In the Supreme Court of the State of California

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

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA,

Defendant and Respondent.

Case No. S239397

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
NELSON R. RICHARDS
Deputy Attorney General
*SAMUEL P. SIEGEL
Associate Deputy Solicitor General
State Bar No. 294404
1300 I Street
Sacramento, CA 95814
(916) 210-6269
Sam.Siegel@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

The Legislature was fully aware of the debate over the feasibility of handgun "microstamping"—an emerging technology that promised to assist law enforcement in solving and preventing crimes—when it considered adding that requirement to the list of criteria that new models of semiautomatic pistols must meet before they can be sold in California. During those deliberations, Appellants National Shooting Sports Foundation, Inc. and Sporting Arms and Ammunition Manufacturers' Institute, Inc. (collectively NSSF), among others, expressed to the Legislature their strong views that the technology was not ready for implementation. Still, the Legislature decided to create an incentive for industry to embrace and advance the technology by enacting the statute challenged here. (Pen. Code, § 31910, subd. (b)(7).) After the law's effective date, new models of semiautomatic pistols cannot be added to the State's roster of guns certified for sale in California unless they come equipped with technology that imprints a microscopic array of identifying characters unique to the gun on each fired cartridge, or some equally effective alternative technology capable of connecting a spent cartridge to a particular gun. (*Ibid.*) Manufacturers that elect not to implement such technology, or that cannot do so as a practical matter, are limited to selling the hundreds of handgun models already on the approved-for-sale list.

NSSF advances a number of arguments to support the Court of Appeal's judgment, which would grant NSSF an evidentiary hearing on the question of whether it is "impossible" to implement microstamping technology, and for a court to invalidate the law on that basis. It contends that: courts are generally empowered under separation of powers principles to set aside laws that are "palpably arbitrary" (Answer Brief on the Merits (ABM) 10, 26-28); Civil Code section 3531, a maxim, has "the same operative force" as other statutes and operates to strike down any law that,

as a factual matter, is impossible to comply with (ABM 10, 36-42); case law—primarily *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, and three out-of-state cases—support its freestanding, non-constitutional impossibility claim (ABM 42-45, 53-61); its impossibility claim does not present a separation of powers issue because it is not a challenge to the wisdom of the microstamping law (ABM 29-32); and the Legislature's prerogative to engage in technology forcing is limited, requiring a showing that the technology is achievable and, in any event, is specific to the pollution context (ABM 32-36).

These arguments, addressed in more detail below, are without merit. While it is correct that a law may be challenged on the ground that it is arbitrary, that is a *constitutional* claim, generally brought under the Due Process Clause. Below, NSSF made clear that it was not pursuing any constitutional claim, leading the trial court to dismiss its maxim-based complaint without leave to amend. A due process claim would not allow NSSF to put the Legislature's implied findings and policy determinations on trial, as NSSF seeks to do in this case. And that constitutional claim would undoubtedly fail, because the microstamping law is rationally related to the Legislature's goal of solving and preventing crimes.

Further, NSSF fundamentally misconstrues the maxims' function. None of the many cases and secondary sources discussed by NSSF supports its claim that a court may strike a law down on its face because it purportedly conflicts with a maxim. To the contrary, those authorities are consistent with the State's position that a maxim, at most, can permit a court to excuse a party's failure to comply with the letter of a statute, where ordering such compliance would be inconsistent with the statute's intent. And NSSF's own description of the evidentiary case it wishes to present demonstrates that recognizing its novel, freestanding "impossibility" claim

would draw courts into policymaking decisions that, under the separation of powers doctrine, are for the Legislature alone to make.

The Legislature elected to enact a technology-forcing statute, which it was empowered to do. NSSF is certainly free to attempt to make the case that dual-microstamping and alternative technologies remain imperfect ten years after the Legislative adopted the microstamping law, and that the law should now be discontinued. But NSSF must make those arguments to the Legislature, not the courts.

ARGUMENT

I. A CLAIM THAT THE MICROSTAMPING STATUTE IS "ARBITRARY" ON ITS FACE IS A CONSTITUTIONAL CLAIM—A CLAIM THAT NSSF DID NOT PURSUE AND THAT WOULD, IN ANY EVENT, FAIL

As it did in the courts below, NSSF attempts to portray its freestanding impossibility claim as not so novel. It argues that this claim is consistent with "long-established authority" permitting judicial review of laws that are "palpably arbitrary." (See, e.g., ABM 62; see also ABM 10 ["This case ... presents an issue of fundamental fairness"].) It is not.

By itself, the contention that the judiciary may annul laws that are facially "arbitrary" or "irrational" is uncontroversial. (*Beeman v. Anthem Prescription Mgmt., LLC* (2013) 58 Cal.4th 329, 363.) But the avenue through which a party raises such a challenge is a constitutional due process claim. (See, e.g., *id.* at p. 363; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 297 (*Garamendi*); see also *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1030 [argument that government action is "intrinsically arbitrary and irrational" is "best understood as a claimed violation of substantive due process"].) As NSSF has repeatedly stated, it is not pursuing a constitutional claim. (See, e.g., State's Request for Judicial Notice, Ex. A, pp. 48-49 [representation from NSSF's counsel at court of appeal argument that NSSF was not "bring[ing] a constitutional

challenge"]; see also 1 JA 93, 95; 4 JA 592-593; 6 JA 1166, 1170 [granting State's motion to dismiss without leave to amend].) And this Court has long held that the Legislature has "'the *actual* power to pass any act it pleases,' subject only to those limits that may arise elsewhere in the state or federal Constitutions." (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 498, quoting *Nougues v. Douglass* (1857) 7 Cal. 65, 70, italics in original.) While courts may review and annul unconstitutional laws, they may not invalidate statutes "by injunction or otherwise" for other reasons. (*Nougues*, *supra*, 7 Cal. at p. 70; see also Opening Brief on the Merits (OBM) 26-29.)

Lockard v. City of Los Angeles (1949) 33 Cal.2d 453, which NSSF discusses at length, does not hold otherwise. (See ABM 26-28.) The Court there rejected a due process challenge to Los Angeles's zoning ordinances. (*Lockard*, *supra*, 33 Cal.2d at p. 468.) That *constitutional* inquiry required the Court to assess whether the land use scheme was "arbitrary or unreasonable," or whether the legislative decision was "clearly and palpably wrong." (*Id.* at p. 461.) The Court held that the zoning laws at issue passed that permissive test, and upheld them accordingly. (*Id.* at p. 468.) *Lockard* does not, as NSSF contends, recognize an extra-constitutional basis on which courts may "set aside" a statute. (ABM 27-28.) Instead, that case unequivocally declares that the judiciary has a "duty to *uphold* the legislative power," unless it "exceed[s] constitutional limitations." (*Lockard, supra*, 33 Cal.2d at pp. 461-462, italics added.)

Moreover, NSSF does not dispute that its asserted impossibility claim differs from a due process claim in several important respects. (See OBM 33-36.) If accepted, NSSF's theory would alter the relevant inquiry from a legal question about what the Legislature might rationally have concluded in deciding to adopt the microstamping law (see *In re Jenkins* (2010) 50 Cal.4th 1167, 1181) into a dispute about the underlying facts.

(See discussion at OBM 34-35.)[1] For example, NSSF's "impossibility" trial would require a court to determine whether the technology "violates the laws of physics" and attempt to determine whether it is ever "achievable." (ABM 33.) It would also mean that a statute's enforceability would turn on the adversarial process, the parties' resources, and the rules of evidence, discovery, and personal jurisdiction. (See OBM 34-35; see also ABM 17-18 [arguing that microstamping law's author's statement on the technology's feasibility should be ignored as "inadmissible hearsay"].) In addition, NSSF's claim would impermissibly circumvent those constitutional review standards that are designed to preserve the Legislature's authority whenever possible—including the requirement that courts resolve doubts about a law's constitutionality in "'favor of the Legislature's action,'" (*Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692 citation omitted), and the presumption in favor of upholding laws challenged as arbitrary and capricious under the Due Process Clause (*Garamendi, supra*, 8 Cal.4th at p. 292). (See also OBM 35-36.) NSSF's novel, non-constitutional claim would subvert the careful balance our Constitution strikes between the legislative and judicial branches, and should be rejected.

In any event, there is no reasonable argument that the microstamping law is constitutionally arbitrary. (See ABM 63, fn. 23 [summarily contending that a due process challenge to the microstamping law "would be meritorious"].) Under the Due Process Clause, legislative choices are

---

[1] NSSF suggests at various places that the State has admitted certain factual propositions or that certain evidence is uncontroverted. (See, e.g., ABM 9, 14, 16-18, 34, 35.) In fact, discovery was proceeding when the trial court granted the State's motion for judgment on the pleadings, and no trial had yet taken place. (1 JA 1160-1175.) The Court of Appeal reversed and remanded for a trial on "impossibility." (Opn. 8, 12.)

"not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data[.]" (*Jenkins*, *supra*, 50 Cal.4th at p. 1181, citation, quotation marks, and italics omitted.) All that is required is a "'reasonably conceivable set of facts'" demonstrating a rational relationship between the law and its goals. (*Garamendi*, *supra*, 8 Cal.4th at p. 292, citation omitted.) Here, a reasonable legislator could have rationally concluded that untraceable firearms pose unique public safety threats. And—with or without the evidence presented in the course of considering the bill—the Legislature could have "rational[ly] speculat[ed]" that the dual-microstamping requirement (or some equally effective alternative) was technologically feasible, or that it was appropriate to create an incentive for the industry to develop and implement such technology. (*Jenkins*, *supra*, 50 Cal.4th at p. 1181.)[2] Nothing more is required to sustain a law challenged as constitutionally arbitrary.

II. THE MAXIMS OF JURISPRUDENCE DO NOT AUTHORIZE COURTS TO ENTERTAIN FREESTANDING "IMPOSSIBILITY" CLAIMS

As the State explained in its opening brief, the maxims of jurisprudence do not permit courts to enjoin enforcement of later-enacted laws. (OBM 20-24.) The maxims are instead interpretive aids that help courts "just[ly] appl[y]" statutes (Civ. Code, § 3509), and assist them in their effort to "ascertain and effectuate" the Legislature's intent when construing laws (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012 (*Moore*)). They do not, however, "qualify" other provisions of the Civil Code. (Civ. Code, § 3509.) And they may not be

---

[2] Indeed, in this case, the Legislature received a presentation depicting microstamped cartridges that had been fired from pistols equipped with characters etched onto the gun's breech face—that is, a part other than the gun's firing pin. (See RA 65-67; see also OBM 13-16.)

applied in a way that precludes enforcement of the express terms of later-enacted statutes. (See *Rossi v. Brown* (1995) 9 Cal.4th 688, 715 [one Legislature "may not bind future" ones].) Consistent with these principles, this Court has squarely held that a statute's "express terms" may not be "nullified or defeated" by a maxim. (*People v. One 1940 V-8 Coupe* (1950) 36 Cal.2d 471, 476; see OBM 22-24.)[3] And it has declared that the maxims may not be applied in a manner that would "frustrate the intent underlying the statute." (*Moore*, *supra*, 2 Cal.4th at p. 1012.)[4]

NSSF disputes this understanding of the maxims. (See ABM 37-39.) In its view, section 3531 carries the "[f]orce of [l]aw," and entitles NSSF to seek a "'judicial declaration'" that the microstamping law is "'invalid and cannot be enforced'" because it is impossible to comply with. (ABM 36-38, quoting 1 JA 15.) But NSSF identifies no authority that supports its expansive conception of the maxims. And many of the sources discussed by NSSF confirm that the maxims serve only as interpretive guides that—at most—allow courts to decline to order strict compliance with a statute, where doing so would produce a result that the Legislature did not intend when it adopted the law.

---

[3] NSSF contends that *Ford V-8 Coupe* "acknowledged" that the idle acts maxim has "operative force," allowing courts to override statutory terms. (ABM 49-50.) To the contrary, the Court clearly and repeatedly rejected the bank's efforts to apply a maxim in a way that would have "nullified or defeated" the statute's "express terms." (*Ford V-8 Coupe*, *supra*, 36 Cal.2d at p. 476; see also *ibid.* ["Since the investigation was not made, [the bank's] interest is forfeited ... and the provision of section 3532 of the Civil Code cannot avail to prevent it"].)

[4] NSSF attempts to dismiss *Moore*'s conclusion as "dicta" (ABM 51, fn. 18), but the Court's clear and unequivocal statement that "any maxim of jurisprudence" may not be applied to "frustrate the intent underlying the statute" is consistent with longstanding precedent. (*Moore*, *supra*, 2 Cal.4th at p. 1012; see also *ibid.* [collecting cases].)

For example, one article that NSSF quotes at length explains that the impossibility canon directs courts "faced with *ambiguous statutes*" to avoid interpretations that would impose an "impossibly onerous" burden on a party. (Scott, *Codified Canons and the Common Law of Interpretation* (2010) 98 Geo. L.J. 341, 395, italics added; see ABM 40-41.) Where one interpretation of a statute would produce "unworkable results," the article argues, the impossibility maxim counsels courts to avoid it. (*Ibid.*) More generally, the article describes the maxims as tools that help courts remedy "imperfections in the legislative process" and address a law's "unforeseen consequences." (*Id.* at p. 390; see also OBM 20-24 [describing maxims in similar terms].) But nowhere does the author suggest that a court may rely on a maxim to nullify a law. To the contrary, his explanation of the maxims' function illustrates why NSSF's understanding of them is incorrect. In this case, NSSF does not rely on the impossibility maxim to advocate one interpretation of an otherwise "ambiguous statute." (Scott, *supra*, at p. 395.) Nor does it argue that a particular interpretation of the microstamping law should be avoided because that construction would produce "unworkable results." (*Ibid.*) Its claim also does not seek to remedy an unintended consequence of the statute. (*Id.* at p. 391)[5] Instead, NSSF seeks a court order that would prevent the State from enforcing the Legislature's expressly stated goal: to require all new models of semiautomatic pistols proffered for sale in California to come equipped with a "microscopic array" of identifying characters etched on "two or more" internal working parts, or some equally effective alternative of

---

[5] Indeed, the alleged technological challenges that give rise to NSSF's suit were hardly "unforeseen" by the Legislature. (Scott, *supra*, at p. 390.) NSSF and others raised these same concerns to the Legislature and the Governor during their deliberations about the bill. (See OBM 12-16.) The Legislature elected to proceed.

connecting a spent cartridge to the gun from which it was fired. (Pen. Code, § 31910, subd. (b)(7).) NSSF's requested relief would be entirely inconsistent with the maxims' purpose: to help courts "ascertain and effectuate" the Legislature's purpose when interpreting statutes. (*Moore*, *supra*, 2 Cal.4th at p. 1012.)[6]

The judicial authorities that NSSF cites also do not support its claim that a court may rely on section 3531 to enjoin another statute. Like the Court of Appeal, NSSF relies heavily on *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, labeling it the case "central to the determination of this appeal." (ABM 55; see also Opn. 8.) But as the State explained in its opening brief, *McMahon* does not hold that a party may assert a facial challenge to a statute based solely on section 3531. (See OBM 24-26.) Instead, that case supports—at most—the uncontroversial proposition that a court may rely on its equitable powers to excuse a specific, individual failure to perform a statutory duty "where circumstances make such performance impossible." (*McMahon*, *supra*, 219 Cal.App.3d at p. 299.) *McMahon*'s implicit recognition that a party may raise a fact-specific impossibility defense does not support the very different assertion that a court may rely on the impossibility maxim to

---

[6] The other article that NSSF discusses at length is also inapposite. (See ABM 41-42.) That author advocates for a rule that would permit courts to relieve a party from a statute's requirements for a short period of time while also ordering compliance "as immediately as feasible." (Plater, *Statutory Violations and Equitable Discretion* (1982) 70 Cal. L. Rev. 524, 580.) Whatever the wisdom of such a rule, here, NSSF does not seek a temporary reprieve from the microstamping law. Instead, it asks for a judicial declaration that the statute's requirements are "not achievable at any time" and an order striking down the statute on its face. (ABM 33.)

support an affirmative cause of action and authorize a court order that would nullify a statute altogether.[7]

This Court's decision in *Sutro Heights Land Co. v. Merced Irrigation District* (1931) 211 Cal. 670, is similarly limited. (ABM 59-61.) There, a group of landowners sued an irrigation district, arguing that the Drainage Act of 1907 required the district to install "suitable drainage works" on their properties. (*Sutro Heights*, *supra*, 211 Cal. at p. 699.) The Court held that the plaintiffs were not entitled to an order directing the district to perform, because it would have brought "financial ruin upon the district." (*Id.* at p. 703.) When the Legislature adopted the Drainage Act of 1907, the Court reasoned, it did not intend for the law to be applied in a manner that would "work [a district's] destruction." (*Ibid.*) Stated differently, the Court held that the judiciary should not issue an order compelling "'technical compliance with the letter of the law, where such compliance will violate the spirit of the law.'" (*Id.* at p. 705, citation omitted.)

NSSF's affirmative lawsuit is plainly different from the impossibility defense raised by the irrigation district in *Sutro Heights*. There, the district requested that the Court not order specific performance in a suit to enforce the Drainage Act. Here, NSSF seeks a blanket declaration that the microstamping statute is "invalid as a matter of law," and a court order enjoining the State from "taking any action to enforce" it. (1 JA 16-17.) And in *Sutro Heights*, the irrigation district prevailed because the relief sought by the opposing party would have produced a

---

[7] NSSF appears to acknowledge that *McMahon* is narrow, noting at several points that the court there held only that section 3531 may be used as a "defense to the enforcement of a statute." (ABM 55; see also ABM 56, 57, 58 [similar].)

result inconsistent with the Legislature's intent when it adopted the Drainage Act. Here, in contrast, NSSF seeks a court order that would prevent the Legislature's clear directive from having any force at all, and would thwart the intent of the microstamping law.[8]

NSSF's three out-of-state authorities are likewise inapposite. (ABM 42-45.) Not one concludes that a court may enjoin a State from enforcing a law in all of its applications because it is impossible to comply with. Two hold only that a party may assert impossibility as a defense to negligence per se claims under a specific set of facts. Thus, in *Gigliotti v. New York, Chicago & St. Louis Railroad Co.* (Ohio Ct.App. 1958) 157 N.E.2d 447, the court held that negligence could not be predicated on a train's failure to comply with a statutory requirement that it sound its whistle at least "80 rods" (1,320 feet) before a crossing, because the distance between the train's point of departure and the crossing where the accident occurred was only 33 feet. (*Id.* at pp. 451-452.) For similar reasons, the court in *Ivaran Lines, Inc. v. Waicman* (Fla.Ct.App. 1984) 461 So.2d 123, held that a shipping company that sent a stolen car overseas without first obtaining a statutorily required certificate of right of possession from the sender was

---

[8] The three additional California cases that NSSF briefly alludes to are consistent with the State's position here. (ABM 47-48.) They hold only that a court may excuse a party from strict compliance with a statute under limited, fact-specific circumstances, where ordering compliance would produce an unjust or irrational result. (See *McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 142 [party may be excused from statute of limitations where its delay was induced by other party's wrongdoing]; *Booska v. Patel* (1994) 24 Cal.App.4th 1786, 1789-1792 [landowner does not have absolute right to sever roots of neighbor's tree, but instead must do what is reasonable under the circumstances]; *Jacobs v. State Bd. of Optometry* (1978) 81 Cal.App.3d 1022, 1030 [plaintiff seeking writ of mandate to compel organization to change its membership criteria need not submit application to join organization before filing writ where organization has already informed him that it would not be accepted].)

not liable to the vehicle's true owner. (*Id.* at pp. 124-125.) The company's failure to comply with the statute was justified, the court held, because the State had not made the necessary forms available before the shipping date. (*Id.* at pp. 124-126.) And in the third extra-jurisdictional case discussed by NSSF—*Buck v. Harton* (M.D. Tenn. 1940) 33 F.Supp. 1014—a three-judge district court struck down the law at issue not because it was impossible to comply with, but instead because it violated several constitutional provisions. (*Id.* at pp. 1020-1021.)

NSSF raises two further arguments premised on its incorrect understanding of the maxims. First, NSSF argues that the separation of powers *requires* courts to invalidate statutes that are impossible to comply with, because no other "constitutional provision, statute or charter provision ... overrides" section 3531. (ABM 45-46.) If section 3531 is to be deprived of its "operative force," NSSF argues, it is the "Legislature, not the judiciary" that must "undertake that task." (ABM 47.) Second, NSSF argues that the Legislature must intend section 3531 to operate as a "statutory proscription to the enforcement" of the microstamping law, because it has not repealed it. (ABM 48-49.) Both contentions assume that the maxims have the "operative force" that NSSF ascribes to them: that they are "statutory proscriptions" that the Legislature intended to control later-enacted statutes, and on which courts may rely to strike down later-enacted statutes. For the reasons discussed above and in the State's opening brief (OBM 20-24), the maxims do not give courts this power.[9]

---

[9] In any event, NSSF's assertions that a court must give effect to the first of two irreconcilable statutes, and that the Legislature must repeal section 3531 to protect its subsequent enactments from freestanding impossibility challenges, are at odds with a basic rule of statutory interpretation: where two statutes conflict and cannot be harmonized, courts

(continued...)

III. THE SEPARATION OF POWERS DOCTRINE PROHIBITS COURTS FROM ANNULLING STATUTES BASED ON AN ASSERTED CONFLICT WITH A MAXIM

NSSF argues that its construction of the maxims presents no separation of powers problem. (ABM 25-36.) This too is incorrect. The separation of powers doctrine prohibits one branch from "arrogat[ing] to itself the core functions of another branch." (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297.) The Legislature is vested with the power to make laws; that power is one of its "core functions." (*Id.* at p. 299; see also Cal. Const., art. IV, § 1.) And while courts may "pass[] upon the constitutional validity" of the Legislature's actions, their power to review and enjoin statutes extends no further. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53; see also OBM 26-28.) This limitation on judicial review is not an end to itself. Instead, it affords the political branches the latitude necessary to respond to public concerns as they arise, and ensures that courts do not "sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (*Estate of Horman* (1971) 5 Cal.3d 62, 77; see also OBM 29.)

NSSF's attempt to analogize this case to *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45 (*Mendocino*), falls short. (ABM 29-31.) There, the Court held that a law permitting counties to designate days on which courts could not be in session did not violate the separation of powers doctrine because the statute did not "'materially impair'" the courts' ability to fulfill their constitutional functions. (*Mendocino*, *supra*, 13 Cal.4th at pp. 58, 66, citation omitted.) In reaching that conclusion, the

---

(...continued)
must "give effect to the *more recently enacted* law." (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7, italics added.)

Court recognized that one branch of government may "exercise a degree of oversight" of another without offending the separation of powers doctrine. (ABM 29.) But that general proposition does not support NSSF's novel request for a court order declaring an *otherwise constitutional* statute void based on the court's independent assessment of the law's effectiveness. The judiciary "overs[ees]" the Legislature's enactments by "pass[ing] upon the constitutional validity" of the laws it adopts. (*Mendocino*, *supra*, 13 Cal.4th at p. 53.) But, as discussed, the separation of powers doctrine forbids courts from annulling statutes unless they violate the Constitution.

NSSF is also wrong in arguing that the Legislature's decision at issue in this case "differs markedly" from the technology-forcing statutes it adopts in other contexts. (ABM 33; see also *id.* 32-36.) Both this Court and the U.S. Supreme Court have recognized that the legislative branches may enact laws designed to spur industry to develop devices or methods that appear to be "'economically or technologically infeasible'" at the time the statute is adopted. (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 466, quoting *Union Electric Co. v. EPA* (1976) 427 U.S. 246, 256-257.) It was entirely reasonable for the Legislature to conclude that microstamping was or could be made to be technologically feasible, or that gun manufacturers could devise some equally effective alternative, or be limited to selling the hundreds of handgun models already listed for sale. (See OBM 13-16 [detailing evidence considered by Legislature].) NSSF's assertion that there has been no study that "has ever been conducted showing any reasonable anticipation that dual placement microstamping will ever be possible to implement" ignores that it is the Legislature's prerogative to make this policy decision. (ABM 33.)

Indeed, NSSF's discussion of *Werner v. Southern California Associated Newspapers* (1950) 35 Cal.2d 121 confirms that its suit is

nothing more than an attempt to draw a court into the kind of policymaking disputes that the separation of powers doctrine prohibits. (ABM 31-32.) In *Werner*, the Court held that the judiciary may not invalidate laws that "it may deem unwise," nor strike down laws solely because it "'disagrees with the desirability of the legislation.'" (35 Cal.2d at pp. 129-130, citation omitted; see also OBM 29-30.) NSSF argues that this case is distinguishable because "[w]hile the wisdom" of the statute at issue in *Werner* "may legitimately be the subject of conflicting opinion," there "can be no legitimate disagreement that a statue requiring impossible compliance is not wise." (ABM 32.) But unless a statute raises constitutional concerns, a debate about a law's wisdom *is* a policy dispute. (See *Mendocino*, *supra*, 13 Cal.4th at p. 53 ["[A]bsent a constitutional prohibition, the choice among competing policy considerations" lies with the Legislature].)

In 2007, NSSF failed to persuade the Legislature that microstamping was infeasible, or that the gun-manufacturing industry could not come up with some equally effective alternative. The Legislature therefore elected to create an incentive for industry to bring these new technologies to market. Granted, ten years in, no semiautomatic pistol with microstamping or similar technology has been added to the State's roster of handguns approved for sale. NSSF is free to make the case that this particular legislative experiment should end. But that case must be made to the Legislature. This Court's admonition to the opponents of rent control is equally apt here: "[A]s with most other such social and economic legislation, we leave to legislative bodies rather than the courts to evaluate whether the legislation has fallen so far short of its goals as to warrant repeal or amendment. Courts, on the other hand, retain the constitutional role of invalidating certain features and applications of [the challenged] law that have or will produce [unconstitutional] results." (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 974.)

CONCLUSION

The Court of Appeal's decision should be reversed.

Dated: October 11, 2017

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
NELSON R. RICHARDS
Deputy Attorney General

Samuel P. Siegel /MJM

SAMUEL P. SIEGEL
Associate Deputy Solicitor General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 4,756 words, as counted by the Microsoft Word word-processing program, excluding the parts of the brief excluded by California Rules of Court, rule 8.520(c)(3).

Dated: October 11, 2017

XAVIER BECERRA
Attorney General of California

Samuel P. Siegel /MJM

SAMUEL P. SIEGEL
Associate Deputy Solicitor General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **National Shooting Sports Foundation v. State of California (Cal Supreme Court)**
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 October 11, 2017, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Lance A. Selfridge
Lewis Brisbois Bisgaard & Smith, LLP
633 West 5th Street, Suite 4000
Los Angeles, CA 90071

Daniel C. DeCarlo
Lewis, Brisbois, Bisgaard & Smith, LLP
633 West 5th Street, Suite 4000
Los Angeles, CA 90071

Lawrence G. Keane, Esq.
General Counsel
National Shooting Sports Foundation, Inc.
11 Mile Hill Road
Newtown, Connecticut 06470

Oliver W. Wanger
Wanger Jones Helsley PC
265 E. River Park Circle, Suite 310
Post Office Box 28340
Fresno, CA 93729

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

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 11, 2017, at San Francisco, California.

M. Campos
Declarant

M. Campos
Signature

SA2017105118
21032783.docx