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COPY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et al., Plaintiffs, v. **STATE OF CALIFORNIA, et al.,** Defendants.	Case No. 01CECG03182 **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT** Date: February 1, 2007 Time: 3:30 p.m. Dept: 72 Before the Honorable Alan Simpson

PLEASE TAKE NOTICE that on Thursday, February 1, 2007, at 3:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 72 of the above-entitled Court, located at 1100 Van Ness Avenue, Fresno, California, defendants Attorney General Bill Lockyer, the State of California, and the California Department of Justice will move, and hereby do move for summary judgment or, alternatively, for summary adjudication on each of the claims in plaintiffs' Amended Complaint pursuant to Code of Civil Procedure 437c, on the ground that there are no

triable issues of material fact in this matter, and defendants are entitled to judgment as a matter of law.

Defendants' alternative request for summary adjudication seeks adjudication of the following issues:

ISSUE ONE: Defendants are entitled to summary adjudication that plaintiffs' First Cause of Action (for "Unauthorized DOJ Redefinition of 'Flash Suppressor'") is without merit because plaintiffs cannot show that the regulation defining "flash suppressor" is arbitrary, capricious, or lacking in evidentiary support.

ISSUE TWO: Defendants are entitled to summary adjudication that plaintiffs' Second Cause of Action (for "Uncertainty of 'Flash Suppressor'") is without merit because plaintiffs cannot show that a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited by the "flash suppressor" definition, let alone in all applications.

ISSUE THREE: Defendants are entitled to summary adjudication that plaintiffs' Fifth Cause of Action (for "Uncertainty of 'Permanently Alter' In Relation To Large Capacity Feeding Devices") is without merit because plaintiffs cannot show that a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited by the large-capacity magazine definitions with the "permanently altered" exception, let alone in all applications.

ISSUE FOUR: Defendants are entitled to summary adjudication that plaintiffs' Claim 1 in the Sixth Cause of Action (for "Inconsistency Regarding Springfield and Browning Products'") is without merit because disagreement with particular DOJ determinations, even if valid, would at most be a basis for challenging the determinations, not a basis for invalidating the regulation defining "flash suppressor" pursuant to which the determinations are made.

ISSUE FIVE: Defendants are entitled to summary adjudication that plaintiffs' Claim 2 in the Sixth Cause of Action (for "Inconsistency Re 'Detachable Magazine'") is without merit because there is no controversy as to whether a magazine attached to a receiver by a screw, requiring a screwdriver for removal, is a "detachable magazine."

ISSUE SIX: Defendants are entitled to summary adjudication that plaintiffs' Claim 3 in the Sixth Cause of Action (for "Inconsistency Regarding Importation of 'Large Capacity' Magazine Rifles") is moot because any question regarding whether modern replicas of 19th Century lever-action rifles with tubular magazines are subject to the "large-capacity magazine" prohibition has been eliminated by legislative amendment.

This motion is based upon this Notice of Motion, the supporting Memorandum of Points and Authorities, the Declarations of Ignatius Chinn, Randy Rossi, and Douglas J. Woods filed herewith, defendants' Separate Statement of Undisputed Facts, and on such further evidence as may be presented at the hearing of the motion.

Dated: December 1, 2006

Respectfully submitted

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et al.

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Case No. 01CECG03182

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT

Date: February 1, 2007
Time: 3:30 p.m.
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Before the Honorable Alan Simpson

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INTRODUCTION

Defendants Attorney General Bill Lockyer, the State of California, and the California Department of Justice ("DOJ") hereby submit this memorandum in support of their motion for summary judgment or, alternatively, summary adjudication in this action. Plaintiffs' lawsuit is simply another chapter in a long-running policy dispute as to the control of assault weapons. It is not a complaint about the clarity of the challenged law, or even truly a challenge to defendants' implementation of law, but instead amounts to only a complaint that the law is not what plaintiffs want it to be.

> The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Penal Code section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings.

Penal Code § 12275.5. With these understated words, the Legislature solemnly heralded the enactment of California's Roberti-Roos Assault Weapons Control Act of 1989 (the "Act"). For the first time in California, the Act identified as "assault weapons" certain rifles, pistols, and shotguns specified by manufacturer and model and established restrictions upon their possession, manufacture, distribution, transportation, and sale.

Over the next 10 years, however, firearms manufacturing interests responded to the Act by attempting to circumvent its proscriptions by use of alternative model names and numbers not listed among the rifle, pistol, and shotgun models identified as assault weapons under the Act. To close the loophole, the Legislature enacted Senate Bill 23, Chapter 129 of the Statutes of 1999 ("SB 23"). In so doing, the Legislature stated: "It was the original intent of the Legislature in enacting Chapter 19 of the Statutes of 1989 to ban all assault weapons, regardless of their name, model number, or manufacture. It is the purpose of this act to effectively achieve the Legislature's intent to prohibit all assault weapons." SB 23, Ch. 129, St. of 1999, Sec. 12.

Among other things, SB 23 created Penal Code section 12276.1, which for the first time defined assault weapons by reference to objective design characteristics, in addition to the existing list of assault weapons already identified by manufacturer and model. In this brief, defendants first set

forth the relevant statutory and regulatory provisions at issue, the history of the promulgation of the regulations in support of SB 23, and the nature of plaintiffs' claims that remain following defendants' demurrer. In the Argument, defendants first address plaintiffs' statutory expansion claim alleged in the First Cause of Action, then the constitutional vagueness challenges alleged in the Second and Fifth Causes of Action, and then the claims that defendants have failed to properly administer SB 23 set forth in Claims 1, 2, and 3 in the Sixth Cause of Action.

In all respects, although plaintiffs have policy disputes with the Legislature and with DOJ's implementation of SB 23, there is no dispute as to either the bases for the DOJ choices or the bases for plaintiffs' criticism of the choices. As this Court recognized long ago in rejecting plaintiffs' motion for preliminary injunction, "there does not appear to be a reasonable likelihood that plaintiffs will prevail at trial." Or. Den. Prelim. Inj., p. 4.[1] Given the proper deference accorded DOJ's decisions, plaintiffs' policy criticisms are insufficient as a matter of law to create any triable issues of material fact in this matter, and defendants are entitled to summary judgment on plaintiffs' claims.

STATEMENT OF FACTS

I. The Challenged Statutory and Regulatory Framework

The relevant portions of the applicable assault weapons Penal Code sections are as follows, with the terms that are the subjects of plaintiffs' various claims highlighted in italics for the Court's reference:

§ 12276.1. Assault weapon; further definition

(a) Notwithstanding Section 12276, "assault weapon" shall also mean any of the following:
(1) A semiautomatic, centerfire rifle that has the capacity to accept a *detachable magazine* and any one of the following:
* * *
(E) A *flash suppressor*.
* * *
(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.
* * *
(4) A semiautomatic pistol that has the capacity to accept a *detachable magazine* and any one of the following:
(A) A threaded barrel, capable of accepting a *flash suppressor*, forward handgrip, or silencer.
* * *

1. The "Order Denying Request for Preliminary Injunction," dated April 16, 2002, is attached to the Declaration of Douglas J. Woods ("Woods Decl.") as Exhibit G.

(D) The capacity to accept a *detachable magazine* at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

* * *

(7) A semiautomatic shotgun that has the ability to accept a *detachable magazine*.

* * *

(d) The following definitions shall apply under this section:

* * *

(2) "Capacity to accept more than 10 rounds" shall mean capable of accommodating more than 10 rounds, but shall not be construed to include a feeding device that has been *permanently altered* so that it cannot accommodate more than 10 rounds.

* * *

Penal Code § 12276.1.

The relevant portions of the assault weapons definitions contained in the California Code of Regulations are as follows:

§ 978.20. Definitions

The following definitions apply to terms used in the identification of assault weapons pursuant to Penal Code section 12276.1:

(a) "*detachable magazine*" means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool. Ammunition feeding device includes any belted or linked ammunition, but does not include clips, en bloc clips, or stripper clips that load cartridges into the magazine.

(b) "*flash suppressor*" means any device designed, intended, or that functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision.

* * *

California Code of Regulations, Title 11, § 978.20.

These provisions come into play by virtue of Penal Code section 12280, which generally prohibits the possession, manufacture, distribution, transportation, importation, sale, gift, or loan of assault weapons, except where the assault weapon is registered with DOJ or where a valid assault weapon permit has been issued by DOJ.

In addition, plaintiffs' lawsuit addresses an exception to another Penal Code provision established by SB 23. The relevant portions of the "large-capacity" magazine Penal Code prohibition are as follows:

§ 12020. Manufacture, import, sale, supply or possession of certain weapons and explosives; punishment; exceptions; definitions

(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison:

* * *

(2) Commencing January 1, 2000, manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, or lends, any

large-capacity magazine.

* * *

(c)(25) As used in this section, "large-capacity magazine" means any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

(A) A feeding device that has been *permanently altered* so that it cannot accommodate more than 10 rounds.

* * *

(C) *A tubular magazine that is contained in a lever-action firearm.*

Penal Code § 12020.

II. DOJ's Promulgation and Implementation of the Regulations

Upon passage of SB 23 and the Governor's signing of the bill in July 1999, DOJ set about promulgating regulations to facilitate the enforcement of, and public compliance with, the provisions of SB 23, including the provisions at issue in this case, as authorized under Penal Code section 12276.5(i). Declaration of Randy Rossi ("Rossi Decl."), ¶ 4. Before even starting to develop the language of the regulations to be considered, DOJ began by bringing together all interested parties, those that DOJ considered to be "stakeholders" in the assault weapons law, for the purpose of preliminary discussions, including what topics the potential regulations might address. *Id.*

With feedback gathered from the meetings and the direct input of DOJ legal and firearms experts, the formal rulemaking process pursuant to the Administrative Procedure Act ("APA") was initiated with submission of the Notice of Proposed Rulemaking to Office of Administrative Law ("OAL"). Rossi Decl., ¶ 5. During the course of the rulemaking process, DOJ held public hearings in Sacramento and Los Angeles to receive public comment. *Id.* As a result of the public hearings and comments received through the mail, DOJ received a total of over 4,100 comments from more than 1,300 people. *Id.* DOJ responded to public input with two new iterations of proposed regulations. *Id.* The succession of improvements to the proposed regulations reflects DOJ's responsiveness to public comment and is the natural and desired result of the APA's provisions for public input in the rulemaking process. *Id.*

Upon adoption of the Regulations, DOJ immediately gave notice to the stakeholders concerning the adoption of the Regulations and proceeded to provide information and training to the interested parties by a host of methods and on a sweeping scale. Rossi Decl., ¶ 6. DOJ held many training sessions throughout the state for law enforcement groups, district attorneys, firearms dealers, and

others. *Id.* DOJ field reps conducted many face-to-face meetings and demonstrations in response to a standing offer to provide training to whoever desired training. *Id.* Information was included in the Assault Weapons Guide that DOJ published, and on a page on DOJ's website which averaged 35,000 hits per week. *Id.*

III. PLAINTIFFS' CLAIMS

A. Definition of "Flash Suppressor"

Plaintiffs make three distinct (albeit somewhat overlapping) claims in this lawsuit involving the definition of "flash suppressor" set forth in section 978.20(b) of the Regulations: (1) that the definition is an unlawful expansion of the statutory term (First Cause of Action); (2) that the definition is unconstitutionally vague (Second Cause of Action); and (3) that DOJ's determinations that two devices are *not* flash suppressors are inconsistent with the definition (Claim 1 in the Sixth Cause of Action).[2]

Unlawful Expansion Claim: Plaintiffs claim that the term "flash suppressor" used by the Legislature has an established technical meaning that is contrary to the definition in the Regulations. Am. Compl., ¶ 39. In particular, plaintiffs disagree with the regulatory language that includes within the "flash suppressor" definition devices that *function* to suppress flash, complaining that such language has the effect of unlawfully enlarging the definition of "flash suppressor" to include devices labeled "compensators" and "muzzle brakes." Am. Compl., ¶¶ 40-42. Plaintiffs want the definition to include only devices *designed or intended* to suppress flash. Am. Compl., ¶ 46. Plaintiffs also complain that the definition should not include devices that *redirect* muzzle flash from the shooter's field of vision, but only devices that *reduce* muzzle flash. Am. Compl., ¶ 42.

Prior to the Legislature's enactment of Penal Code section 12276.1, though, there was no established technical definition of the term "flash suppressor" in the industry, and certainly no such definition categorically excluding devices labeled "muzzle brakes" and "compensators." Declaration of Ignatius Chinn ("Chinn Decl."), ¶ 13. According to firearms reference materials reviewed by DOJ staff in the rulemaking process, including materials appended to plaintiffs' Amended Complaint,

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2. The three claims alleged in the Sixth Cause of Action, each seeking a different remedy, are individually subject to summary adjudication. *See Lilienthal & Fowler v. Superior Court*, 12 Cal. App. 4th 1848, 1854-55; Code Civ. Proc. § 437c(o).

before DOJ defined "flash suppressor" in the Regulations there were varied, overlapping, and often conflicting definitions of the terms "flash suppressor," "flash hider," "muzzle brake" and "compensator" used in the industry. *Id.*, Ex. A; Am. Compl., ¶ 39, Exs. 6-15. DOJ's regulation established a single, industry-wide definition of the Legislature's "flash suppressor" term to encompass all devices that are designed or intended to, or that function to, suppress muzzle flash when a firearm is fired. *Id.*, ¶ 13.

Vagueness Claim: Plaintiffs claim that the definition of the term "flash suppressor" is unconstitutionally vague in various respects: it requires testing of the device which the ordinary rifle owner is unable to perform (Am. Compl., ¶¶ 48, 52-54); it does not include a list of devices identified as flash suppressors (Am. Compl., ¶ 49); it does not specify whether flash suppression function is determined by reference to shooting from the shoulder or from the hip (Am. Compl., ¶ 50); it does not specify whether flash suppression function is determined by reference to firearms with iron sights or with telescopic sights (Am. Compl., ¶ 51); it does not specify which ammunition characteristics to consider in determining flash suppression function (Am. Compl., ¶ 55); and it does not specify any flash measurement standards (Am. Compl., ¶ 55).

DOJ's understanding, though, is that the absence of measurement standards in the statute listing "flash suppressor" means the Legislature intended to include devices that reduce or redirect *any* amount of flash, and that DOJ is not at liberty to deviate from such intent by establishing some hypothetically permissible level of perceptible flash that would not render the device a flash suppressor. Chinn Decl., ¶ 6. DOJ determines whether a particular feature or device is a flash suppressor as defined in section 978.20(b) by inspecting the device, reviewing material regarding the device provided by the manufacturer or otherwise, and/or consulting with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). *Id.*, ¶ 7-10. Correspondingly, others may ordinarily learn whether a particular device functions to suppress flash by the same means, and by consultation with DOJ. *Id.*, ¶ 11.

Inconsistent Determination Claim: Plaintiffs claim that two devices – the Springfield Muzzle Break and the Browning BOSS – *do* function to perceptibly reduce or redirect muzzle flash from the shooter's field of vision and therefore *should* meet the definition of "flash suppressor" in the

Regulations, but that DOJ has nonetheless determined the two devices are *not* flash suppressors. Am. Compl., ¶¶ 78-79. As a result, plaintiffs claim the definition in the Regulations should be invalidated. Am. Compl., ¶ 80. Beginning in approximately 2000, DOJ has confirmed in a variety of informal contexts that the Springfield Muzzle Break is not a flash suppressor, based on such determination by ATF. Chinn Decl., ¶ 15, Ex. B. In evaluating the Browning BOSS, DOJ has determined that the device redirects flash in a 360 degree arc around the barrel such that, on balance, it floods the shooter's field of vision with flash. *Id.*, ¶ 15. DOJ has thus determined that the Browning BOSS does not function to perceptibly reduce or redirect muzzle flash from the shooter's field of vision. *Id.*

B. "Permanently Altered" Exception to Large-Capacity Magazine Definition

Plaintiffs claim in their Fifth Cause of Action that DOJ should have issued a regulation to define the term "permanently altered" in the exception to the definition of "large-capacity magazine" established in Penal Code section 12020(c)(25).[3] As the Regulations were originally noticed to the public, DOJ *did* propose that the statutory term "permanently altered" be defined to mean "any irreversible change or alteration." Chinn Decl., ¶ 17. After consideration of public comment received during the initial comment period, however, DOJ determined that the proposed definition failed to provide any additional clarity to the term, and also that none of the alternative definitions proposed in the public comments provided additional clarity while maintaining legislative intent. *Id.* DOJ thus determined that the term "permanently altered" would be sufficiently understood without further definition. *Id.*

C. Detachable Magazine Enforcement

In Claim 2 of their Sixth Cause of Action, plaintiffs claim that DOJ has not fulfilled a duty to exercise supervisory power over district attorneys and law enforcement to assure that arrests and prosecutions are carried out in a manner consistent with section 978.20(a) of the Regulations, which defines the term "detachable magazine" to mean a magazine "that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required." In

3. Plaintiffs claim that DOJ likewise should have defined the term "permanently altered" in the exception to the term "capacity to accept more than 10 rounds" established in Penal Code section 12276.1(d)(2). Am. Compl., ¶ 71.

particular, plaintiffs complain about a letter from DOJ dated February 22, 2001, responding to an inquiry from plaintiffs' counsel as to the legal effect under section 978.20(a) of a screw drilled through the receiver into the magazine. Am. Compl., ¶¶ 81-82, Ex. 28. DOJ confirmed in the letter, consistent with plaintiffs' counsel's understanding, that a magazine requiring either disassembly of the firearm action or use of a tool for removal (such as in the screw example) is not a detachable magazine under the regulatory definition. Am. Compl., Ex. 28.

D. Application of Large-Capacity Magazine Prohibition to Replica 19th Century Lever-Action Rifles

At the time this lawsuit was filed, the statutory definition of "large-capacity magazine" in Penal Code section 12020(c)(25) did not expressly exempt lever-action firearms. Plaintiffs charged in Claim 3 of their Sixth Cause of Action that DOJ had created confusion by authorizing members of the Single Action Shooting Society, Inc. ("SASS") to bring modern replicas of 19th Century lever-action rifles into California for the purpose of participating in SASS western style shooting competitions. Am. Compl., ¶¶ 84-85. Because plaintiffs claimed such firearms fell within the definition of "large-capacity magazines," plaintiffs requested that the prohibition against importation of large-capacity magazines be interpreted as limited to a prohibition against importation of the SASS rifles *for the purpose of sale*. Am. Compl., ¶¶ 84-85. The law was amended in 2001, however, expressly to exempt from the "large-capacity magazine" definition "[a] tubular magazine that is contained in a lever-action firearm." Penal Code § 12020(c)(25)(C).

ARGUMENT

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a a matter of law." Code Civ. Proc. § 437c(c). Due to the proper deference accorded DOJ's decisions, plaintiffs' policy criticisms are insufficient as a matter of law to create any triable issues of material fact in this matter, and defendants are entitled to summary judgment on plaintiffs' claims.

I. DEFENDANTS ARE ENTITLED TO SUMMARY ADJUDICATION ON PLAINTIFFS' FIRST CAUSE OF ACTION FOR ALLEGED UNLAWFUL EXPANSION OF THE "FLASH SUPPRESSOR" TERM.

"The Attorney General shall adopt those rules and regulations that may be necessary or proper

to carry out the purposes and intent of [the Act]." Penal Code § 12276.5(i). "[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." Gov. Code § 11342.2. Within these parameters, any evaluation of the regulations challenged here must be highly deferential to DOJ's exercise of discretion.[4]

Administrative rulemaking is quasi-legislative in character, and the validity of a regulation is thus subject to limited judicial review in the same manner as other legislation. *Dabis v. San Francisco Redevelopment Agency*, 50 Cal. App. 3d 704, 706 (1975). Courts exercise limited review out of deference to the separation between the legislative and judicial powers, and to the agency's presumed expertise within the scope of its authority. *Californians for Political Reform Foundation v. Fair Political Practices Commission*, 61 Cal. App. 4th 472, 484 (1998); *California Labor Federation, AFL-CIO v. Industrial Welfare Commission*, 63 Cal. App. 4th 982, 989 (1998). Review is ordinarily limited to whether the agency exceeded the scope of its delegated authority, whether it employed fair procedures, and whether the action is reasonable or instead arbitrary, capricious, or lacking in evidentiary support. *Brock v. Superior Court*, 109 Cal. App. 2d 594, 605 (1952).

As described above (pp. 5-6), plaintiffs complain that DOJ's regulation defining the statutory term "flash suppressor" is contrary to an established technical meaning already existing in the industry, and has the effect of improperly including "compensators" and "muzzle brakes" within the definition. Am. Compl., ¶¶ 39, 42. In particular, plaintiffs want the definition to include only devices *designed or intended* to *reduce* flash, without any consideration of how the device *functions*, and without any reference to *redirecting* flash from the shooter's field of vision. Am. Compl., ¶¶ 40-42, 46. Plaintiffs' claim is simply a policy dispute with DOJ (and indeed the Legislature) as to what the law should be, and falls well short of suggesting the "flash suppressor" definition is arbitrary,

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4. It is unclear how plaintiffs will argue in an attempt to support this claim, but their previous arguments in support of their preliminary injunction motion and their arguments in support of their motion for summary judgment suggest they may respond with evidence from outside the administrative rulemaking record. No such evidence would suggest that DOJ's "flash suppressor" definition is arbitrary, capricious, or lacking in evidentiary support. In any event, as this Court has already recognized, such evidence is inadmissible on this declaratory relief challenge to a regulation. *See* Gov. Code § 11350(d); Woods Decl., Ex. G, pp. 2-4. The same limitation applies to plaintiffs' Second Cause of Action and Claim 1 in the Sixth Cause of Action, to the extent such claims seek to challenge the regulatory definition of "flash suppressor," not just the statutory term.

capricious, or lacking in evidentiary support.

Contrary to plaintiffs' threshold premise, at the time that SB 23 was passed, the terms "flash suppressor" and "flash hider" took on similar and dissimilar meanings across the reference materials and were interwoven with discussions of "muzzle brakes" and "compensators." Chinn Decl., ¶ 13, Ex. A; Am. Compl., ¶ 39, Exs. 6-15. It was the absence of any established industry-wide definition of "flash suppressor" that spoke to the need to provide a definition by regulation. Given the varying definitions in the industry references, DOJ was left to define the term "flash suppressor" according to its terms, and the statutory purpose, as a device that suppresses flash. *See Great Lakes Properties, Inc. v. City of El Segundo*, 19 Cal. 3d 152, 155 (1977). Contrary to plaintiffs' critique, there was no basis for limiting the scope of the term to include only those devices "designed or intended" to suppress flash. An administrative regulation may not impair the scope of the statute it implements. Gov. Code § 11342.2. Moreover, if necessary in determining legislative intent, courts may compare statutes on related subjects and look to the presence or absence of common language for guidance. *Traverso v. People ex rel Department of Transportation*, 6 Cal. 4th 1152, 1166 (1993). In Penal Code section 12020, which establishes the unlawful carrying and possession of weapons in California with extensive definitions, *in no less than seven instances* the Legislature expressly limited the definition of particular weapons or particular devices for weapons by reference to how the weapon or device was "designed" or "intended" to be used. *See* Penal Code § 12020(c)(1)(A), (c)(1)(B), (c)(1)(E), (c)(2)(E), (c)(4), (c)(9), and (c)(10). Where the Legislature intends to limit a weapon device's definition to how it is "designed" or "intended" to be used, as opposed to how it may function, section 12020 makes clear that the Legislature knows how to do so. No such limitation was expressed in Penal Code section 12276.1.[5]

Correspondingly, plaintiffs' contention that any proper definition of "flash suppressor" must exclude "muzzle brakes" and "compensators," even if such devices function to suppress flash, is incorrect as a matter of law and undisputed fact. There are many devices that are called muzzle brakes and compensators *that also suppress flash*, both intentionally and unintentionally. Chinn

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5. In any event, several of the existing definitions *did* in fact contemplate function, rather than design or intent. *See, e.g.*, Chinn Decl., Ex. A, p. 29 ("device attached to the muzzle of a weapon which reduces the amount of visible light or flash created by burning propellant gases").

Decl., ¶ 13. *Id.* Plaintiffs admit muzzle brakes and compensators can affect flash. Am. Compl., ¶ 41. In one vivid example from among the reference materials, the author stated:

> [M]ost modern military and police rifles have flash suppressors (also called flash hiders) attached to their muzzles. . . . *Some modern systems try to combine both the muzzle brake and the flash hider to have the best of both systems.* . . . For maximum flash hiding, the open-prong flash hider is hard to beat. One modern version of this . . . is the Vortex offered by Western Ordnance International Corp. . . . Originally, the unit was designed just for hiding flash, but it was discovered that it also reduced the size of groups as well as recoil somewhat. . . . Because of all the enhancements the Vortex offers, *it's now being sold as a multipurpose device.* . . . For those wanting reduction of recoil, *Fabian Brothers' muzzle brake is most ideal.* . . . The original design, sold as the Mil/Brake, didn't do much to suppress flash, but it was revamped when it became the Muzzle Stabilizer; *now the birdcage-style slits at its front greatly reduce flash.*

Duncan Long, *The Complete AR-15/M16 Sourcebook* (Chinn Decl., Ex. A, pp. 66-67) (emphasis added). Plaintiffs' suggestion that any definition of "flash suppressor" must not have the effect of including "muzzle brakes" or "compensators" approaches the question from the wrong direction. The Legislature expressly included "flash suppressors" in the list of qualifying assault weapon characteristics; it did not *exclude* devices identified as "muzzle brakes" and "compensators" from such list. To exclude such devices categorically, even if they suppress flash, would impermissibly impair the scope of the statute. *See* Rossi Decl., Ex. A, p. 15.[6]

Plaintiffs' criticism of DOJ's decision to include devices that "redirect" muzzle flash from the shooter's filed of vision, as opposed to only devices that "reduce" flash, in the "flash suppressor" definition amounts to mere policy nit-picking, and again misunderstands DOJ's responsibility in the regulatory process. It is undisputed that, in the course of public comment in the regulatory process, DOJ determined that the word "conceals" in the original proposed definition presented the possibility of an overly broad interpretation that could have included any device positioned between the shooter's eye and the muzzle flash. *See* Rossi Decl., Ex. A, p. 15. To avoid such unintended interpretation, the word "conceals" was dropped and the "redirects" language added. *Id.* This modification, actually intended to protect against overbroad application of the "flash suppressor"

6. Because the underlying purpose of SB 23 was to get past firearms manufacturer self-labeling in order to ban assault weapons, "regardless of their name, model number, or manufacture" (SB 23, Ch. 129, St. of 1999, Sec. 12), reading the term "flash suppressor" to exclude devices simply because a manufacturer may identify them differently would entirely undermine the Legislature's intent.

term, should be embraced by plaintiffs and is in no event arbitrary.[7]

Disagreement with DOJ's choice is insufficient to defeat summary judgment. The existence of the various definitions in the reference materials is undisputed, the bases for DOJ's decision are undisputed, and plaintiffs' policy criticisms cannot suggest that DOJ's judgment in establishing the "flash suppressor" definition was arbitrary, capricious, or lacking in evidentiary support. Defendants are thus entitled to summary adjudication on this claim.[8]

II. DEFENDANTS ARE ENTITLED TO SUMMARY ADJUDICATION ON PLAINTIFFS' VAGUENESS CLAIMS

A. Constitutional Due Process Vagueness Standard

Legislation will not be considered unconstitutionally vague unless it fails "to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Harrott v. County of Kings*, 25 Cal. 4th 1138, 1151 (2001). Plaintiffs do not and cannot make any contention that the words of the provisions challenged as uncertain are themselves not reasonably understandable.

Moreover, in evaluating a claim that legislation is unconstitutionally vague *on its face*, as is the case here, where First Amendment rights are not implicated a court "should uphold the challenge *only if the enactment is impermissibly vague in all its applications*." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (emphasis added) (reversing judgment granting declaratory and injunctive relief in pre-enforcement facial challenge to drug paraphernalia ordinance). As the United States Supreme Court explained: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.* at 425. To illustrate, the Supreme Court observed: "The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine is of no due process significance unless the possibility ripens into a

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7. In any event, even one of the references cited by plaintiffs speaks in terms of flash suppressors "disrupting" flash, in addition to "reducing" it. Chinn Decl., Ex. A, p. 45; Am. Compl., Ex. 8.

8. In response to defendants' requests to identify all facts in support of this claim, plaintiffs simply incorporated by reference their boilerplate interrogatory answer, which in turn refers to the "primary facts" as being "detailed in the Complaint and Plaintiffs' Motion for Summary Judgment and exhibits thereto." *See* Plfs.' Resp. Sp. Int. 23-39, 2. (Woods Decl., Ex. D). These materials do nothing to contest the undisputed facts.

prosecution." *Id.* at 503, n.21 (citation omitted).

As one court has stated with respect to the Act, in particular:

> We have no quarrel with petitioner's assertion that many of the provisions of the AWCA at issue in this case are ambiguous in certain respects; but we are also aware that "[m]any, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear." Moreover, with the AWCA in mind, our Supreme Court recently stated that the fact "[t]hat a criminal statute contains one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face."

Jackson v. Department of Justice, 85 Cal. App. 4th 1334, 1355 (2001) (quoting *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1201 (1988), and *In re Jorge M.*, 23 Cal. 4th 866, 886 (2000)).

One fundamental error that infects all of plaintiffs' vagueness arguments is their failure to recognize the import of the mens rea requirement applicable to assault weapons prosecutions. The California Supreme Court has determined: "The People bear the burden of proving the defendant knew or reasonably should have known the firearm possessed the characteristics bringing it within the AWCA." *In re Jorge M.*, 23 Cal. 4th 866, 887 (2000). As a result of the existence of this mens rea requirement, if unknown circumstances that would technically make a firearm an assault weapon are sufficiently extraordinary that it would be unreasonable to expect knowledge of them, an element of the crime is not met, and the crime cannot be prosecuted. Plaintiffs' suggestion (Am. Compl., ¶ 4) that the challenged provisions do not satisfy the mens rea requirement confuses the analytically independent inquiries of (1) whether the expectation is reasonable that the criminal provisions will be understood (constitutional vagueness analysis), and (2) whether the expectation is reasonable that a firearm owner would know what facts exist that would render his firearm an assault weapon pursuant to the criminal provision (mens rea requirement analysis at trial). A reasonable person can understand the law (no due process problem) without knowing obscure facts (no mens rea, and no prosecution). The mens rea requirement is a hurdle for a prosecutor and thus serves as a protection for a defendant from potential criminal liability, not a basis for arguing the challenged provisions are vague.[9]

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9. In response to defendants' requests to identify all facts in support of their vagueness claims, plaintiffs simply incorporated by reference their boilerplate interrogatory answer, which in turn refers to the "primary facts" as being "detailed in the Complaint and Plaintiffs' Motion for Summary Judgment and exhibits thereto." *See* Plfs.' Resp. Sp. Int. 41-63, 2. (Woods Decl., Ex. D). These materials do nothing to contest the undisputed facts. Correspondingly, defendants requested that plaintiffs provide all facts concerning any contention that any prosecution had been improperly brought involving whether a device was a "flash suppressor" or whether a large-capacity magazine had been

B. Plaintiffs' Second Cause of Action for alleged "Uncertainty of 'Flash Suppressor'" is a policy disagreement with DOJ, not a basis for invalidating the "Flash Suppressor" definition.

Looking first at the actual text of the provisions challenged here (*see, e.g., Hoffman Estates*, 455 U.S. at 497-503), plaintiffs can identify no word or phrase in the statute or "flash suppressor" definition that would call into constitutional question the provisions at issue. Instead, plaintiffs resort to alleged facts outside the text in attempting to make their claim. *See* Am. Compl., ¶¶ 47-57. Even taking into account such attempt to import outside sources of ambiguity, none of the points raised suggests that a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited, let alone in all applications.

As described above, (p. 6), plaintiffs complain that the "flash suppressor" definition does not specify any flash measurement standards. Am. Compl., ¶ 55. But the absence of measurement standards *in the statute* listing "flash suppressor" as a qualifying assault weapon characteristic means the Legislature intended to include devices that reduce or redirect *any* amount of flash, and DOJ is not at liberty to deviate from such intent by establishing some hypothetically permissible level of perceptible flash preferred by plaintiffs. *See* Chinn Decl., ¶ 6; Rossi Decl., Ex. A, p. 15; Gov. Code § 11342.2. This complaint is simply plaintiffs wanting the definition to be different from what it is, not that they do not have a reasonable opportunity to know what is prohibited.

Plaintiffs also complain that the "flash suppressor" definition requires testing which the ordinary rifle owner is unable to perform (Am. Compl., ¶¶ 48, 52-54), but the gap in plaintiffs' logic is that there is no basis for plaintiffs' false assumption that a firearm owner must be able to perform comparison testing upon his particular firearm in order to reasonably know whether a device perceptibly reduces or redirects flash. Short of test-firing, ordinary methods available for determining whether a particular device functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision include inspection of the device, consultation with DOJ or ATF, review of product literature provided by the manufacturer or distributed by the industry, or any other credible, authoritative sources of information regarding the device, which may include dealers or even other firearms owners. *See* Chinn Decl., ¶ 11. If a firearms owner confirms by any of these

"permanently altered," but plaintiffs could identify none. Plfs.' Resp. Sp. Int. 85-104.

methods that a device functions to perceptibly reduce or redirect flash from the shooter's field of vision, then such owner would fairly be subject to prosecution. But again, this point raises a mens rea issue for a prosecutor to address at trial – whether the criminal defendant should reasonably have known in the circumstances that the device's characteristics brought it within the "flash suppressor" definition; it is not a point addressing the vagueness issue of whether a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited, let alone in all applications.[10/]

Finally, as described above (p. 6), plaintiffs complain that the "flash suppressor" definition is vague due to possible variables as to firearm and ammunition characteristics and shooter usage. Am. Compl., ¶¶ 50, 51, 55. If the selection of any variable would make a perceptible difference, though, determination of whether a device functions to perceptibly reduce or redirect flash from the shooter's field of vision assumes any typical shooting usage, and assumes the characteristics of any commonly available firearms and ammunition. Chinn Decl., ¶ 12. The mens rea requirement would prevent prosecution for use of a device that may function to suppress flash if hypothetically used with some obscure type of ammunition.

Accordingly, there is no disputed fact as to whether the "flash suppressor" definition in the Regulations is impermissibly vague, let alone in all applications, and defendants are entitled to summary adjudication on this claim.

C. Plaintiffs' Fifth Cause of Action for alleged "Uncertainty of 'Permanently Alter' In Relation To Large Capacity Feeding Devices" is a policy disagreement with DOJ, not a basis for requiring adoption of plaintiffs' proposed regulation.

As described above (p. 7), plaintiffs complain that DOJ should have issued a regulation to define the statutory term "permanently altered" in the exception to the definition of "large-capacity magazine" established in Penal Code section 12020(c)(25). Notably, plaintiffs do not even try to pretend that the "permanently altered" term is vague in all applications. Indeed, plaintiffs offer their own description of alteration methods they consider "permanent," and indeed by this action seek an order requiring that DOJ issue a new regulation adopting their description. Accordingly, plaintiffs'

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10. Plaintiffs' suggestion that DOJ's definition should have simply been a list of those devices identified as "flash suppressors" on the mechanism itself, its packaging, or its manual (Am. Compl., ¶ 49) is the same as suggesting that the fox guard the henhouse. It was the manufacturers' efforts to circumvent existing assault weapon provisions by virtue of self-definition of their products that led to enactment of SB 23 in the first place.

facial vagueness challenge to the "permanently altered" provision in the statute fails at the threshold.

Nor is there any argument that defendants have failed in some obligation to issue a regulation defining "permanently altered" on the terms demanded by plaintiffs. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995) ("[There is no] basis for suggesting that [an administrative agency] has a statutory duty to promulgate regulations that . . . address every conceivable question . . ."); *Alfaro v. Terhune*, 98 Cal. App. 4th 492, 503-505 (2002) ("an agency decision not to institute rulemaking should be overturned only in the rarest and most compelling circumstances").

DOJ has explained its conclusion reached in the rulemaking process that the term "permanently altered" would be sufficiently understood without further definition. Chinn Decl., ¶ 17. In regard to plaintiffs' concern that, if construed "over-literally," the term "permanently altered" has no meaning or application because "[a]lterations of metal or plastic objects are *always* subject to reversal, given the necessary time, expertise, resources, and specialized tools and equipment" (Am. Compl., ¶ 72), no party argues for "over-literal" interpretation. DOJ *rejected* in the rulemaking process an interpretation of the term to mean "irreversible," as plaintiffs know. Chinn Decl., ¶ 18. In response to plaintiffs' contention that "permanently altered" should be defined in terms of physical alteration of the contours or characteristics of the magazine through processes such as metalworking, machining, welding, brazing, soldering, or application of bonding agents or adhesives (Am. Compl., ¶¶ 74-75), DOJ agrees that such means of altering a magazine so that it cannot accommodate more than 10 rounds *can* ordinarily be permanent, but of course DOJ cannot definitively classify such methods as "permanent" because non-permanent alterations using such methods are possible in given instances. Chinn Decl., ¶ 18. It is simply not workable to attempt to list every method by which an alteration ordinarily could be made "permanent," especially when use of even the specified methods would not necessarily be permanent in every instance. *Id.*

Accordingly, there is no triable issue of material fact as to any need or obligation for a definition of "permanently altered" in the Regulations, let alone any issue as to whether the term is vague in all applications, and defendants are entitled to summary adjudication on this claim.

III. DEFENDANTS ARE ENTITLED TO SUMMARY ADJUDICATION ON PLAINTIFFS' CLAIMS THAT DEFENDANTS IMPROPERLY ADMINISTERED AND/OR FAILED TO ADMINISTER SB 23.

A. Plaintiffs' Claim 1 in the Sixth Cause of Action for alleged "Inconsistency Regarding Springfield and Browning Products" is a disagreement with two DOJ "flash suppressor" determinations, not a basis for invalidating the "flash suppressor" definition.

Disagreement with an agency conclusion is not a basis for invalidation of the authority pursuant to which the conclusion is reached. *Cf., e.g., Maples v. Kern County Assessment Appeals Bd.*, 96 Cal. App. 4th 1007, 1015 (2002) (properly challenging directly tax board's valuation of development project).

As described above (pp. 6-7), plaintiffs complain that two devices – the Springfield Muzzle Break and the Browning BOSS – *do* function to perceptibly reduce or redirect muzzle flash from the shooter's field of vision and therefore *should* meet the definition of "flash suppressor" in the Regulations, but that DOJ has nonetheless determined the two devices are *not* flash suppressors. Am. Compl., ¶¶ 78-79. Even if plaintiffs were correct in their view that DOJ should have classified these devices as flash suppressors under the definition in the Regulations, their remedy would be to challenge such ostensibly erroneous determinations by petition for writ of mandate or otherwise, *not* to seek wholesale invalidation of section 978.20(b). *See* Am. Compl., ¶ 80.

Plaintiffs cannot claim that DOJ is violating the law, express their approval, and then advocate for further such action. It is paradoxical for plaintiffs to suggest that an alleged failure by DOJ to enforce the law would support a judicial prohibition against enforcement of the law. Plaintiffs present no persuasive evidence to support their claim that DOJ erred in its determination that these two devices are not flash suppressors.[11] In any event, even assuming there were a valid dispute as to the merits of DOJ's determinations, there is no dispute as to what these determinations are and

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11. In discovery, defendants requested that plaintiffs admit that DOJ is correct that the Springfield Muzzle Break and Browning BOSS are *not* flash suppressors, but plaintiffs responded that they could neither admit nor deny. *See* Plfs.' RFA Resp. 13-17. They attempt to explain their inability to admit or deny by pointing again to the claimed vagueness of the term "flash suppressor" (*see* Plfs.' Resp. Form Int. 17.1), but this explanation is circular. It is plaintiffs' ostensible certainty that the devices in question *are* flash suppressors that is the fundamental premise of this claim! In response to defendants' requests to identify all facts in support of their claim, plaintiffs simply incorporated by reference their general interrogatory answer, which in turn refers to the "primary facts" as being "detailed in the Complaint and Plaintiffs' Motion for Summary Judgment and exhibits thereto." *See* Plfs.' Resp. Sp. Int. 67, 69, 53, 55, 2. Reference to the relevant portions of those documents shows a failure to address DOJ's explanation for its determinations. *Compare* Am. Compl., ¶¶ 78-80, *and* Pls.' SJM Mem. 14:6-15:7 *with* Chinn Decl., ¶ 15.

that – right or wrong – the determinations provide no basis for invalidating the flash suppressor regulation. Accordingly, defendants are entitled to summary adjudication on this claim.

B. Plaintiffs' Claim 2 in the Sixth Cause of Action for alleged "Inconsistency Re 'Detachable Magazine'" assumes a dispute that does not exist.

"A plaintiff may bring an action for declaratory relief before an actual invasion of rights has occurred. However, the action must be based on an actual controversy with known parameters. If the parameters are as yet unknown, the controversy is not yet ripe for declaratory relief." *Sanctity of Human Life Network v. California Highway Patrol*, 105 Cal. App. 4th 858, 872 (2003).

As described above (pp. 7-8), plaintiffs complain, based on speculation derived from a DOJ letter, that DOJ has not fulfilled a duty to exercise supervisory power over district attorneys and law enforcement to assure that the regulatory definition of the term "detachable magazine" as meaning a magazine "that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required" is observed. Am. Compl., ¶¶ 81-83. Contrary to plaintiffs' speculation, and in any event as confirmed in the letter cited by plaintiffs, DOJ does not consider a magazine attached to a receiver by a screw, requiring a screwdriver for removal, to be a detachable magazine. Chinn Decl., ¶¶ 20-21. Mere observation of the possibility that the 58 district attorneys in California would view the maneuver with skepticism (due to the immediate ability in such circumstances to detach the magazine from the firearm by removing the screw) and proceed with a prosecution in the circumstances does not create a justiciable controversy.[12/]

In their summary judgment memorandum, plaintiffs admit that DOJ "admits that the use of a screw as described renders the magazine non-detachable based on the regulation defining a 'detachable magazine.'" Pls.' SJM Mem. 15:20-21. This alone is sufficient to demonstrate the absence of a controversy. Moreover, there is no evidence of any prosecution involving improper application of the "detachable magazine" definition at all, let alone such a prosecution in which DOJ has improperly acquiesced.[13/]

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12. Observations regarding possible district attorney activity are not a basis for a claim against the Attorney General. *See Pitts v. County of Kern*, 17 Cal. 4th 340, 368-369 (1998); *People v. Brophy*, 49 Cal. App. 2d 15, 28 (1942).

13. In response to defendants' discovery request that plaintiffs identify all facts in support of this claim, plaintiffs simply incorporated by reference their general interrogatory answer, which makes no reference to any evidence

Because there is truly no controversy in this regard, even in the abstract, defendants are entitled to summary adjudication on this claim.[14/]

C. Plaintiffs' Claim 3 in the Sixth Cause of Action for alleged "Inconsistency Regarding Importation of 'Large-Capacity' Magazine Rifles" is moot.

"[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court." *Wilson v. Los Angeles County Civil Service Comm.*, 112 Cal. App. 2d 450, 452 (1952) (quoting 1 C.J.S. *Actions* § 17a). As described above (p. 8), plaintiffs complain that DOJ allowed members of the SASS to bring modern replicas of 19th Century lever-action rifles with tubular magazines into California for SASS western style shooting competitions, even though such rifles would technically fall within the prohibition against importation of "large-capacity magazines" as the law originally read. Am. Compl., ¶¶ 25, 84-85; *see also* Pls.' SJM Mem. 17:6-18:6. The law was amended in 2001, however, to expressly exempt from the "large-capacity magazine" definition "[a] tubular magazine that is contained in a lever-action firearm." Penal Code § 12020(c)(25)(C). As a result, plaintiffs' request for a limiting interpretation (Am. Compl., ¶ 85) is unnecessary, and their claim is moot. *See Southern California Gas Co. v. Public Utilities Commission*, 38 Cal. 3d 64, 66-67 (1985) (dismissing as moot claims that certain Commission rules lacked required legislative authorization, after Legislature passed new law expressly confirming required authorization).

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of disagreement as to the regulatory definition of "detachable magazine." *See* Plfs.' Resp. Sp. Int. 71, 2. Correspondingly, defendants requested that plaintiffs provide all facts concerning any contention that any prosecution had been improperly brought involving whether a device was a "detachable magazine" under the regulatory definition, but plaintiffs could identify none. Plfs.' Resp. Sp. Int. 105, 106.

14. Plaintiffs complain in their summary judgment memorandum that the Attorney General "has also issued letter responses that conflict with previous statements and has proposed regulations that expand the definition of 'assault weapons' beyond legislative intent," Pls.' SJM Mem. 15:26-28. But the first letter referenced is simply another caution that the reader "should be aware that a local district attorney who believed you were manufacturing an assault weapon could file charges against you." *See* Pls.' Ex. CCCC. The remainder of the communications are either (1) unrelated to detachable magazines at all or (2) refer to application of the "capacity to accept" language in the statute, and the question of whether a firearm with a magazine considered non-detachable (because it requires a tool for removal) nonetheless may have a "capacity to accept" a detachable magazine upon removal of the non-detachable magazine, which is the subject of different proposed regulations and not a subject of this lawsuit. *See* Pls.' Exs. DDDD-OOOO. None of this offered evidence is contrary to the fact that DOJ does not consider a magazine attached to a receiver by a screw, requiring a screwdriver for removal, to be a detachable magazine.

Accordingly, defendants are entitled to summary adjudication on this claim.[15]

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant their motion for summary judgment or, alternatively, summary adjudication.

Dated: December 1, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

STACY BOULWARE EURIE
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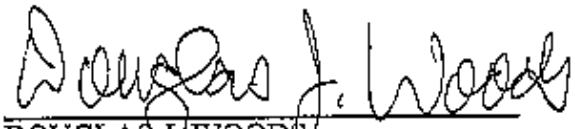
Supervising Deputy Attorney General



DOUGLAS J. WOODS
Deputy Attorney General

Attorneys for ATTORNEY GENERAL BILL LOCKYER, the STATE OF CALIFORNIA, and CALIFORNIA DEPARTMENT OF JUSTICE

15. In their responses to discovery, plaintiffs admit the law has been amended but inexplicably deny that their claim is moot. Plfs.' RFA Resp. 11, 12. Their only explanation for the denial is: "The cause of action has not been dismissed." Plfs.' Resp. Form Int. 17.1. Indeed, the "remedial legislation" was anticipated in one of the original exhibits ostensibly supporting plaintiffs' claim. *See* Am. Compl., Ex. 31.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Hunt, et al. v. State of California, et al.**

No.: **01CECG03182**

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; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On December 1, 2006, I served the attached:

- **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT**
- **SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT**
- **DECLARATION OF IGNATIUS CHINN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT**
- **DECLARATION OF RANDY ROSSI IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT**
- **DECLARATION OF DOUGLAS J. WOODS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT**

- **DEFENDANTS' EVIDENCE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT**

- **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT**

by placing a true copy thereof enclosed in a sealed envelope with the addressed as follows:

Don B. Rates
BERENSON & RATES
22608 North East 269th Avenue
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(By Federal Express)

Stephen P. Halbrook
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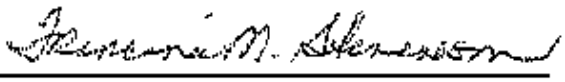
C.D. Michel, Esq.
Trutanich Michel, LLP
TUYET T. TRAN
BRUCE E. BARTRAM
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802
(By Golden State Overnight)

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 December 1, 2006, at Sacramento, California.

Francina M. Stevenson
Declarant



Francina M. Stevenson
Signature

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