is -- is distinguishable from *McMahon* is that in *McMahon*, the  
24 County of Butte was required to pay. They had to take money  
25 out of it coffers and pay them to the federal government.

1 They had no option. If they didn't do that, it was going to  
2 be subject to some sort of legal challenge or writ of  
3 mandate, or something along those lines.

4 But here they -- the -- the manufacturers can comply  
5 by continuing to sell their arms that are already on the  
6 roster, and by -- by selling revolvers, for example, they  
7 just wouldn't be able to sell new model semiautomatic  
8 pistols, and they can comply that way. And indeed, Smith and  
9 Wesson, when the law was enacted, said that it wasn't going  
10 to bother to try to comply with the law. Said it was -- it  
11 was not willing to comply and it wasn't going to do it.

12 Which goes to -- this goes to two things in this  
13 case. One, had there been any efforts to comply; and, two,  
14 they can actually comply with the law as it's written. No  
15 one is subjecting Smith and Wesson to any sort of criminal  
16 liability or civil liability for not selling firearms in the  
17 state, they're just not doing it -- or, excuse me, they're  
18 not selling their new model semiautomatic pistols. They can  
19 continue to sell the firearms that are on the roster, the  
20 approved firearm.

21 **JUSTICE:** Mr. Richards, let me pose a hypothetical to  
22 you. What if the legislature passed and the governor signed  
23 a bill -- you mentioned clean air -- passed a bill signed by  
24 the governor that required, because of concerns about the  
25 clean air in California and the great cost of maintaining our

1 highways and the drain that that put -- puts on the state  
2 treasury, that by January 1, 2019, vehicles in California all  
3 had to be -- had to operate like hovercrafts, air, the auto  
4 manufacturers, other groups bring action, declaratory relief,  
5 injunctions, saying there's just no way we can do that by  
6 2019, if ever; how would you respond to that challenge? Not  
7 possible to do that.

8           **MR. RICHARDS:** The -- I mean, it -- it would depend  
9 on how the -- if -- if you're talking about a legal challenge  
10 in the complaint, if they tried to bring it under the -- the  
11 civil code impossibility section --

12           **JUSTICE:** Correct.

13           **MR. RICHARDS:** -- that -- that -- that complaint  
14 would fail and would fail for essentially poor strategic  
15 decision-making.

16           In your scenario, they -- they very well could bring  
17 a rational basis challenge on the -- on the grounds that, you  
18 know, requiring hovercrafts is patently ridiculous and  
19 they -- they -- they could probably bring that -- that type  
20 of -- that type of challenge, but it would be a  
21 constitutional challenge, and that's -- that's again, getting  
22 back to what -- what's the suit really about.

23           For a court to sit in judgment of the legislatures  
24 determinations as a whole, and to be able to invalidate them  
25 as a whole, and prevent them from being enforced, the court

1 has to use the constitution. It can't rely on -- on -- on  
2 other statutes that the legislatures enacted.

3 Put it differently, if, for example, this -- this --  
4 this -- this case were reversed and the legislature decided  
5 to repeal the section of the civil code dealing with  
6 impossibility, there'd been no more claim. So it doesn't  
7 make sense that the legislature enacted this law with the  
8 impossibility rule on the books only so that it can be  
9 invalidated for impossibility grounds when they have the  
10 control to repeal the impossibility requirement themselves.

11 **JUSTICE:** Well, that -- that -- the impossibility  
12 requirements been on the books for a long time.

13 **MR. RICHARDS:** It -- it -- it certainly has, but it's  
14 still a law --

15 **JUSTICE:** Since 18 -- since 1872.

16 **MR. RICHARDS:** That is -- that is correct, but it is  
17 still a law that the legislature can in -- and placed on the  
18 books and repeal at its will. And if it did repeal it, then  
19 there would be no impossibility challenge. And that's --  
20 again, that's sort of the point.

21 The legislature has the control here. It can't  
22 contravene the state or federal constitution, but out --  
23 outside of that, it's -- it's authority to act is plenary,  
24 and we cited the cases in our brief that -- that support that  
25 proposition.

1           And, again, appellants, in talking about *McMahon*,  
2 referred to footnote 11, the reading of that's not really  
3 supported by the case. I mean, the court's pretty clear  
4 saying we're not going to reach the issues because we're  
5 rejecting the challenge. Court's do that all the time.  
6 We're going to reject the claim that you believe you brought  
7 because -- and we're not going to reach the difficult  
8 constitutional questions it raises.

9           But the appellants didn't discuss footnote 10, which  
10 talked about Code of Civil Procedure 526, which is the  
11 statutory recognition of the separation of powers principles,  
12 that courts are not allowed to enjoin state officials from  
13 enforcing statues for the public benefit. And the four  
14 exceptions to that doctrine, or that rule on 526, reflect the  
15 contours of the separation of powers doctrine.

16           So, again, the -- the -- the statute, Section 526, is  
17 really just, you know, a mirror image of the argument that  
18 we're making, that courts cannot do what appellants have  
19 asked here. Absent the constitutional challenge, courts  
20 don't have that authority.

21           And unless the Court has any further questions, we're  
22 prepared to concede the remainder of the time to Mr.  
23 Esbenshade.

24           **JUSTICE:** Thank you very much, Mr. Richards.

25           **MR. RICHARDS:** Thank you.

1           **JUSTICE:** Mr. Esbensshade?

2           **MR. ESBENSHADE:** Good morning, your Honors. Andrew  
3 Esbensshade on behalf of the Office of Los Angeles City  
4 Attorneys, amicus curiae. I appreciate the opportunity to  
5 address you.

6           I had two points I wanted to address briefly. I'm  
7 actually going to go to the second because it seems more in  
8 line with the questions so far and the discussion, which is  
9 that even if impossibility could be a legitimate challenge to  
10 the statute at issue, appellants' argument would still fail  
11 at the outset.

12           There are, at least, but there are two reasonable  
13 interpretations of the statute with regard to where the  
14 microstamps must be placed on the firearm. Under one of  
15 these interpretations, which is placing two microstamps on  
16 the firing pin, appellants have conceded that compliance is  
17 possible. They have also --

18           **JUSTICE:** I thought they --

19           **MR. ESBENSHADE:** They conceded --

20           **JUSTICE:** -- Mr. Esbensshade, that -- that -- that  
21 issue was discussed during the legislative process, and was  
22 it not determined that because of the problems relating to  
23 the defacing of the pin, or removal of the pin, that the  
24 microstamping needed to be put in two places, one, perhaps on  
25 the pin, and another -- and another place inside the gun of

1 the chamber?

2           **MR. ESBENSHADE:** Well, your Honor, that's a -- I was  
3 going to get to that because you had raised that before, and  
4 while there is certain language that has been pulled out  
5 legislative history by appellants, that language regarding  
6 the firing pin and one other surface for a -- a -- a verific  
7 -- verification other than the firing pin is not in the  
8 legislation itself. The legislation simply says two or more  
9 places.

10           And there is a good reason why there might be two  
11 microstamps as opposed to one, even if both are on the firing  
12 pin, and that is that sometimes microstamps are not fully  
13 legible when they come off. But if there are two of them,  
14 then you might get a partial print effectively, a partial  
15 reading on one and the rest from the other, or you might get  
16 one that survives and the other does not.

17           So it certainly makes sense for the legislature to  
18 consider the possibility that two could both be on the firing  
19 pin. And, again, the language of the statute itself, which  
20 is what ultimately was passed, does not say anything about  
21 the firing pin and a different location. It says two or more  
22 places.

23           That simply means under, you know, basic grammar  
24 rules, it's not in the same place. They're not on top of  
25 each other, anywhere else it could be, and I think the key



1 point is that, although appellants could do that and have  
2 conceded they could put two firing -- two microstamps on the  
3 firing pin, they have not tried, they have not submitted  
4 anything to the attorney general or Department of Justice.

5 They have also not inquired whether that would meet  
6 the statute, and I think that this goes to an issue that came  
7 up during Mr. Richards' argument, which is the facial versus  
8 as-applied challenge. The statute specifically provides that  
9 the interpretation -- the interpretation is to go; the  
10 methods of compliance are to be determined by the state.

11 That has not been allowed to happen because no one  
12 has submitted anything to know is the state going to  
13 interpret a method of compliance as being two microstamps on  
14 a firing pin, or are they going to say, no, one has to be on  
15 something other than the firing pin.

16 That is why it is beneficial to courts to see how a  
17 statute is interpreted, particularly when a statute itself  
18 provides that the state is to come up with the methods of  
19 compliance, there is a method in place, the attorney  
20 general -- the Department of Justice have put forth  
21 guidelines and would look at any firearms submitted until  
22 appellants, if they submitted something, or one of their  
23 members or -- or a manufacturer submitted something, they  
24 would then know is that permissible or not, they would then  
25 be able to come to a court and say we have now been

1 determined not to be meeting the statute.

2 **JUSTICE:** Which branch would the attorney general's  
3 bureau fit in?

4 **MR. ESBENSHADE:** Which -- well, that would be part  
5 of -- it's not -- I probably should defer, but I would say  
6 the attorney -- I would say the executive as carrying out the  
7 legislation.

8 **JUSTICE:** How does that fit with the separation of  
9 powers? Mr. Richards's basic argument that this a  
10 legislative thing, everybody else stay out until there's an  
11 allegation that your -- your violated and you're going to  
12 prison, then everybody gets involved.

13 **MR. ESBENSHADE:** Subject to my not being -- speaking  
14 on behalf of the attorney general's office certainly, or the  
15 state, I would say that legislature passed the legislation,  
16 we know what the legislation says. The legislation  
17 specifically says that --

18 **JUSTICE:** You just told -- told me that you don't  
19 know what the legislation says because the -- the attorney  
20 general's office hasn't issued a -- a testing result or an  
21 opinion on whether it could be stamped twice on by the firing  
22 opinion.

23 **MR. ESBENSHADE:** Yes, your Honor, I know, but I do  
24 know --

25 **JUSTICE:** Well, what --

1           **MR. ESBENSHADE:** -- what the statute --

2           **JUSTICE:** -- wouldn't dec relief case, if it proceeds  
3 to summary judgment, wouldn't that supply the answers that  
4 we're talking about not having?

5           **MR. ESBENSHADE:** I believe, again, and on behalf of  
6 my client amicus, that that would simply replace the -- the  
7 statutory mandate that the Department of Justice determine  
8 methods of compliance with a court making that determination.

9           In fact, it is for the executive branch to implement  
10 the statute and then, as applied, the courts can determine  
11 whether that application in a particular instance is --  
12 violates the constitution in some cases where there's a  
13 constitution challenge, here there is none, so it would  
14 simply be is that a -- a proper determination that can be  
15 upheld under the law.

16           So, again, I think, just looking at this passage of  
17 the statute, the implementation and determination of methods  
18 of compliance by the Department of Justice, and then any  
19 challenge it wants to admit on as by basis, now we've skipped  
20 the second step because appellants have jumped right into  
21 court, and because they have not made any attempt to actually  
22 submit a firearm that might or might not be deemed to comply,  
23 or -- or made any inquiry saying if we were to do this, would  
24 that comply with the sections. There's been no effort at  
25 all. It's simply their arguing --

1           **JUSTICE:** So your client, your amicus client.

2           **MR. ESBENSHADE:** Yes, sir.

3           **JUSTICE:** The concern there is really the pleadings,  
4 the -- the procedural issues, that it's the cart before the  
5 horse?

6           **MR. ESBENSHADE:** That is one of the concerns, and  
7 it's a concern that seems to me follow your Honor's question,  
8 so it was the area I wanted to focus on.

9           But, yes, that certainly is one concern, challenging  
10 the statute before it has had an opportunity to be  
11 implemented by the Department of Justice, given their  
12 interpretation as to how they're going to implement it, and  
13 then made a determination on that basis.

14           And, again, appellants have taken this position where  
15 they are arguing -- I won't characterize it, but they are  
16 arguing for the harshest or most difficult to comply with  
17 interpretation only then argue that because it has a  
18 difficult to comply with interpretation, we cannot comply  
19 with it, whereas they've conceded there's another  
20 interpretation which -- which -- with which they could comply  
21 technologically, and there's no disagreement on that.

22           So I think even on the face of a record before your  
23 Honor is including in their brief, it's on page 17 of the  
24 response to the amicus, I think it's also in their other  
25 briefing, and today Mr. Selfridge has indicated that there's

1 no dispute that putting micro -- two microstamps on the  
2 firing pin would be possible.

3           The question is would that comply with the statute as  
4 interpreted by the Department of Justice, and that problem is  
5 we don't know what that answer is because they have not made  
6 that effort, and I think that step has been skipped in the  
7 appropriate process.

8           I had another point, but frankly I'm probably over my  
9 time and I think -- unless your Honors have any questions.

10           **JUSTICE:** Thank you, Mr. Esbenshade.

11           **MR. ESBENSHADE:** Thank you, very much.

12           **JUSTICE:** Appreciate it. Mr. Selfridge?

13           **MR. SELFRIDGE:** I think in rebuttal, your Honor, I  
14 would like to start by focusing a little bit more attention  
15 on -- on the *Cooper* case.

16           The *Cooper* case plainly holds in disjunctive language  
17 that a constitutional, statutory, or charter proscription is  
18 sufficient to take a case outside of the operation of the  
19 separation of powers doctrine.

20           Mr. -- Mr. Richards made an attempt to distinguish  
21 that case on -- on the facts, but the fact of the matter  
22 remains that those -- that is the standard for -- for the  
23 separation of powers doctrine. *Cooper* was the seminal case  
24 issued by the California Supreme Court, but it's been -- that  
25 same language has been quoted numerous times since then down

1 to today.

2           **JUSTICE:** Let me ask you this: Mr. Richards said  
3 that there's no cases ever held -- or upheld a  
4 nonconstitutional challenge like the one you're making.

5           **MR. SELFRIDGE:** My very next point. My very next  
6 point is that there most certainly are, and I am going to  
7 call them to the court's attention.

8           They are cases from sister jurisdictions. There --  
9 there's no case in California that has invalidated *McMahon*.  
10 Obviously, *Cooper* remains good law in California. But the --  
11 the -- the cases are the following, *Buck v. Harton*, a  
12 Tennessee case, and it will be found on appellants' opening  
13 brief at page 28, where the court says, and I'm paraphrasing  
14 slightly for simplicity, Because of impossibility,  
15 complainants were entitled to a degree -- decree granting a  
16 permanent injunction restraining defendants from bringing or  
17 permitting to be brought any proceeding at law or inequity  
18 for the purpose of enforcing said statute against  
19 complainants.

20           Cited on the next page of appellants' opening brief,  
21 page 29, the case of *Gigliotti v. New York, Chicago & St.*  
22 *Louis Railroad Company*, an Ohio case, the case said, quote,  
23 If a statute apparently requires the performance of something  
24 which cannot be performed, a court may hold it inoperative,  
25 unquote.

1           And then the last one to be found on the same page of  
2 appellants' opening brief, 29, *Ivaran Lines, Incorporated v.*  
3 *Farovi Shipping Corporation*, a Florida case. In accordance  
4 with the prevailing law, violation of a statute or regulation  
5 is excused where it appears without dispute that compliance  
6 with the statute is impossible, even in the exercise of  
7 reasonable diligence.

8           My research did not reveal any contrary holdings  
9 across the United States. This seems to be a matter of law  
10 recognized throughout our nation. It seems to be a matter of  
11 law recognized in our state.

12           Now Justice Levy raised a point, which I think is  
13 really extremely important in a question that was posed.  
14 Justice Levy said, essentially to Mr. Richards, Well, then  
15 the legislature has all power, doesn't it? Well, no, it  
16 doesn't. This is America. The legislature cannot require  
17 the impossible. Courts do have the power to enjoin  
18 legislatures when they've stepped out of bounds, and --  
19 and -- and so I think that question from the bench pretty  
20 much hit the -- hit the nail right on the head.

21           Now, to -- to go on, I find it important and  
22 consistent that Mr. Richards, once again, acknowledged that  
23 the *McMahon* court did, in fact, make factual findings. He  
24 acknowledged that below. He acknowledged that again today.  
25 It's true and undisputed. It conducted an impossibility

1 analysis based upon factual -- factual determinations.

2 And that gets back to the main issue before this  
3 panel today, which is that this is a pleading motion. We are  
4 not asking the Court to make any determine -- ultimate  
5 determinations of fact in in case, that's to be done after  
6 there is a determination on a factual determination on the  
7 record, which has not yet happened in the trial court.

8 Ultimately. all this Court has to do is to except the  
9 allegations of impossibility that appellants have made as  
10 true, and send the Court -- send the case back to the trial  
11 court where it will proceed, first through summary judgment,  
12 and then through -- if -- if the cross motions are both  
13 denied, then through trial, and perhaps someday it may come  
14 here again. Perhaps someday it may go up from here.

15 **JUSTICE:** Counsel, why didn't you bring a  
16 constitutional challenge?

17 **MR. SELFRIDGE:** We didn't bring a constitutional  
18 challenge because we brought an impossibility challenge  
19 instead. We thought that was --

20 **JUSTICE:** Why? Why didn't you?

21 **MR. SELFRIDGE:** Because there is a constitutional  
22 case pending in federal court in Sacramento, *Pena v. Lindley*,  
23 I believe. Stephen Lindley is the -- I forget his exact  
24 title, but I believe he's the director of the state's firearm  
25 program, that brought the constitutional issue.



1           And so since that was being -- that was proceeding in  
2 federal court, as it should, a -- a second amendment case  
3 should be there and not here, we -- we decided we would focus  
4 our efforts here on -- on -- on the matters of state law, the  
5 matters of impossibility.

6           And -- and to answer the question more directly,  
7 those are the issues that are most important to trade  
8 associations. My -- my clients are trade associations. One  
9 is a trade association of manufacturers. The other is a  
10 trade association that concerns the provocation of standards  
11 --

12           **JUSTICE:** What about a non-second amendment  
13 constitutional challenge?

14           **MR. SELFRIDGE:** We did not bring any. I mean, the --  
15 the challenge, if it had been constitutional --

16           **JUSTICE:** Well, I know you did -- I know you didn't,  
17 and you explained why you didn't bring the second amendment.  
18 I was wondering why you didn't bring another constitutional  
19 challenge on a different ground?

20           **MR. SELFRIDGE:** Because the constitutional challenge  
21 would have been the second amendment ground. That is the  
22 constitutional challenge --

23           **JUSTICE:** Okay.

24           **MR. SELFRIDGE:** -- to this -- to this -- to this  
25 statute, and in -- in time, that constitutional challenge may

1 prevail --

2           **JUSTICE:** Is that constitutional -- Mr. Selfridge, is  
3 that constitutional challenge in Sacramento federal --  
4 federal court, correct?

5           **MR. SELFRIDGE:** Yes.

6           **JUSTICE:** Is that related to the same statute?

7           **MR. SELFRIDGE:** Yes.

8           **JUSTICE:** Okay.

9           **MR. SELFRIDGE:** Yes, it is. But consider it, if you  
10 will, your Honors, a matter of commodity between -- between  
11 the industry and between other associations such the National  
12 Rifle Association and the California Second Amendment  
13 Foundation, those are the entities that general present the  
14 federal constitutional issues.

15           As I said, my clients are trade associations, and it  
16 seemed more appropriate for my clients to be bringing an  
17 impossibility issue that was directly related to the  
18 manufacturing, and to bring that under the law of our state.

19           Mr. Esshanobby (phonetic) -- I'm sorry, did I  
20 pronounce the name correctly?

21           **MR. ESBENSHADE:** Esbenshade.

22           **MR. SELFRIDGE:** Esbenshade. I do apologize. I try  
23 to pronounce people's names correctly. I grew up never  
24 having mine pronounced correctly.

25           Mr. Esbenshade mentioned that there are two

1 reasonable interpretations of the statute. Well, I'm not  
2 sure that's true, but even if it is, it creates an ambiguity.  
3 But he did say that the -- that certain -- that we simply  
4 pulled certain language out of the legislative -- out of the  
5 legislative history, and -- and I -- and I think that that is  
6 giving the legislative history less -- less do than --  
7 than -- than it is entitled to.

8           There is no contrary legislative history to what I'm  
9 about to read to the Court now. There's about 1463 pages of  
10 legislative history, if I recall correctly. I've read every  
11 one of them. And these two -- these two quotations I'm about  
12 to read are reflective of everything else that is in there as  
13 to the location of the two microstamps requiring -- required  
14 by the dual microstamping process.

15           This technology consists of engraving microscopic  
16 characters onto the firing pin and other interior surfaces  
17 which would be transferred onto the cartridge casing when the  
18 handgun is fired. There could be no doubt that that means  
19 that the second place is somewhere other than the pin.

20           And then going on. Proponents of the bill argue that  
21 countermeasures can be taken by the manufacturer to prevent  
22 circumvention of the technology. Specifically, they suggest  
23 that parts of the gun that come into contact with the bullet  
24 casing, other than the firing pin, can be similarly micro  
25 engraved to make filing the engraving away more difficult.

1           Those -- those capture in a nutshell what the  
2 legislature wanted when it enacted Penal Code Section 31910,  
3 subdivision (b)(7)(A), and unfortunately, what the  
4 legislature did was enact a statute that appellants now  
5 allege to be impossible to comply with.

6           And that takes us back to where we all began at about  
7 an hour ago, what is the real purpose for being here today?  
8 The purpose for being here today, the purpose for which  
9 appellants have -- have brought this appeal is so that they  
10 can have their day in court.

11           We only have a pleading motion in front of this panel  
12 today. We are only asking this panel to recognize that we  
13 have satisfied the elements of alleging a cause of action for  
14 declaratory relief, and to send that cause of action back to  
15 the trial court down the street where we can work the case  
16 through summary judgment, perhaps through trial if necessary,  
17 and obtain the factual determinations that we need in order  
18 to reach a determination on the merits of this case of  
19 extreme public importance.

20           **JUSTICE:** Thank you, Mr. Selfridge.

21           **MR. SELFRIDGE:** Thank you to the panel.

22           **JUSTICE:** And all counsel, we really appreciate your  
23 outstanding, very good presentation here. An excellent job,  
24 all of you, and very -- your arguments were outstanding, and  
25 as we already mentioned previously, your briefings, so it's

1 really a pleasure to -- to watch you all practice your craft,  
2 and thank you for your planned efforts. Travel safe, and the  
3 matter will be deemed submitted.

4 **(Hearing Adjourned.)**

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CERTIFICATE OF TRANSCRIPT

I, Rosalie DeLeonardis, hereby certify that this transcript is a true, complete, and accurate transcription of the recording of the proceeding that took place on NOVEMBER 16, 2016 before ACTING PRESIDING JUSTICE LEVY, JUSTICE GOMES, and JUSTICE FRANSON, In the Court of Appeal of the State of California, Fifth Appellate District, in the matter of *NATIONAL SHOOTING SPORTS FOUNDATION, INC., et al. v. STATE OF CALIFORNIA*, Case No. F072310. This is the original transcript, and the statements that appear in this transcript were transcribed by me to the best of my ability. Executed under penalty of perjury in Elk Grove, California on the 20<sup>th</sup> day of April, 2017.

*Rosalie DeLeonardis*

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**DECLARATION OF SERVICE BY U.S. MAIL**

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

I declare:

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

On June 21, 2017, I served the attached **REQUEST FOR JUDICIAL NOTICE** 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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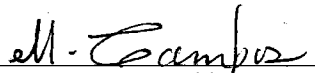
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 21, 2017, at San Francisco, California.

\_\_\_\_\_  
M. Campos  
Declarant

\_\_\_\_\_  
  
Signature

