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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL BRIEF** Date: January 18, 2011 Time: 8:30 a.m. Location: Dept. 402 Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

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INTRODUCTION

This case brings a constitutional vagueness challenge to three sections of the California Penal Code, commonly known as "AB 962," that regulate the transfer of "handgun ammunition. Plaintiffs' claims are based on the failure of these laws to sufficiently define "handgun ammunition."

Confusion over what ammunition is regulated by these statutes abounds. Although AB 962 purports to regulate only ammunition that is "principally for use in" a handgun, nothing in these statutes provides clarification as to the meaning of this standard, nor a way for those subject to the law to determine whether any given ammunition actually meets that standard.

It comes as no surprise that the California Department of Justice, Bureau of Firearms' designated ammunition expert himself admitted that he had to undertake a *multiple step research process* to determine what ammunition he felt was covered by these statutes. Defendants admitted they began their evaluation of what ammunition is regulated by examining *incomplete statistics* that are not known to the public, and that if they had more time and more information that their answers as to what ammunition is "handgun ammunition" *might change*. Ultimately, Defendants' expert's methodology for determining what ammunition was "principally used in handguns" involved looking at *handgun* sales records, *without comparing rifle sales*, determining which were the "most popular," and then reviewing websites, written materials, and drawing on *his own subjective experience*.

The likelihood of arbitrary and discriminatory enforcement that will result due to each officer's subjective understanding as to what ammunition is "principally for use in a handgun" cannot be understated. There are literally *thousands* of different kinds of ammunition. And the arbitrary and discriminate enforcement that is likely to result as law enforcement relies on not only their *subjective understanding* of the "principally for use" standard, but also their *subjective application* of that standard. This is precisely what the vagueness doctrine is intended to prevent.

Ultimately, the Legislature was required to provide the utmost clarity in the laws challenged by Plaintiffs because they impose *criminal penalties* and impact *fundamental rights*. And the Legislature had a perfectly feasible option to achieve that clarity: provide a list of regulated "handgun ammunition." And the Legislature, recognizing a list is appropriate, in fact tried – but failed – to enact one. Those forced to comply with the law should not bear the burden of that failure.

FACTUAL AND PROCEDURAL BACKGROUND

Passed in 2009, Assembly Bill 962 ("AB 962") added sections 12060, 12061, and 12318 to the California Penal Code[1] and implemented a statutory scheme for the transfer and handling of "handgun ammunition."[2] Section 12060 contains the definitions applicable to sections 12061 and 12318. Section 12061 requires "handgun ammunition" vendors[3] to: (1) preclude prohibited employees (persons prohibited by law from possessing firearms) from accessing "handgun ammunition;" (2) store "handgun ammunition" out of the reach of customers; and (3) record specific information about every transfer of "handgun ammunition" made by the Vendor and obtain a thumb print from the customer. Section 12318 requires that all sales and transfers of "handgun ammunition" be conducted in a "face-to-face" transaction.

Section 12060(b) provides the definition of "handgun ammunition" applicable to sections 12061 and 12318. It provides: "'Handgun ammunition' means handgun ammunition as defined in subdivision (a) of Section 12323, but excluding ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code." Section 12323(a), in turn, defines "handgun ammunition" as: ". . . ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, as defined in subdivision (a) of Section 12001,[4] notwithstanding that the ammunition may also be used in some rifles."

Taken together, "handgun ammunition," for purposes of the Challenged Provisions, is defined by section 12060(b) as all ammunition "*principally for use* in [handguns] . . . , notwithstanding that

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[1] All further statutory references are to the California Penal Code unless noted.

[2] Assem. Bill No. 962 (2009-2010 Reg. Sess.) is codified at Penal Code §§ 12060, 12061, 12316, 12317, and 12318. The amendments to Penal Code §§ 12317 and 12318 are not challenged in this suit.

[3] Section 12060(c) defines a "vendor" as: "any person, firm, corporation, dealer, or other business enterprise that is engaged in the retail sale of any handgun ammunition, or that holds itself out as engaged in the business of selling any handgun ammunition.

[4] Section 12001(a) provides: "As used in this title, the terms 'pistol,' 'revolver,' and 'firearm capable of being concealed upon the person' shall apply to and include any device designed to be used as a weapon . . . ." (For convenience, "pistols, revolvers, and other firearms capable of being concealed upon the person" are hereafter referred to as "handgun(s).")

the ammunition may also be used in some rifles."[5] (Pen. Code, § 12060, subd. (b), italics added.).

On June 16, 2010, Plaintiffs Sheriff Clay Parker, et al., filed a Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate challenging the validity of Penal Code sections 12060, 12061, and 12318 (the "Challenged Provisions"). Plaintiff Herb Bauer Sporting Goods, Inc., is a sporting goods retailer that sells ammunition and derives a significant portion of its profits from the sale of ammunition. Plaintiffs Abel's Sporting, Inc. and RTG Sporting Collectives, LLC are commercial ammunition distributors that ship ammunition to California residents. These Plaintiffs are unable to know what ammunition is regulated under the Challenged Provisions and fear criminal prosecution for inadvertent violations of these laws. (Undisputed Material Fact (hereafter "UMF") No. 2.) Plaintiffs Sheriff Clay Parker is the Sheriff of Tehama County and is charged with enforcing state law, including the Challenged Provisions. Plaintiff Parker is unable to ensure the Challenged Provisions are uniformly and equitably enforced due to the inability to determine what ammunition should be regulated as "handgun ammunition" under these provisions. (UMF No. 3.)

Defendants filed their Answer to Plaintiffs' Complaint on August 2, 2010. On August 19, 2010, the sponsor of the Challenged Provisions, Assemblyman Kevin De Leon, amended then pending Assembly Bill 2358 ("AB 2358") in a last minute attempt to correct the admitted vagueness of the Challenged Provisions. (UMF No. 20.) On August 31, 2010, that legislation failed. (UMF Nos.19 and 20.)

Plaintiffs then moved for a preliminary injunction to enjoin the enforcement of the Challenged Provisions pending a decision of this case on the merits. On November 17, 2010, Plaintiffs withdrew their Motion for Preliminary Injunction and the parties, with the participation of the Court, negotiated a briefing schedule by which summary judgment could be heard and, if necessary, a trial could be held before the remainder of the Challenged Provisions take effect.

As of filing, Plaintiffs have completed all anticipated written discovery. On December 1-2, 2010, Plaintiffs deposed Defendants' expert witness, Blake Graham. Plaintiffs do not anticipate the

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[5] Excluding ammunition "designed and intended" to be used in "antique firearms," and blanks. (Pen. Code, § 12061, subd. (b).)

need for further discovery. Defendants have not indicated an intention to serve any written discovery. The parties are currently in the process of setting deposition dates for Plaintiffs' Herb Bauer Sporting Goods and Steven Stonecipher, and Plaintiffs' expert Steven Helsley. The parties have stipulated to have all depositions completed by December 20, 2010.

Plaintiffs now move this court for Summary Judgment, or in the Alternative, for Summary Adjudication to resolve this case on the merits. As set forth in detail below, the Challenged Provisions are impermissibly vague and should be declared invalid and unenforceable.

ARGUMENT

I. STANDARD OF REVIEW

A motion for summary judgment shall be granted if no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c(c).) To be "material," a fact must relate to some claim or defense in issue under the pleadings, and it must also be essential to the judgment in some way. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.)

For purposes of this motion, there exists no triable issue of material fact. Once certain background facts about the nature and use of ammunition are understood, determining whether the Challenged Provisions are unconstitutionally vague should be a purely legal question.

The due process provisions of the Fourteenth Amendment and Article I, section 7 of the California Constitution, each require 'a reasonable degree of certainty in legislation, *especially in the criminal law . . . .*' " (*People v. Heitzman* (1994) 9 Cal.4th 189, 199, *quoting In re Newbern* (1960) 53 Cal.2d 786, 792 (emphasis added). And where statutes impact constitutionally protected conduct, the United States Supreme Court has raised the bar on the required certainty. The Constitution demands the greatest clarity "where the certainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." (*Coluati v. Franklin* (1979) 439 U.S. 379, 391; *Baggett v. Bullitt* (1964) 377 U.S. 360, 372; See also *People v. Barksdale* (1972) 8 Cal.3d 320, 327 ["stricter standards of permissible statutory vagueness may be applied to a statute having a *potentially inhibiting effect on fundamental rights*" (internal quotations omitted)].) (Emphasis added.)

The Challenged Provisions restrict the ability to acquire ammunition, and "the right to keep and bear arms necessarily involves the right . . . *to purchase and provide ammunition suitable for such arms. . . .*" (*Andrews v. State*, 50 Tenn. 165, 178, 8 A. Rep. 8, 13 (1871), italics added.) And the

Supreme Court recently held that Second Amendment rights are of utmost importance, clarifying they are indeed *fundamental* to our system of ordered liberty. (*District of Columbia v. Heller* (2008) 128 S.Ct. 2783, 2821-2822; *McDonald v. Chicago* (2010) 130 S.Ct. 3020, 3088.)[6]

To pass constitutional muster and avoid vagueness, a statute must pass two separate and distinct tests. "[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited *and* in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357, italics added (hereafter *Kolender*).) Accordingly, to prevail, Plaintiffs must show that the Challenged Provisions fail to clearly define the regulated behavior by establishing that *either*: (1) the Challenged Provisions fail to provide notice to persons of ordinary intelligence as to what ammunition, and therefore what ammunition transactions, are regulated; *or* (2) that the Challenged Provisions' definition of "handgun ammunition" is so vague that, without more, it fails to provide sufficient standards to prevent arbitrary and discriminatory enforcement of the law.

The Challenged Provisions fail to provide sufficient guidelines on both counts, let alone guidelines of the definiteness required by criminal statutes that impact fundamental rights.

II. THE CHALLENGED PROVISIONS ARE FACIALLY VAGUE

A. The Challenged Provisions Fail to Provide Adequate Notice of What Ammunition is Regulated

"The underlying concern [of the void for vagueness doctrine] is the core due process requirement of adequate notice. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115.) To provide such notice, the terms of a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct" is to be regulated. Any statute that requires persons of "common intelligence" to "guess at its meaning" or "differ as to its application" necessarily violates due process. (*Connally v. General Const. Co.* (1926) 269 U.S. 385, 391 (hereafter *Connally*).)

To determine whether a statute is clear enough to provide adequate notice, courts look first to the language of the statute, then to its legislative history, and finally to court decisions construing the statutory language. (*People v. Heitzman* (1994) 9 Cal.4th 189, 200.) When weighed against each of the *Heitzman* prongs of analysis, the Challenged Provisions are void for vagueness for failure to

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[6] *Andrews* was cited by the Court in *Heller*.

provide notice as to the ammunition they regulate. This failure is particularly egregious where, as here, the law imposes criminal penalties and inhibits the exercise of *fundamental rights.*

The Challenged Provisions purport to regulate only ammunition "principally for use in handguns." Nothing in the statutes provide clarification as to the meaning of this standard, nor a way for those subject to the Challenged Provisions to determine whether any given ammunition meets that criterion. Likewise, Plaintiffs are not aware of any court decisions interpreting Penal Code § 12323, subdivision (a), or any of the Challenged Provisions that provide clarification as to what ammunition is "handgun ammunition" under these statutes. The courts have, however, provided instruction as to the meaning of terms contained in the Challenged Provisions and Penal Code section 12323(a)'s definition of "handgun ammunition."

In the interest of efficiency, Plaintiffs have addressed the "language of the statute" and "court decisions construing the statute" prongs of the *Heitzman* analysis jointly, which is followed by an examination of the relevant legislative history of the Challenged Provisions and related bills.

1. The Language of the Challenged Provisions Fail to Clarify what Ammunition Is Regulated and Courts Have not Provided Clarity

a. Individuals and Retailers are Unable to Determine which Ammunition is "Principally for Use in Handguns"

When the legislature fails to "define a term in a statute, [courts] construe that term according to its ordinary, contemporary, common meaning." (*U.S. v. W.R. Grace* (9th Cir. 2007) 504 F.3d 745, 755, *quoting U.S. v. Cabaccang* (9th Cir. 2003) 332 F.3d 622, 626.) Merriam-Webster defines "principally" by its synonyms, "chiefly, mainly, [and] primarily." (Webster's Revised Unabridged Dictionary (G. & C. Merriam Co. 1913) p. 1138.) Similarly, the United States Supreme Court has found that "primarily" is synonymous with "principally." (*Malat v. Riddell* (1966) 383 U.S. 569, 572.) While there is little case law defining the term "principally," there are an abundance of cases defining the synonymous terms "mainly" and "primarily." And courts have repeatedly determined these words are commonly understood to mean quantifiably more than fifty percent (50%), and their reasoning is persuasive. (See *In re Kelly* (9th Cir. 1988) 841 F.2d 908, 913 [" 'Primarily' means 'for the most part.' i.e., more than half"]; *State ex rel. Martin v. Kansas City* (1957) 181 Kan. 870, 876 [317 P.2d 806, 811] [" 'mainly within' a city would mean that a common perimeter of more than fifty percent was present"]; *Schrader v. State* (1986) 69 Md. App. 377, 390 [517 A.2d 1139, 1146] ["in

quantifiable terms, 'primarily' is commonly understood to suggest a figure representing more than 50 percent"].) So "handgun ammunition," in the Challenged Provisions, appears to mean ammunition that is used, or for use, *more than 50 percent* of the time in handguns.

Defendants do not dispute this, and seem to agree. It remains unclear, however, what esoteric factual information is actually needed to establish that any given ammunition is actually "principally for use in" a handgun. Regardless, there is no way for persons of ordinary intelligence to whom the law applies to determine this for any particular ammunition. Virtually all ammunition can be, and in fact is, used safely in both handguns and rifles. (UMF Nos. 28, 29.) Packaging for ammunition that *can* be used in a handgun is not often labeled as such (nor in any event does it identify the ammunition's "principal use"). (UMF Nos. 30, 31, 32.) And there is no commonly understood delineation between "handgun ammunition" and "rifle ammunition" that clarifies which ammunition is "principally for use in a handgun" under the Challenged Provisions. (UMF Nos. 34, 35.) People simply cannot be expected to know what ammunition these laws regulate.

In opposing Plaintiffs' Motion for Preliminary Injunction, Defendants relied on two cases for the premise that use of the term "principally"does not render a statute void for vagueness–*Bone v. State Board of Cosmetology* (1969) 275 Cal.App.2d. 851 and *United States v. Harriss* (1954) 347 U.S. 612. Plaintiffs do not suggest the use of the term "principally" or its synonyms will be vague in the context of *other statutes*. Rather, the unworkable standard "principally for use in a handgun" renders the *Challenged Provisions* unconstitutionally vague because it requires Plaintiffs to answer a question that is not only unreasonable to ask, but virtually impossible to answer.

Both *Bone* and *Harriss* do, however, provide compelling illustrations of the differences between standards that can be applied by an individual to determine what conduct is regulated, and statutes like the Challenged Provisions that render such a determination impossible. In *Bone*, the Court considered an attempt to stop the State Board of Cosmetology's enforcement of a statute that prevented persons who held a cosmetologist's license (as opposed to a barber's license) from cutting hair in businesses that were " 'primarily' engaged in the business of hair cutting." (*Bone*, *supra*, 275 Cal.App.2d. at p. 857.) The court found that "plaintiff suffer[ed] from no uncertainty as to his *own* classification for, *by his own statement*, his shops specialize in styling and cutting the hair.' " (*Ibid.*,

italics added.) Plaintiffs in *Bone* went into business with full knowledge of whether they were engaging in the practice of barbering or cosmetology. (*Id.* at 852.) Thus, those plaintiffs could comply with the statute simply by determining if their own businesses were primarily engaged in "hair cutting," a determination that involved an *analysis of information readily available* to them. In stark contrast, Plaintiffs here have no way to determine whether ammunition is used "principally" in a handgun, nor is there any place for them to acquire such information.

Harriss involved a challenge to the Federal Regulation of Lobbying Act, which requires disclosures of lobbying activities. (*Harriss*, *supra*, 347 U.S. at pp. 614-617.) The Act applies to any person who solicits, collects, or receives monies used "principally" to aid in the passage or defeat of legislation. (*Id.* at 619.) So long as the law is clear as to what activities constitute lobbying, the individual can determine whether his or her particular activities are "lobbying activities" regulated by the law. Much like the Plaintiffs in *Bone*, the *Harriss* plaintiffs could readily determine whether they were in compliance with the law by examining *their own conduct*. Plaintiffs in this case, however, cannot examine their own conduct to determine whether ammunition is principally used in handguns.

A recent ruling in the Tennessee Chancery Court, which Plaintiffs acknowledge is not binding on this Court, provides for good comparative analysis. That case, *State of Tennessee ex rel. Rayburn v. Cooper*, involved a challenge to a state law authorizing firearms to be carried by patrons in establishments where "the serving of meals" is the "*principle* business conducted" – as opposed to the serving of alcohol. (UMF No. 114.) There, plaintiffs argued it would be extremely difficult for an individual to determine whether they were in a bar or a restaurant. (UMF No. 115.) The court found the statute unconstitutionally vague, reasoning that whether the serving of meals is a business' principle business is *not something that can be known* to the ordinary citizen. (UMF No. 116.) The court added that *inquiry would not be satisfactory*. (UMF No. 116.)

The prospects for Plaintiffs in this litigation is more dire. Drinking or dining patrons might at least be able to ask the bar or restaurant whether the principle business conducted was the "service of meals." Plaintiffs here have no way of making an effective inquiry into whether any given ammunition is used more than fifty percent of the time in a handgun rather than a rifle. Accordingly, the Challenged Provisions provide an unclear and unworkable standard and therefore

fail to satisfy the constitutional requirements of due process as they are "impermissibly vague in all of [their] applications," *People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1116, *quoting Hoffman Estates v. Flipside* (1982) 455 U.S. 489.

Even if Defendants could somehow identify some specific ammunition in the ever expansive world of ammunition that clearly satisfies the standard set by the Challenged provisions, (which they cannot) such a showing would not save the Challenge Provisions from facial vagueness. That is, the Challenged Provisions set an unworkable standard for everyone, not merely in application to Plaintiffs. And where a law is vague in all circumstances, rather than in a specific application to a party in the suit, the law must fail for vagueness. (*United States v. Salerno* (1987) 481 U.S. 739, 745; see also Tribe, American Constitutional Law § 3-31, p. 611 (3d ed 2000) [a facial challenger will be successful where the law cannot be constitutionally applied to anyone].)

Tennessee ex rel. Rayburn provides further comparative analysis on this point. There, defendants argued that the law was not vague because there were obvious instances where a patron could determine whether a particular establishment was a "restaurant," pointing to establishments that only serve food – and no alcohol. (UMF No. 117.) But this did not save the statute from vagueness. Moreover, while the *Rayburn* defendants could point to examples of establishments that clearly satisfied the statute's requirements, Defendants here can make no such showing. Plaintiffs are not aware of ammunition that can "only be used in handguns." Nor are there statistics available to those the law applies to that establish whether ammunition is used more often in handguns.

b. Absent an Official List, Those Subject to the Challenged Provisions Cannot Determine what Ammunition is Regulated

Unworkable definitions for tangible items that do not inform ordinary persons which items fall within that definition must fail for vagueness. Because, where a person is unable to determine whether his particular item possesses those characteristics bringing it within the scope of the statute, absent something like an official list of regulated items, the law cannot be said to provide either fair notice or meaningful guidelines to a person of ordinary intelligence.[7] The California Supreme

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[7] Throughout the California Codes, examples of such lists provided to bring clarity to laws regulating tangible items abound. For instance, section 3004.5 to the Fish and Game Code requires the use of nonlead centerfire rifle and pistol ammunition when taking big game and coyote within specified areas. (Fish & G. Code, § 3004.5, subd. (a).) In enacting this requirement, the Legislature granted the

Court's decision in *Harrott v. County of Kings* (2001) 25 Cal.4th 1138 is instructive. In *Harrott*, the Court addressed the limitations of the Assault Weapons Classification Act ("AWCA"), finding its language failed to fully inform persons of ordinary intelligence which firearms were regulated as "assault weapons." (*Id.* at p. 1153.) In *Harrott*, the Attorney General, under the mandates of the AWCA, created the Assault Weapons Identification Guide ("the Guide"), designating – by manufacturer markings – firearms that were deemed assault weapons regulated under the Act. (*Id.* at p. 1142-1143.) The Court of Appeal reversed the lower court's decision on due process grounds, basing its ruling on the "difficulty an ordinary citizen might have, when a gun's markings are not listed in the Identification Guide, in determining whether a semiautomatic firearm [is] an assault weapon under the AWCA." (*Harrott*, *supra*, 25 Cal.4th at pp. 1146-1147.) The California Supreme Court concluded that ordinary citizens are not responsible for determining the meaning of unclear statutes *without the benefit of clear guidelines*. (*Id.* at p. 1153, italics added.)

Here, the Challenged Provisions are even more problematic, as they fail to include a list of regulated ammunition, and they do they confer *the authority* to create such a list.[8] Without the benefit of a list of regulated ammunition, individuals and vendors, including Plaintiffs, are left to guess first as to what standard is actually imposed by the "principally for use in a handgun" language, and then further guess as to what ammunition actually satisfies that standard. And *even experts* are unable to determine whether any ammunition is actually principally used in handguns. This makes the *ordinary* person's attempt to inquire as to whether his or her ammunition is "principally for use in handguns" futile. There is no place to turn for a definitive answer–no official list, no statistics that identify whether the ammunition is used more often in a handgun, and no experts to ask.

2. The Legislative History of the Challenged Provisions *Confirms* Vagueness

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Fish and Game Commission the authority to certify and publish a list of nonlead ammunition suitable for use in regulated areas. (*Id.*) The list of certified nonlead ammunition can be easily accessed at the Commission's website. (UMF No. 118.)

[8] The DOJ Firearms Bureau licenses and regulates firearm retailers in California. DOJ also provides licensees with information about their responsibilities and changes in the law. On December 30, 2009, DOJ published an "Information Bulletin" providing a brief overview of AB 962. (UMF No. 119.) Tellingly, despite retailer inquiries, this Bulletin did not clarify what "handgun ammunition" is under the Challenged Provisions. Nor could it have – none of the Challenged Provisions, nor any other provision of the law, confer authority upon an agency or other entity to promulgate regulations to clarify them.

a. A Previous Attempt to Rely on the "Principally for Use in Handguns" Language Exposed the Vagueness Problem

Nothing in the legislative history of section 12323 or AB 962 provides clarification of the "principally for use in handguns" language relied upon by the Challenged Provisions. There is, however, revealing language in the legislative history of Senate Bill 1276 (hereafter SB 1276), a failed measure introduced in 1994 to implement provisions regulating the transfer of "handgun ammunition" substantially similar to those appearing in the Challenged Provisions. (UMF Nos. 13, 15.) The Bill Analysis conducted by the Senate Committee on Judiciary for SB 1276 contains a "comment" on section 12323's definition of "handgun ammunition" which reads, in relevant part:

> Existing Penal Code section 12323 was added in1982 and defines handgun ammunition as "ammunition principally for use in pistols and revolvers . . . notwithstanding that the ammunition may also be used in some rifles. . . ." However, it may not be suitable for defining handgun ammunition in general. It may be assumed that many ammunition calibers are suitable for both rifles and handguns. *Without additional statutory guidance, it may be very difficult for dealers to determine which ammunition is "handgun ammunition"* for purposes of the requirements added to Penal Code section 12076.

(UMF No.14 , italics added.) While the legislative history of AB 962 does not explain the Legislature's understanding of the Challenged Provision's definition of "handgun ammunition," the history of one of AB 962's predecessors, SB 1276, provides compelling evidence of the same definition's vagueness when considered in a statute very similar to the Challenged Provisions.

b. The Legislature Recognized the Vagueness of the Challenged Provisions and Tried, But Failed, to Fix Them by Creating a "List" of Handgun Ammunition

In 2010, the author of AB 962, Assemblyman Kevin de León, introduced legislation that would have expanded the application of AB 962. (Assem. Bill No. 2358 (2009-2010 Reg. Sess.) (hereafter AB 2358).) Subsequent to the filing of this litigation, Assemblyman de León amended AB 2358 in the last days of the legislative session, working frantically with Defendant DOJ to revise the Challenged Provisions by amending Penal Code section 12323, subdivision (a), to replace the "principally for use in" language with a "list of ammunition calibers." (UMF Nos. 16, 17, 19, 20.) Even though AB 2358 failed passage, testimony provided during consideration of that bill provides further compelling evidence that the Challenged Provisions fail to provide sufficient notice as to what types of ammunition are regulated. At the August 23, 2010 Senate Public Safety Committee hearing on AB 2358, Assemblyman de León indicated the Legislature "had been listening to gun dealers, as well as vendors, regarding their concerns about AB 962," and revealed that the most

common complaint is that the "existing definition of 'handgun ammunition' is *too vague*, and that we want to bring some clarity to the law for California vendors." (*Hearing on A.B. 2358 Before the S. Pub. Safety Comm.*, 2010 Leg., 2009-2010 Reg. Sess. (Cal. 2010) (statement of Assem. Kevin de León, Sponsor).)[9]

Assemblyman de León's own testimony illustrates the widespread and openly voiced confusion about the definition of "handgun ammunition" in the Challenged Provisions – a confusion shared by individuals, vendors, and experts, and here recognized by the bill's sponsor himself.

C. The Challenged Provisions Encourage Arbitrary and Discriminatory Enforcement Based on Police Officers' Subjective Understanding

"[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards ...." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109.) "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a 'standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " (*Kolender*, *supra*, 461 U.S. at pp. 357-358, *quoting Smith v. Goguen* (1974) 415 U.S. 566.).

1. Law Enforcement Officers Are Unable to Determine What Ammunition is "Principally for Use in Handguns"

In applying the "arbitrary and discriminatory enforcement" prong of the vagueness doctrine, the United States Supreme Court acknowledged the importance of "definiteness and clarity" in the law–characteristics the Challenged Provisions lack (*City of Chicago v. Morales* (1998) 527 U.S. 41, 47 (hereafter *Morales*). Where a statute "provides absolute discretion to police officers to determine what activities" fall within its scope, "constitutional standards for definiteness and clarity" are lacking and the threat of arbitrary and discriminatory enforcement materializes. (*Id.* at pp. 61, 64.) Because law enforcement officers, like individuals and vendors, are unable to determine which ammunition is "principally for use in a handgun", the Challenged Provisions encourage arbitrary and discriminatory enforcement of the law.

In *Morales*, petitioner City of Chicago enacted a Gang Congregation Ordinance which prohibited criminal street gang members from loitering in any public place. (*Morales*, *supra*, 527 U.S. at p. 45.) The ordinance defined "loitering" as "remaining in any one place with no apparent

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[9] "Where [a bill's] author's statements appear to be *part of the debate* on the legislation and were *communicated to other legislators*, we can regard them as evidence of legislative intent." (*Carter v. Cal. Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 928.)

purpose." (*Id.* at p. 47.) Despite attempts to clarify the scope of the term "loitering," the Supreme Court of Illinois struck down the ordinance, reasoning that it did not "meet constitutional standards for definiteness and clarity" because it "provides absolute discretion to police officers to determine what activities constitute loitering." (*Id.* at pp. 61, 64.) On review, the United States Supreme Court confirmed the holding, finding the law unconstitutionally vague. (*Id.* at p. 64.)

Like the Gang Congregation Ordinance in *Morales*, the lack of clarity as to which ammunition is considered "handgun ammunition" violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." (*Kolender*, *supra*, 461 U.S. at p. 358.) And the DOJ has stated that it will not and cannot adopt a policy as to what ammunition is "handgun ammunition." (UMF No. 18.) Because there are no official guidelines regarding which ammunition is "principally for use in handguns," each law enforcement officer must look beyond what is reasonably apparent and attempt to make his or her own determination as to whether any given ammunition is used more than fifty percent of the time in handguns. As such, the Challenged Provisions unlawfully "entrust lawmaking to the moment-to-moment judgment of the policeman on his beat," encouraging arbitrary and discriminatory enforcement." (*Kolender*, *supra*, at p. 359.)

2. Absent an Official List, Law Enforcement Officers Must Determine What is "Handgun Ammunition" According to their own Subjective Interpretations

A statute regulating a tangible item defined in a manner that does not clearly identify the items that fall within the scope of that definition lacks sufficient clarity to prevent arbitrary and discriminatory enforcement of the law. Absent an official list of regulated ammunition, law enforcement officers, much like individuals and ammunition retailers, will be unable to determine what ammunition is "principally for use in a handgun."

Harrott, discussed above, recognized that "ordinary law enforcement officers in the field" would find it difficult, without the benefit of clear guidelines, to determine whether a semiautomatic firearm should be considered an "assault weapon" under the AWCA. (*Harrott*, *supra*, 25 Cal.4th at p. 1147 fn. 4.) The court noted the author of the legislation recognized this difficulty when he wrote "a great many law enforcement officers who deal directly with the public are not experts in specific firearms identification. . . . There are numerous makes and models of civilian military-looking semi-automatic firearms which are not listed by California as 'assault weapons' but which are very

similar in external appearance." (*Id.*, *quoting* Sen. Don Rogers, Letter to Governor Deukmejian Re: Sen. Bill No. 2444 (1989-1990 Reg. Sess.) Aug. 23, 1990.) The Act's author thus saw it as necessary to "assur[e] that law enforcement officers are assisted in the proper performance of their duties through having at their disposal a reliable means of accurately identifying each listed 'assault weapon.' " (*Id.*) Without the Guide, it was too likely that law enforcement officers would interpret and apply the law in an arbitrary and discriminatory manner because each officer's understanding of what constitutes an "assault weapon" could too easily differ from the next officer's understanding.

The same danger exists here. Just as the Court noted in *Harrott* that law enforcement officers could not be expected to be experts in the identification of "assault weapons," neither can law enforcement be expected to be experts in the identification of ammunition that is "principally for use in a handgun." Without a list specifying which ammunition is "handgun ammunition" under the Challenged Provisions, law enforcement officers are left to their own understanding of the definition.

And testimony from Defendants' own "expert" from the Department of Justice, Bureau of Firearms confirms this. When asked whether the "principally for use in a handgun"standard required a consideration of whether any particular ammunition might be fired more often through a handgun than a rifle, Defendants' expert responded:

> "I would say [its] *not much of a factor* because principally for use really deals with the kind of firearm its going to go into, *in my – in my est- -- in my understanding*, so if you have one weapon that can shoot a million rounds a second and then you have 500,000 rounds – or handguns out there that shoot ten rounds a minute, that weapon is actually – or the ammunition is principally for use in *the larger pool of – of weapons*."

(UMF No. 100.)

So Defendants' expert's subjective understanding of the standard appears to indicate that the actual use of the ammunition in a handgun versus a rifle doesn't matter; what matters, *to him*, is whether there are more handguns in circulation that fire the ammunition in question than rifles that fire that same ammunition. (UMF No. 98.) And when asked to clarify whether he would consider the numerosity of total firearms or the numerosity of models of those firearms to be the determining criteria, he stated:

> "Given the *available information in the amount of time I had*, I tried to compare the *number of manufacturers* that may have produced a weapon in a particular caliber, *the number of models that each manufacturer used in that caliber*, and then, *perhaps*, the length of time that a particular gun has been available in a particular caliber."

(UMF No. 101.)

Ultimately, Defendants' expert's methodology for determining what ammunition was principally used in handguns, *in his opinion*, was a two-step process that involved looking at handgun sales records, then reviewing websites and written materials, and drawing on *his experience*. (UMF Nos. 43-47, 61-65, 85-87, 93.]

The likelihood of arbitrary and discriminatory enforcement that will result due to each individual officer's or law enforcement agency's application of their own subjective methodologies and opinions to determine what ammunition is "principally for use in a handgun" is increased exponentially by the fact that there are literally thousands of different cartridges that may or may not be "principally for use in a handgun." Where one officer may witness the transfer of ammunition suitable for use in both handguns and rifles and cite the transaction as a violation of the Challenged Provisions, another officer may witness an identical transaction and determine the transfer is not regulated by the law.

The Challenged Provisions thus invite arbitrary and discriminatory enforcement as each officer relies not only on his or her *subjective understanding* of the "principally for use" standard, but also on his or her *subjective application* of that standard.

D. "Common Understanding" Does Not Save the Challenged Provisions from Vagueness

Defendants assert, via their Responses to Plaintiffs' Specially Prepared Interrogatories, Set One, that there is a "common understanding" as to what ammunition is "principally for use in handguns" under the Challenged Provisions. (UMF No. 36.) Defendants' argument appears to be based on the premise that, "when a statute does not define some of its terms," it is permissible to "look to the common knowledge and understanding of members of the particular vocation or profession to which the statute applies for the meaning of those terms." (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 575).) "Where the language of a statute *fails to provide an objective standard* by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies." (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 766.)

But Defendants' attempts to assign a "common understanding" as to what ammunition is "handgun ammunition" are misplaced. The Challenged Provisions do not "fail" to "define" or "set forth a standard" for what ammunition is "handgun ammunition." Rather, the Challenged Provisions *do* define handgun ammunition; and they *do* provide a standard; they just provide an unworkable, unconstitutionally vague standard. And as to the confusion as to what the "principally for use in a handgun" language means, Defendants do not assert there is a "common understanding" as to whether that means ammunition will be considered "handgun ammunition" if more rounds of that ammunition have actually been fired out of a handgun than a rifle, or whether the standard depends on if there or more total handguns, or models of handguns, in circulation that fire that ammunition versus rifles that fire that ammunition. Instead, Defendants circumvent the vague definition and standard included in the Challenged Provisions and attempt to replace it with a "common understanding" of what ammunition is "handgun ammunition."

Even if Defendants' "common understanding" defense was appropriately invoked, such reasoning fails to save the Challenged Provisions from vagueness. First, Defendants "common understanding" argument makes a distinct leap. That is, Defendants offer evidence of "common usage" of various ammunition in "handguns" and subtly, but significantly, equate that "common usage" with "common understanding." Such leaps should not be permitted to redress the vagueness of criminal statutes that impact fundamental rights.

Moreover, there is no "common understanding" as to what ammunition is and is not covered by the Challenged Provisions' "principally for use in a handgun" standard. Despite Plaintiffs' inquiry to DOJ prior to this lawsuit as to what ammunition is "handgun ammunition" (UMF No. 18), despite Plaintiffs' filing of a Complaint to which Defendants did not demur, and despite Plaintiffs filing of a motion for preliminary injunction, Defendants now assert, for the first time, that there is a "common understanding" as to what ammunition is "principally for use in a handgun" (UMF No. 36). According to Defendants, there is now a "common understanding" *among all those to whom the Challenged Provisions apply*, and *among all those who might enforce it*, that the following "calibers" are "principally for use in a handgun:" .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, and .32. (UMF Nos. 36, 37.)

But if this is so clear, and it is so "commonly understood" that these "calibers" are "handgun ammunition," why then did Defendants not just say so from the beginning? The answer, simply put, is because there is no "common understanding" as to what ammunition is regulated as "handgun ammunition." The whole argument is a *post hoc* rationalization dreamed up for this litigation. The arguments and facts refuting Defendants' "common understanding" defense are overwhelming.

1. Cartridges Vary Widely and Are Not Differentiated Solely by "Caliber"; It Is Unclear Whether the Challenged Provisions Regulate Ammunition that Falls Within a "Caliber" Class or by Specific "Cartridge"

Defendants assert that the "calibers" identified in their common understanding list are "handgun ammunition." This is not surprising, as ammunition is commonly referred to in terms of "calibers." But when people refer to ".22," "9mm," or ".45" – and assume they have effectively communicated the specific ammunition they have in mind – they are usually mistaken. Within any given "caliber" there are multiple different "cartridge" types. (UMF No. 26.) These cartridges are often very different and they are given specific names to identify them.

Three terms, in order of specificity, are used to describe a loaded, self-contained metallic cartridge: "ammunition," "caliber," and its given "cartridge name."[10] (UMF No. 22.) Reference to the "caliber" only, is not a particularly precise method of identifying ammunition. (UMF No. 27.) The more precise description is to use the specific cartridge name – *e.g.*, .38 Smith & Wesson Special, .221 Remington Fireball, etc. – because often the "caliber" in the cartridge's given name does not reflect the actual bore or bullet diameter.[11] (UMF No. 25.) And within any given "caliber" there are usually various "cartridges" – some of which may be used more often in a handgun, and some of which may be used more often in a rifle. (UMF No. 26.)

Without further clarification from the Legislature such as an official list of regulated

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[10] "Ammunition" is defined by the Association of Firearms and Tool Mark Examiners as: "One or more loaded cartridges consisting of a primed case, propellant, and with one or more projectiles." (UMF No. 23.) The definition of "caliber" depends on whether it is applied to a firearm or ammunition. When applied to ammunition, the Glossary of the Association of Firearms and Tool Mark Examiners defines it as: "A numerical term, without the decimal point, included in a cartridge name to indicate the nominal bullet diameter." (UMF No. 24.) In other words, "caliber" is a measurement of one dimension of a cartridge.

[11] For instance, the .38 Smith & Wesson Special uses a bullet with a nominal diameter of .357 and the .221 Remington Fireball use bullets of .224 diameter.

ammunition, and given the common reference to different ammunition in terms of "caliber" only, it is unclear whether the Challenged Provisions regulate ammunition that falls within a "caliber" that is principally used in handguns, or whether the Challenged Provisions regulate ammunition according to whether the individual cartridge is "principally used in handguns." Either way, the Challenged Provisions invite arbitrary and discriminatory enforcement of the law, and there is no common understanding as to what ammunition the Challenged Provisions were actually intended to regulate.

All Plaintiffs have to go on thus far is that, when they asked Defendants to identify all types of ammunition that are subject to the Challenged Provisions as ammunition "principally for use in a handgun," Defendants responded by listing the following "calibers": .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, and .32.[12] (UMF No. 37.) Defendants then asserted that there is a"common understanding" that the listed ammunition is "principally used in a handgun." (UMF No. 36.)

2. Defendants Undertook a Two-Step Research Process Utilizing Incomplete Information that is not Publicly Known, and Factored in Subjective Experience to Determine what Ammunition is Regulated

The absurdity of Defendants' argument that there is a "common understanding" that the Challenged Provisions regulate the ammunition identified in the DOJ's list is evident from the process they used to create the list. When asked how they determined what ammunition is "principally for use in a handgun," Defendants admitted they undertook a *two-step research process.* (UMF No. 43.) As a "starting point," Defendants' expert witness stated that he consulted the California Dealer Record of Sales (DROS) database, which is linked to the Automated Firearms System (AFS), to determine which "calibers of ammunition" should be *further researched* to determine whether they are "handgun ammunition" under the Challenged Provisions. (UMF Nos. 45-47.) The DROS records contain sales statistics about the number of "handguns" chambered in various calibers and for various cartridges in a particular year. (UMF No. 45.) The sales data relied upon by Defendants are not published anywhere to Plaintiffs' knowledge, nor are these databases accessible to vendors, nor to local law enforcement officers. Yet Defendants consulted them as the

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[12] Interestingly, Defendants objected to the use of the word "type" as vague and ambiguous, despite the use of that very word in the Challenged Provisions that requires Vendors to record the "type" of "handgun ammunition" sold. (Defs. Resps. to Pls' Specially Prepared Interrogs. at 5:18-20; Pen. Code, § 12061, subd. (a)(3)(c).)

"first step" in determining what ammunition is regulated. (UMF No. 47.)

Plaintiffs are puzzled as to how statistics of handgun sales in California lead to a determination that the calibers Defendants list are "principally for use in a handgun." The number of sales of a firearm of a particular caliber does not mean that more rounds of that "caliber" are used in a handgun. A handgun could be purchased for home self-defense and the owner may purchase a single box of ammunition and never use it. Conversely, military use of rifle of that same caliber might be extensive. The reality is that no one knows. And no one can know, because records of ammunition usage in handguns and rifles – records that *would* be relevant – do not exist.

Regardless, Defendants went on to review records over the past five years – and admitted that if they had an opportunity to review sales records over a larger time frame, that their "caliber list" might have changed. (UMF Nos. 39, 41, 44, 49.) Defendants considered only "handgun sales" and did not conduct any comparative analysis with rifle sales for firearms chambered in that same caliber. (UMF Nos. 57-59.) In fact, Defendants admitted that such records do not even exist. (UMF Nos. 57, 59.) They admitted they did not take into account the number of rifles chambered for ammunition they consider "handgun ammunition" that are in use by the military. (UMF Nos. 88, 89.) They admitted they do not know what percentage of total guns in circulation are represented by the handgun sales data relied upon. (UMF No. 50.) And finally, they admitted that they picked only the most popular selling calibers of handguns in order to determine which ones should be researched further to determine if ammunition of that caliber is "principally for use in a handgun." (UMF Nos. 47, 48.)

Then, after consulting incomplete data that is not openly published and picking out the most popular calibers, Defendants researched written materials, ammunition vendor websites, and online encyclopedias to determine what ammunition is "principally for use in a handgun." (UMF Nos. 38, 44.) In determining which ammunition to list, Defendants gave some weight to whether ammunition vendors marketed or labeled some cartridges that were of a "caliber" of popular selling handguns as "handgun cartridges." (UMF No. 65.) The DOJ's representative asserted that the fact that these websites refer to some ammunition as "handgun cartridges" helped establish that the calibers listed by the DOJ listed are "principally for use in a handgun." (UMF No. 63.) But the fact that

ammunition vendors label or market a particular cartridge as a "handgun cartridge" does not identify whether that cartridge, or ammunition of that caliber, is actually "principally used in handguns." (UMF No. 32.) Nor does it prevent arbitrary and discriminatory enforcement as a result of subjective interpretations by law enforcement.

Regardless, Defendants point to four websites in particular for the premise that it is clear what ammunition is regulated by the Challenged Provisions. (UMF No. 64.) Yet two of these companies intend to cease shipment of all ammunition suitable for use in handguns and rifles to California when section 12318 takes effect – precisely because *they are unable to determine what ammunition is "principally for use in handgun" and regulated by the Challenged Provisions*. (UMF Nos. 70-82.) Finally, after consulting vendor websites (who themselves are unsure as to what ammunition is regulated), Defendants' expert pulled from his subjective experiences to determine what ammunition should be considered "handgun ammunition." (UMF Nos. 43, 70, 86, 87.) Ultimately, the Defendants' expert concluded that, based on his training and experience over the last sixteen years or so, when added to experience with handguns and other factors, he "*has a feeling* that there are certain calibers that are more often than not handgun calibers." (UMF No. 87, emphasis added.)

After taking this extensive research into account and pulling from personal experiences, Defendants were able to list the ammunition that they *feel* are "principally for use in a handgun."[13] Defendants then asserted that the ammunition they were able to identify as "handgun ammunition" after undertaking this multi-step research process is "commonly understood" to be the ammunition that is regulated under the Challenged Provisions. (UMF No. 38.) But, as Plaintiffs note, *supra*, this

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[13] Although Plaintiffs are now informed as to the research required by Defendants to determine what ammunition is "principally for use in a handgun," Plaintiffs are still unclear as to the ultimate criteria that Defendants believe will cause a particular type of ammunition to be deemed "handgun ammunition." On some occasions, Defendants state that the Challenged Provisions apply to ammunition that is "used principally" in handguns, UMF No. 97, which would appear to take into account the actual usage of the particular ammunition in a handgun versus a rifle. But at other times they suggest that it has more to do with the number of handguns in circulation that are chambered in a particular caliber versus the total number of rifles that are chambered in that caliber. (UMF No. 98.) And yet, at other times, Defendants suggest the determination is guided by a "mix" of factors. (UMF No. 99.)

extensive research and analysis establishes, if anything, the *common usage* of a particular ammunition. It does not establish that there is a *common understanding* among those the law applies to, and those who are charged with enforcing it, that the ammunition they listed is what is in fact regulated.

In fact, Defendants admit that they have not consulted any research studies, polls, or surveys – nor taken any of their own – that would provide insight as to what the public's common understanding regarding what ammunition is "principally for use in a handgun." (UMF Nos. 90-92.)

3. Defendants' "Caliber List" Is Admittedly Both Over-inclusive and Under-inclusive According to Materials they Rely On

Defendants assert that the ammunition identified in their "caliber list" as ammunition that is "principally for use in a handgun" is supported by the fact that those calibers are identified in *Cartridges of the World* in its section describing "handgun cartridges." (UMF No. 93.) Defendants' reliance on this resource to provide a "common understanding" that ammunition identified in their caliber list is "handgun ammunition" is startling. Defendants consider the following "calibers" to be "handgun ammunition": .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, and .32. (UMF No. 37.) However, *Cartridges of the World* identifies multiple cartridges in most of these calibers in its sections that discuss rifle cartridges.[14] (UMF No. 94.) And Defendants' own representative admitted that there are many cartridges that fall within the listed calibers that are not "principally for use in a handgun." (UMF No. 96.) Even more confusing, Defendants' expert stated he would only classify *three* .45 cartridges as "principally for use in a handgun": .45 ACP, .45 GAP, and .45 Long Colt. (UMF No. 106.) But *Cartridges of the World*, which Defendants rely on, includes numerous additional .45 cartridges in its handgun cartridge section. (UMF No. 107.)

The same problem is presented for calibers Defendants have not determined to be "handgun ammunition" under the Challenged Provisions. How are Plaintiffs to feel remotely safe when selling ammunition that is not included in Defendants' list of what they consider to be ammunition "principally for use in handguns," but which is identified in *Cartridges of the World's* section on

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[14] Examples include the 25-20 WCF, 25-35 WCF, 25 Winchester Super Short Magnum, 32-20 Winchester, 38-55 Winchester, 444 Marlin, 44-40 WCF, 45-70 Government, 450 Marlin.40-50 Sharps, 40-60 Markin, 40-60 Colt, 40-63 and 40-70 Ballard, _44 Evans, 44 Henry, 44 Game Getter, and the 44-40 Extra Long. (UMF No. 94.)

handgun cartridges?[15] (UMF No. 95.) Plaintiffs are plainly subject to arbitrary and discriminatory enforcement when the State's own ammunition expert assures that certain ammunition is not "handgun ammunition," but the very book he relied upon includes that ammunition in its chapter entitled "Handgun Cartridges of the World." (UMF No. 95.)

Accordingly, Defendant DOJ's reliance on *Cartridges of the World* to support its conclusion that the listed calibers are "handgun ammunition," but no other "caliber" of ammunition is – is not only misplaced but further demonstrates the utter confusion as to what ammunition the Challenged Provisions actually apply to, and how law enforcement will likely apply (or misapply) the law.

4. The Legislature's Attempted Enumerated List Differs Drastically from Defendants' Caliber List; Defendants Helped Formulate the AB 2358 List and Identified Different Calibers as "Handgun Ammunition"

First, Defendants assert the law is clear as to what ammunition it applies to, i.e. its "caliber list." They assert that everyone the law applies to and those who enforce it know this. (UMF No. 38.) But if that were truly the case, why then when Plaintiffs filed this lawsuit did the Legislature try and amend AB 2358 to include a list of ammunition the Challenged Provisions would apply to? (UMF Nos. 19, 20.) And more importantly, why did the Legislature's "list" differ so drastically from the DOJ's list? AB 2358's list initially listed as handgun ammunition "any variety of ammunition of the following calibers of ammunition . . . "**.22**, .25, .32, .38, .9mm, .10mm, .40, **.41**,.44, .45, **5.7x28mm**, **.223**, .357, .454, **5.56x4.45mm**, **7.62x39**, **7.63mm**, and **.50**. (UMF No. 19 [emphasis indicates those calibers not included in Defendants' caliber list].) That list was subsequently revised to list only the following: **.22 rimfire** ,25, .32, .38, .9mm, .10mm, .40, **.41**, .45, **5.7x28mm**, .357, .454, **5.56x45**, **7.63mm**, and **7.65mm**. (UMF No. 20.) The Legislature's first attempted list identified *eight* "calibers" of ammunition that were *not* included in the DOJ's "common understanding" list. (UMF Nos. 19, 37.) The second list identified *six* "calibers" of ammunition that were *not* included in the DOJ's "common understanding" list. (UMF Nos. 20, 37.) And neither of the Legislature's proposed "lists" in AB 2358 identified "**.380**" as handgun ammunition, which *was* included in the DOJ's caliber list. (UMF Nos. 19, 20, 37.) If ".380" is "commonly understood" to be

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[15] Examples include the 8mm Rast-Gasser, 8mm Revolver, 8mm Roth-Steyr, 41 Remington Magnum, 10.4 mm Italian Revolver, 455 Revolver, 460 S&W, 480 Ruger, 50 Action Express, 500 S&W. (UMF No. 95.)

"handgun ammunition," would the Legislature not have included it in its attempted enumerated lists? And if the Legislature considered multiple "calibers" to be "handgun ammunition" that are not "commonly understood" as such, what is to prevent law enforcement from considering those additional calibers, and others, to be "handgun ammunition"?

The difficulty Defendants had in identifying ammunition as "handgun ammunition" is further illustrated by testimony provided about AB 2358's "list." Defendants' representative admitted he was asked to opine on what he thought should be included as "handgun ammunition" in Assembly Bill 2358's enumerated list of "handgun ammunition" calibers. (UMF No. 16.) When asked what ammunition to include, he said he remembered identifying the following as handgun ammunition: ".45, .380., .25, .40, .38, .357, possibly .4.54, and possibly **.762**, and maybe **.223"** (UMF No. 17 [emphasis indicates calibers not identified in Defendants' caliber list].). Notably missing from this list of handgun ammunition identified as such by Defendants is ".44," which *is* identified by Defendants to be "commonly understood" to be "principally for use in handgun. (UMF No. 17, 37.) So, Plaintiffs, although still not provided with an official list of regulated ammunition, have been advised of four different "lists" of handgun calibers, some which appear to be broken down to specific cartridge, and some which are just identified by "caliber." Again, the confusion speaks for itself.

But the confusion is further compounded when considering what is likely the most popular "caliber" in the world – ".22". (UMF Nos. 102, 103.) It *was* included in the Legislature's lists (UMF Nos. 19, 20), but according to Defendant DOJ, it is apparently *not* "commonly understood" to be "handgun ammunition" (UMF No. 37.) When Plaintiffs' counsel inquired about whether ".22 rimfire" ammunition would be considered "handgun ammunition"prior to filing this lawsuit, counsel for Defendant DOJ stated they "did not know." (UMF No. 104.) Then, the Legislature included it on not one, but *both,* of its lists of "handgun ammunition." (UMF Nos. 19, 20.) But now, when asked to list all ammunition that is "handgun ammunition" in written discovery propounded by Plaintiffs, Defendant DOJ did *not* include ".22" in its "common understanding" list. (UMF No. 37.) And then when the DOJ's representative was pressed, he testified that he would not consider it handgun ammunition *at this time*, but that it could change if he *had more time to research, and had data*

available to him. (UMF No. 105.) So, for arguably the most popular caliber of ammunition in the world, Plaintiffs have the following to rely on from the agency charged with enforcing the laws and from the Legislature: First, I don't know if it is "handgun ammunition"; then, yes it definitely is (twice); and then, no, it is not; and finally, it isn't at this time but it may be in the future. Once again, the confusion speaks for itself.

5. There Is Confusion as to the Ammunition Exempted as Ammunition "Designed and Intended to be Used in an Antique Firearm"

Section 12060(b) excludes from its definition of "handgun ammunition" "ammunition designed and intended to be used in an 'antique firearm' as defined in [18 U.S.C. § 921(a)(16)]." 18 U.S.C. § 921(a)(16) defines "antique firearm," in relevant part as: "(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898." There are multiple ammunition cartridges that can be used in firearms manufactured both before and after 1898, including but not limited to cartridges in the following calibers: 22, .32, .38, .44, .45, and .50. (UMF No. 108.) Ammunition that can be used in a modern firearm chambered to fire that cartridge can also be used in an antique firearm chambered to fire that same cartridge. (UMF No. 109.)

Ammunition, when manufactured, is designed and intended to be used in any firearm that is chambered for that cartridge, regardless of when the firearm it will be used in was manufactured. (UMF No. 110.) Accordingly, ammunition cartridges that can be used in both antique firearms and modern firearms are designed and intended to be used in both – not one or the other. The calibers Defendants claim are "handgun ammunition" include cartridges that are designed and intended to be used in "antique firearms," and thus should be exempt from the Challenged Provisions.[16] (UMF No. 11.) The Challenged Provisions' exemption of ammunition that Defendants' own expert nonetheless considers regulated "handgun ammunition"[17] further demonstrates the arbitrary and discriminate enforcement likely to ensue as a result of the vagueness of the Challenged Provisions.

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[16] There are also multiple cartridges used in firearms manufactured both before and after 1898 that the DOJ does not include in its list, but may nonetheless actually be used more often in a handgun.

[17] The DOJ's expert witness testified that .45 Long Colt is unequivocally "handgun ammunition" under the Challenged Provisions. Yet this cartridge is used in firearms manufactured prior to 1898.

III. PENAL CODE SECTION 12061 IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO PLAINTIFF HERB BAUER'S SPORTING GOODS, INC.

Although Plaintiffs' Motion is not dependant upon Plaintiffs' "as applied" vagueness challenge – as defendants have alternatively moved this Court for summary adjudication, Plaintiffs have demonstrated a controversy and threat of enforcement as identified in the DOJ Information Bulletin, filed concurrently herewith. (UMF NO. 239.) Defendants have a duty to enforce the law, and in fact provided notice to all California firearm dealers, including Plaintiff Herb Bauer Sporting Goods, Inc., that Penal Code section 12061, subdivisions (a)(1) and (2) took effect, and have been in force, since January 1, 2010. (UMF NO. 239.) For each of the reasons set forth in Plaintiffs' facial vagueness claims discussed in detail above, the Challenged Provisions currently in effect are likewise unconstitutionally vague as applied to Plaintiff Herb Bauer Sporting Goods, Inc.

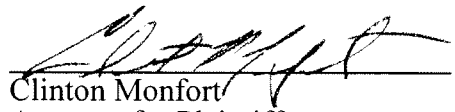
CONCLUSION

Because the Challenged Provisions are facially vague, because Penal Code sections 12060 and 12061, subdivisions (a)(1) and (2), are vague as applied, and because no triable issues of material fact exist, the Court should grant Plaintiffs' Motion for Summary Judgment, or in the Alternative, for Summary Adjudication. To the extent the court determines issues of material fact remain, Plaintiffs request the Court resolve these disputes following hearing on Plaintiffs' Motion and take any testimony required at hearing pursuant to the stipulation of the parties. Plaintiffs simultaneously submit the papers filed in support of their Motion for Summary Judgment or in the Alternative for Summary Adjudication as Plaintiffs' Trial Brief, and further request the Court enter judgment in favor of Plaintiffs, if necessary, upon consideration of all facts and evidence at trial.

For each of the foregoing reasons, Plaintiffs request a declaratory judgment, which this Court is authorized to issue, declaring that Penal Code sections 12060, 12061, and 12318, and each of them, are null and void as unconstitutionally vague in violation of the Due Process clause of the Fourteenth Amendment.

Dated: December 7, 2010

MICHEL & ASSOCIATES, P.C.



Clinton Monfort
Attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On December 6, 2010, I served the foregoing document(s) described as
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL BRIEF
on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
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P.O. Box 944255
Sacramento, CA 94244-2550

__ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on December 6, 2010, at Long Beach, California.

_X_ (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on December 6, 2010, at Long Beach, California.

__ (VIA FACSIMILE TRANSMISSION) As follows: The facsimile machine I used complies with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, copies of which is attached to this declaration.
Executed on December 6, 2010, at Long Beach, California.

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

CLAUDIA AYALA