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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' SEPARATE STATEMENT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION** Date: February 1, 2007 Time: 3:30 p.m. Dept: 72 Before the Honorable Alan Simpson

Defendants Attorney General Bill Lockyer, the State of California, and the California Department of Justice ("DOJ") hereby submit the following separate statement pursuant to Code of Civil Procedure section 437c(b) in opposition to plaintiffs' motion for summary judgment or summary adjudication in this action.

In all important respects the facts in this matter are undisputed, as detailed in the separate statement submitted in support of *defendants'* motion for summary judgment, and summary judgment should be granted in favor of defendants accordingly. Correspondingly, the undisputed facts identified in conjunction with defendants' motion for summary judgment are alone sufficient to defeat the summary judgment motion filed by *plaintiffs*. Moreover, as set forth below, defendants dispute a number of the "undisputed" material facts listed by plaintiffs in ostensible support of plaintiffs' motion. Such disputes are not material to *defendants'* motion and thus do *not* preclude entry of summary judgment in favor of defendants. To the extent these disputes are material to plaintiffs' summary judgment arguments, however, they provide an additional basis for denying plaintiffs' motion for summary judgment. *See* Weil & Brown, CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2006), § 10:95.1 ("separate statement effectively *concedes* the materiality of whatever facts are included").

Defendants, not plaintiffs, are entitled to judgment as a matter of law on each of the remaining causes of action set forth in plaintiffs' Amended Complaint.

Procedurally, it is not entirely clear how the headings in plaintiffs' separate statement correspond with the issues for adjudication identified in plaintiffs' Notice of Motion. In particular, plaintiffs' first heading "MATERIAL FACTS RELATING TO THE PASSAGE OF SENATE BILL 23 (1999) AND THE ISSUANCE OF REGULATIONS" seems out of place, but may be intended to be incorporated by reference in each of the following sections. The headings from plaintiffs' separate statement are simply repeated verbatim here for the Court's ease of reference.

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I. MATERIAL FACTS RELATING TO THE PASSAGE OF SENATE BILL 23 (1999) AND THE ISSUANCE OF REGULATIONS

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence	Defendants' Response and Supporting Evidence
1. Prior to 1989, the term "assault weapon" did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of "assault rifles" so as to allow an attack on as many additional firearms as possible on the basis of "evil" appearance. *Steinberg v. Carhart* (2000) 530 U.S. 914, 101, n.16	Disputed. *See, e.g., Tobon v. Martin*, 809 F.2d 1544, 1545 (11th Cir. 1987) (referring to "Uzi 9mm assault weapon" found in petitioner's home at time of arrest); *United States v. Martin*, 640 F. Supp. 543, 547 (E.D. Ark. 1986) (referring to officer's observation of "AK assault weapon"). California's assault weapons law was enacted to address firearms with a high rate of fire and capacity for firepower, not firearms with an "evil" appearance. *See* Penal Code § 12275.5.
2. In 1989 the California Legislature passed the first statewide regulation of firearms deemed to be "assault weapons" by make and model, such as model AR-15 manufactured by Colt's Manufacturing Company, LLC; that act was called the Roberti-Roos Assault Weapon Control Act ("AWCA"). Under this Act, any firearm on a list specified in Penal Code section 12276 is considered an "assault weapon." Firearms identified in Penal Code section 12276 are also called "Category 1" "assault weapons." Such "assault weapons" are regulated after December 31, 1991, and, in general, were required to be registered as "assault weapons" with the Department of Justice on or before March 31, 1992. 1989 Cal. Stat. Ch. 19 section 3 at 64, codified at Cal. Penal Code sections 12275 *et seq.* Assault Weapons Identification Guide, 3rd Edition - November 2001. (Exh. A at p.2.)	Undisputed.

3.	The Roberti-Roos Assault Weapons Control Act also regulated AK and AR-15 "series" "assault weapons." These are also called Category 2 "assault weapons." Effective August 16, 2000, firearm models that are variations of the AK or AR-15, with only minor differences from those two models, are considered "assault weapons" under the original Roberti-Roos Assault Weapons Control Act of 1989, but only upon the Department of Justice issuing regulations identifying the make and model of such firearms pursuant to Penal Code section 12276.5. Penal Code sections 12276, subd (e) and (f) and 12276.5. Assault Weapons Identification Guide, 3rd Edition - November 2001. (Exh. A at p.56.)	Undisputed.
4.	The Roberti-Roos Assault Weapons Control Act of 1989 (Penal Code section 12276) regulates specific "assault weapons" by makes and models. Since its passage in 1989, many manufacturers created new firearm models that have very similar characteristics to controlled "assault weapons." In response, the Legislature passed and the Governor signed SB 23 (Chapter 129, Statutes of 1999), which created Penal Code section 12276.1 to define "assault weapons" by generic characteristics. Under Penal Code section 12276.1, a firearm's make, model, or markings have no bearing on whether it is an "assault weapon." A firearm's status as an assault weapon under this category is determined solely by its characteristics. There are three general types of firearms that are controlled by the generic	Undisputed.

		characteristics "assault weapons" laws. These types include semiautomatic centerfire rifles, semiautomatic pistols, and semiautomatic or revolving cylinder shotguns. Penal Code section 12276.1; Assault Weapons Identification Guide, 3rd Edition - November 2001. (Exh. A at p.70.); and Senate Bill 23 (1999) (Exh. B.)	
	5.	On December 20, 1999, the Office of the Attorney General, California Department of Justice filed a Notice of Publication/Regulations submissions with the Office of Administrative law. The Department of Justice proposed to adopt sections 978.10 through 978.44 in Title 11, Division 1 of the California Code of Regulations (CCR). These sections apply to "assault weapons" and "large capacity magazines." Rule Making File: Part A – Notice of Publication/Regulations Submission. (Exh. C.)	Undisputed.
	6.	The text of the regulations originally noticed to the public define six terms used in the identification of "assault weapons" pursuant to Penal Code section 12276.1: "detachable magazine"; "flash suppressor"; "forward pistol grip"; "permanently altered," "pistol grip that protrudes conspicuously beneath the action of the weapon," and "thumbhole stock." Rule Making File: Part B – Text of Regulations Originally Noticed to the Public. (Exh. D.); Rule Making File: Part C- Initial Statement of Reasons. (Exh. E at Hunt 02894.)	Undisputed.

7.	The text of the initial statement of reasons states that the regulations were necessary to establish "a title for the regulatory action and specifying the scope of regulations increase the general clarity of the regulatory action for persons affected by the regulations." Rule Making File: Part C – Initial Statement of Reasons. (Exh. E at Hunt 02893.)	Undisputed, aside from typographical errors.
7.	[*sic*] To define the terms expressed in Penal Code section 12276.1, the Department of Justice relied upon the Small Arms Lexicon and Concise Encyclopedia by Chester Mueller and John Olson and the Dictionary of Weapons and Military Terms by John Quick, Ph.D. Rule Making File: Part C – Initial Statement of Reasons. (Exh. E at Hunt 02894.)	Undisputed.
8.	Prior to proposing the text of the regulations originally noticed to the public, the Department of Justice did not consider any alternatives. Rule Making File: Part C – Initial Statement of Reasons. (Exh. E at Hunt 02894.)	Disputed. The material cited by plaintiffs confirms that DOJ *did* consider alternatives before proposing the text of the regulations initially noticed.
9.	The Department of Justice estimated that there would be "approximately 100,000 assault weapon registrants" of "assault weapons" pursuant to Senate Bill 23. Rule Making File: Part C – Initial Statement of Reasons. (Exh. E at Hunt 02896.)	Undisputed.
10.	Approximately 1,300 written comments were received by the	Undisputed.

	Department of Justice during a 45 day comment period. Rule Making File: Part D – Written Comments Submitted During The 45-Day Comment Period. (Exh. F.)	
11.	The Department of Justice held two public hearings to receive testimony on the proposed regulations. The Department's first public hearing was held February 24, 2000, during which it heard 82 comments from the general public. The second public hearing was held February 28, 2000, during which the Department of Justice heard testimony from 51 people. Rule Making File: Part E – Public Hearing Record. (Exh. G.)	Undisputed, except that the comments in the first public hearing were from 57 people.
12.	In response to the comments received from the public regarding the proposed regulations, on May 10, 2000, the Department of Justice notified the public of changes to the proposed regulations and modified the text of the proposed regulations. Rule Making File: Part F – Notice of Modifications to Text / Modified Text of Regulations. (Exh. H.)	Undisputed.
13.	The Department of Justice received comments during a 15-day comment period beginning May 10, 2000, through May 30, 2000. During this comment period, the Department of Justice received approximately 190 written comments. Rule Making File: Part G – Written Comments Submitted During First 15-Day Comment Period. (Exh. I.)	Undisputed.

14.	In response to the comments received from the public regarding the modified regulations, on July 12, 2000, the Department of Justice notified the public of changes to the proposed regulations and modified the text of the proposed regulations. Rule Making File: Part H – Second Notice of Modifications to Text / Modified Text of Regulations. (Exh. J.)	Undisputed.
15.	The Department of Justice received comments during the Second 15-Day comment period beginning July 12, 2000, through May 30, 2000. During this comment period, the Department of Justice received approximately 85 written comments. Rule Making File: Part I – Written Comments Submitted During Second 15-Day Comment Period. (Exh. K.)	Undisputed, aside from typographical errors.
16.	The volume of the written comments received during the three comment periods was so substantial and voluminous that the Department of Justice created a Comment Identification Key identifying each individual that submitted comments to the issues each individual raised during the comment period. Rule Making File: Part J – Comment Identification Key. (Exh. L.)	Undisputed.
17.	Subsequent to the Second 15-Day Written Comment Period, the Department of Justice issued an Updated Informative Digest, which identified the following documents as reference material to the Rule Making File during the rule making process: • Jane's Infantry Weapons,	Undisputed, aside from typographical errors.

	Glossary, Twentieth Edition, 1994-95 • Sporting Arms and Ammunition Manufacturer's Institute, Inc. (SAAMI), Technical Correspondent's Handbook, Glossary of Industry Terms • SAAMI Non-Fiction Writer's Guide • National Rifle Association Institute for Legislative Action (NRA-ILA), Firearms Glossary • Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Federal Firearms Regulation Reference Guide, 2000 • California Attorney General's Assault Weapons Identification Guide, 1993 • Complete Guide to Guns & Shooting, by John Malloy, 1995.	
	Rule Making File: Part K -- Updated Informative Digest. (Exh. M.)	
18.	Exhibits C through T are true and correct copies of Parts A through R of the Rule Making File produced to Plaintiffs by the Department of Justice. Rule Making File: Parts A-R. (Exh. C through T.)	Undisputed.
19.	Though the Department of Justice estimated that 100,000 persons would register their firearms, only 37,924 persons registered their Penal Code section 12276.1 "assault weapons" pursuant to Senate Bill 23. Thus, if the Department of Justice estimate is correct, there is an estimated 62,076	Disputed in part. Plaintiffs' analysis fails to account for other possibilities, such as disposal, export of firearms out of state, and/or making firearms permanently inoperable pursuant to Penal Code section 12285(b)(1).

persons that either modified their firearms or failed to register their Penal Code section 12276.1 "assault weapons."

Rule Making File: Part C – Initial Statement of Reasons. (Exh. E at Hunt 02896.); Assault Weapon Registration Daily Report for December 31, 2001. (Exh. U.)

II. MATERIAL FACTS RELATING TO PLAINTIFFS' CLAIM THAT DOJ'S REGULATIONS HAVE UNLAWFULLY EXPANDED THE DEFINITION OF THE TERM "FLASH SUPPRESSOR"

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence	Defendants' Response and Supporting Evidence
20. The text of the regulations originally noticed to the public defined "flash suppressor" as: "any device that reduces or conceals the visible light or flash created when a firearm is fired. This definition includes flash hiders, but does not include compensators and muzzle brakes (devices attached to or integral with the muzzle barrel to utilize propelling gasses for counter-recoil.)" Rule Making File: Part B – Text of the Regulations Originally Noticed to the Public. (Exh. D at HUNT 02881.)	Undisputed, aside from typographical errors.
21. The Department of Justice modified their initial proposed definition of "flash suppressor" to read: "flash suppressor" means any device that reduces or redirects muzzle flash from the shooter's field of vision. Rule Making File: Part F – Notice of Modifications to Text / Modified Text of Regulations. (Exh. H.)	Undisputed.

22.	Subsequent to the First 15 day comment period, the Department of Justice modified their proposed definition of "flash suppressor" to read: "flash suppressor" means any device designed, intended, or that functions to reduce or redirect muzzle flash from the shooter's field of vision." Rule Making File: Part H – Second Notice of Modifications to Text / Modified Text of Regulations. (Exh. J.)	Undisputed.
23.	Dictionaries generally define "flash suppressor" as an object designed or intended to reduce flash. Declaration of Torrey D. Johnson in Support of Plaintiffs' Request for Declaratory and Injunctive Relief, ¶ 6; Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶13.	Disputed. Prior to the enactment of Penal Code section 12276.1, there was no established technical definition of the term "flash suppressor." Declaration of Ignatius Chinn filed with defendants' summary judgment motion ("Chinn Decl."), ¶ 13, Ex. A; Am. Compl., ¶ 39, Exs. 6-15. The various definitions were not limited to design or intent, to the exclusion of function. *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").
24.	In introducing the redirection concept, DOJ's definition departs from all definitions of "flash suppressor" found in the technical literature, including dictionaries, glossaries and materials DOJ itself listed as the basis for its definition. Each of these reference works defines a flash suppressor function as seeking to "reduce" flash — not "redirect" it. Declaration of Torrey D. Johnson in Support of Plaintiffs' Request for Declaratory and Injunctive Relief, ¶ 5; Declaration of Michael Shain in Support of Plaintiffs' Request for Declaratory and Injunctive Relief, ¶ 9;	Disputed. Not all of the various definitions use the term "reduce." Chinn Decl., Ex. A. DOJ replaced the word "conceals" with "redirects" in the definition of "flash suppressor" because it concluded that the word "conceals" in the original proposed definition presented the possibility of an overly broad interpretation which could have included any device positioned between the shooter's eye and the muzzle flash, such as the sights on a gun. Declaration of Randy Rossi filed with defendants' summary judgment motion ("Rossi Decl."), Ex. A, p. 15. The term "reduces" alone would have been insufficient because, as noted in a number of public comments, in one ultimate sense light is not reduced, but only redirected.

	Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶ 13.	*See id.*, Ex. A, p. 28. 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.
25.	The Small Arms Lexicon and Concise Encyclopedia by Chester Mueller and John Olson does not define the term "flash suppressor." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03029.)	Undisputed.
26.	The Small Arms Lexicon and Concise Encyclopedia by Chester Mueller and John Olson does, however, define "flash hider" as a "muzzle attachment for a gun to conceal the flame when it is fired at night." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03029.)	Undisputed.
27.	The Small Arms Lexicon and Concise Encyclopedia by Chester Mueller and John Olson also defines "muzzle brake" as "an attachment secured to the muzzle of a gun, which may be a cannon, rifle, or shotgun, to utilize some of the muzzle blast to apply a forward force to the barrel at the instant the gun is reacting backward in recoil. Basically it is a tube screwed to the muzzle, having a bore of diameter slightly larger than the bore of the barrel to enable the bullet or shot charge to pass freely through it. The wall of the tube is provided with holes or slits at right angles to the bore or inclined backward and outward at a slight angle to permit a portion of the	Undisputed, aside from typographical errors.

		muzzle blast to thus act against the tube and escape from it." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03032.)	
	28.	The Small Arms Lexicon and Concise Encyclopedia by Chester Mueller and John Olson also defines "compensator" as "a muzzle brake commonly used on cannon, now often used on some types of shotguns and automatic weapons to reduce the upward jump of the muzzle as well as recoil. It consists of a metal tube of bore slightly larger than the bullet or shot charge, screwed to the muzzle. Its wall has a series of openings at right angles to the bore, of selected patterns, designed to cause the muzzle blast to exert forward in opposition to the backward recoil movement of the gun when it is fired. The Cutts Compensator is an example." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03027.)	Undisputed, aside from typographical errors.
	29.	The Small Arms Lexicon and Concise Encyclopedia by Chester Mueller and John Olson also defines "muzzle compensator" as "a device attached to the muzzle of a gun barrel which utilizes the escaping gases to control the direction and amount of undesirable muzzle movement. It may also reduce the recoil energy of the weapon." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public.	Undisputed.

	(Exh. P at HUNT 03032.)	
30.	The Dictionary of Weapons and Military Terms by John Quick defines "flash suppressor" as "a device attached to the muzzle of a weapon which reduces the amount of visible light or flash created by burning propellent gases." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03039.)	Undisputed.
31.	The Dictionary of Weapons and Military Terms by John Quick defines "flash hider" as "a metallic cone and/or flat disks which are attached to the muzzle of a gun to conceal the flash when it is fired and to prevent temporary blindness of the gun crew while firing." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03039.)	Undisputed.
32.	The Dictionary of Weapons and Military Terms by John Quick defines "muzzle brake" as "a device attached to the muzzle of a weapon which utilizes escaping gas to reduce recoil and noise." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03042.)	Undisputed.
33.	The Dictionary of Weapons and Military Terms by John Quick defines "muzzle compensator" as "a device attached to the muzzle of a weapon which utilizes escaping gases to control muzzle movement."	Undisputed, aside from typographical errors.

		Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03042.)	
	34.	[*sic*]	
	35.	The Dictionary of Weapons and Military Terms by John Quick defines "compensator" as "On some small arms, a device used to hold down muzzle rise and reduce recoil." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03037.)	Undisputed.
	36.	The Association of Firearm and Tool Mark Examiners 1969 Glossary defines "flash suppressor" as "a muzzle attachment designed to reduce muzzle flash." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03049.)	Undisputed.
	37.	The Association of Firearm and Tool Mark Examiners 1969 Glossary defines "flash inhibitor" as "a material that is added to the propellant for the purpose of reducing muzzle flash." Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03049.)	Undisputed, aside from typographical errors.
	38.	The Association of Firearm and Tool Mark Examiners 1969 Glossary defines "compensator" as "a device attached to or integral with the muzzle end of the barrel to utilize propelling gases for counter-recoil. Also called Muzzle Brake."	Undisputed, aside from typographical errors.

	Rule Making File: Part N – Supportive Reference Materials Originally Noticed To The Public. (Exh. P at HUNT 03048.)	
39.	The Jane's Infantry Weapons, Glossary, Twentieth Edition, 1994-95 does not define "flash suppressor."	Undisputed.
	Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03060.)	
40.	The Jane's Infantry Weapons, Glossary, Twentieth Edition, 1994-95 does, however, define "flash hider" as a "conceal attachment to the muzzle for concealing muzzle flash from an observer. Also acts as a flash eliminator, though it is less efficient than a properly designed eliminator."	Undisputed, aside from typographical errors.
	Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03060.)	
41.	The Jane's Infantry Weapons, Glossary, Twentieth Edition, 1994-95 also defines "flash eliminator" as "a device fitted to the muzzle to cool emergent gases preventing the formation of flame or flames."	Undisputed, aside from typographical errors.
	Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03060.)	
42.	The Jane's Infantry Weapons, Glossary, Twentieth Edition, 1994-95 also defines "compensator" as "a device attached to a weapon barrel (usually an automatic weapon) to divert some of the muzzle blast upward and thus counteract the	Undisputed.

	tendency for the muzzle to rise during automatic fire." Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03060.)	
43.	The Jane's Infantry Weapons, Glossary, Twentieth Edition, 1994-95 also defines "muzzle brake" as an "attachment to the muzzle of a weapon designed to deflect some of the emergent gases and direct them against the surface so as to generate a thrust on the muzzle countering the recoil force. Widely used on artillery but less popular in small arms since an efficient brake will divert too much gas to the sides and rear, to the discomfort of the fire and his companions." Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03061.)	Undisputed, aside from typographical errors.
44.	Sporting Arms and Ammunition Manufacturing Institute, Inc.'s Glossary of Industry Terms defines the term "flash suppressor" as "a muzzle attachment designed to reduce muzzle flash. Also called a flash hider." Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03111.)	Undisputed, aside from typographical errors.
45.	Sporting Arms and Ammunition Manufacturing Institute, Inc.'s Glossary of Industry Terms defines the term "flash hider" as a "flash suppressor."	Undisputed.

	Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03100.)	
46.	Sporting Arms and Ammunition Manufacturing Institute, Inc.'s Glossary of Industry Terms defines the term "compensator" as "a device attached to the muzzle end of the barrel that utilizes propelling gases to reduce recoil. See also muzzle brake." Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03100.)	Undisputed, aside from typographical errors.
47.	Sporting Arms and Ammunition Manufacturing Institute, Inc.'s Glossary of Industry Terms defines the term "muzzle brake" as "a device at the muzzle end usually integral with the barrel that uses the emerging gas behind a projectile to reduce recoil. See also, compensator." Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03133.)	Undisputed, aside from typographical errors.
48.	The National Rifle Association Institute for Legislative Action (NRA - ILA), Firearms Glossary defines the term "Flash Hider/Suppressor" as "a muzzle attachment intended to reduce visible muzzle flash caused by burning propellant." Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03200.)	Undisputed.
49.	The National Rifle Association	Undisputed.

	Institute for Legislative Action (NRA - ILA), Firearms Glossary defines the term "muzzle brake" as "an attachment to or integral part of the barrel that traps and diverts expanding gasses and reduces recoil." Rule Making File: Part O – Notice of Additional Supportive Reference Materials/Additional Material. (Exh. Q at HUNT 03200.)	
50.	The Association of Firearms and Toolmark Examiners defines a "flash suppressor" as "a muzzle attachment designed to reduce muzzle flash." Glossary of the Association of Firearm and Toolmark Examiners by the AFTE Standardization Committee. (Exh. V at p. 60.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 6.); Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶ 42 n. 7.	Undisputed.
51.	The Association of Firearms and Toolmark Examiners defines a "compensator" as "a device attached to or integral with the muzzle end of a barrel to utilize propelling gases for counter-recoil. Also called Muzzle Brake." Glossary of the Association of Firearm and Toolmark Examiners by the AFTE Standardization Committee. (Exh. V at p. 45.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 6.)	Undisputed, aside from typographical errors.
52.	The Association of Firearms and Toolmark Examiners defines a "muzzle brake" as "a device at or in	Undisputed.

	the muzzle end of a barrel that uses the emerging gas behind the projectile to reduce recoil. Glossary of the Association of Firearm and Toolmark Examiners by the AFTE Standardization Committee. (Exh. V at p. 88.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 6.)	
53.	The Sporting Arms and Ammunition Manufacturers' Institute defines a "flash suppressor" as "an attachment to the muzzle designed to reduce muzzle flash. Note: A flash suppressor is not a silencer." Non-Fiction Writer's Guide: A writer's resource to firearms and ammunition. (Exh. W at p. 47.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 7.)	Undisputed.
54	The Firearms Encyclopedia defines a "flash suppressor" as "a device attached to the muzzle of a firearm that serves to disrupt, or reduce the amount of flame produced upon firing." Firearms Encyclopedia (Exh. X at p. 104.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 8.)	Undisputed, except this is not the full definition.
55.	The Firearms Encyclopedia defines a "flash hider" as "a device attached to the muzzle of any gun for the purpose of concealing (not reducing) the flash or flame generated by the burning propellant and by the ignition of expanding gases as they contact the oxygen-rich atmosphere. Usually a large conical or tubular extension clamped to the muzzle. See also Flash Suppressor."	Undisputed, aside from typographical errors.

	Firearms Encyclopedia. (Exh. X at p. 103-104.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 8.)	
56.	The Firearms Encyclopedia defines a "compensator" as "a device fitted to the muzzle of any firearm whose function is to reduce the upward movement of the muzzle brought about by recoil forces. The earliest form of this device to see commercial application was the Cutts Compensator, marketed for many years by Lyman Gunsight Co. A compensator fits over the muzzle and uses slots in its outer end to deflect propellant gases upwards, thus providing downward thrust to counteract recoil-inducing jump. Their effectiveness depends to a large extent upon the volume and the direction of the gases diverted, and other factors such as the stock design, center of gravity, etc. See also Cutts Compensator and Muzzle Brake. Firearms Encyclopedia. (Exh. X at p. 71.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 8.)	Undisputed, aside from typographical errors.
57.	The Firearms Encyclopedia defines a "muzzle brake" as "a device attached to the muzzle to reduce recoil and, to some extent, muzzle jump. Regardless of the vast array of sizes, shapes, and internal configurations, all brakes function by momentarily trapping propellant gases as they emerge from the muzzle and by diverting them at right angles to the bore's centerline, or slightly rearward. When gases are diverted in sufficient quantities, they reduce rearward thrust, and if deflected rearward, exert forward thrust and thus tend to counterbalance a portion of recoil.	Undisputed, aside from typographical errors.

	Generally speaking, the greater the percentage of gases diverted and the more nearly they approach 180 degrees change in direction, the greater the amount of recoil reduction produced. Practical limitations generally prevent achieving more than about 40 per cent recoil reduction with even the best and most efficient "muzzle brakes." It is not possible to divert gas directly rearward because of its effect on the shooter, and even approaching rearward diversion can produce shock-wave effects on bystanders and also greatly increases the intensity of the muzzle blast. The disadvantages of size and bulk, interference with line of sight, increased muzzle blast and discomfort, and cost have generally limited the use of muzzle brakes on conventional sporting guns. On the other hand, they have become very widely used on military arms, and are almost universally used on weapons over .50 caliber. See Also Cutts Compensator. Firearms Encyclopedia. (Exh. X at p. 167-168.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 8.)	
58.	The Book of Rifles defines a "flash suppressor" as "a prong type arrangement fitted to the muzzle of weapons which reduces muzzle flash." The Book of Rifles (Exh. Y at p. 598.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 9.)	Undisputed.
59.	The Book of Rifles defines a "flash hider" as "a device attached to the muzzle of a rifle to reduce muzzle flash. Mis-named because its function	Undisputed.

	to reduce, not to hide, muzzle flash." The Book of Rifles. (Exh. Y at p. 598.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 9.)	
60.	The Book of Rifles defines a "muzzle brake" as "a device attached to the muzzle of a gun, designed to deflect the propelling gases emerging from the muzzle behind the bullet, and to utilize the energy of these gases to pull the gun forward to counter the recoil of the weapon." The Book of Rifles (Exh. Y at p. 604.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 9.)	Undisputed.
61.	The United States Army defines a "flash suppressor" as "a two, three or four prong device attached to the muzzle of a weapon which tends to cool the hot gases as they leave the muzzle behind the bullet. Cooling the hot gases reduces the flash." U.S. Army Special Forces Foreign Weapons Handbook. (Exh.Z at p. V-12.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 10.)	Undisputed, aside from typographical errors.
62.	The United States Army defines a "flash hider" as "an attachment attached to the muzzle of a weapon which shields the muzzle flash, or a circular disk attached to the barrel just to the rear of the muzzle to shield the flash from the firer." U.S. Army Special Forces Foreign Weapons Handbook. (Exh. Z at p. V-12.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 10.)	Undisputed.
63.	The United States Army defines a "compensator" as "a device attached	Undisputed.

	to the muzzle of a weapon, which due to its design allows the gases following the bullet out of the muzzle to be deflected upward through slots in the top surface of the compensator. The lower portion of the compensator is solid, so that while some gas escapes through the top, gas is also pressing against the bottom. This pressure against the bottom of the compensator, literally pushing the compensator down, pushes the muzzle down. This action tends to retard the muzzle climb which is an instability factor in a full-automatic firing weapon. U.S. Army Special Forces Foreign Weapons Handbook. (Exh. Z at p. V-9) (Also attached to Plaintiffs' First Amended Complaint as Exh. 10.)	
64.	The United States Army defines a "muzzle brake" as "a device at the muzzle of the weapon which deflects the emerging powder gases. The energy imparted by this act of deflection pulls the weapon forward to offset some of the rearward motion. U.S. Army Special Forces Foreign Weapons Handbook. (Exh. Z at p. V-18.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 10.)	Undisputed, aside from typographical errors.
65.	The Firearms Dictionary defines a "flash suppressor" as a "flash hider." A "flash hider" is defined by the Firearms Dictionary as "a device that reduces but does not hide muzzle flash. Fastened to the muzzle of military small arms, the flash hider does not reduce muzzle blast." Firearms Dictionary. (Exh. AA at p. 103.) (Also attached to Plaintiffs' First	Undisputed.

		Amended Complaint as Exh. 11.)	
	66.	The Firearms Dictionary defines a "muzzle brake" as a device fastened to the muzzle of a rifle, sometimes to the muzzle of a shotgun, that reduces recoil (q.v.) & to some extent also cuts down on muzzle jump (q.v.). Muzzle brakes are found primarily on heavy recoil rifles & jump, the slots in the brake tend to increase muzzle blast somewhat by directing it backward toward the shooter. Muzzle brakes are also known as compensators. Also see Compensator, Cutts." The Firearms Dictionary. (Exh. AA at p. 156-157.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 11.)	Undisputed, aside from typographical errors.
	67.	In opposition to the proposed regulations, Sheriff Jim Pope wrote the Department of Justice on February 23, 2000, stating that: "Under 978.20(b) Flash Suppressor – How is one of my officers, at 3:00 a.m. on a dark street, supposed to determine if a device on the barrel of a weapon "reduces or conceals the visible light or flash created when the weapon is fired. . . . ?" Can a muzzle break or compensator also be a flash suppressor and how is an officer supposed to tell the difference? Is the Browning BOSS System a flash suppressor? . . ." February 23, 2000, letter from Jim Pope to Debbie Coffin, Analyst for the Department of Justice – Firearms Division. (Exh. BB.)	Undisputed.
	68.	In opposition to the proposed regulations, Orange County Sheriff	Undisputed.

Michael S. Carona wrote the Department of Justice a letter on May 5, 2000, stating that "the definition of 'flash suppressor' has been made worse by deleting the references to 'compensator and muzzle brakes'. . . If the proposed definitions are adopted, each county will likely craft a unique interpretation of what constitutes an 'assault weapon'. Such could only result in confusion and the arrest of unwitting violators. I am responsible for insuring that my deputies are properly trained on this issue. As written, proper training would not be possible."

May 25, 2000 letter from Orange County Sheriff Michael S. Carona to the Department of Justice. (Exh. CC.)

69. On May 23, 2000, Shasta County Sheriff Jim Pope wrote the Department of Justice again, stating: "New language defines a flash suppressor as a device that redirects muzzle flash from the shooter's field of vision. The original language specified that a muzzle compensator, muzzle break, or similar device, was excluded . . . This section needs further clarifying language, and needs the original language placed back into the law which would allow muzzle compensator, breaks, or other similar devices to be utilized on a weapon without the weapon being registered under the assault weapon bill."

May 23, 2000, letter from Shasta County Sheriff Jim Pope to Debbie Coffin, Analyst for the Department of Justice – Firearms Division. (Exh. DD.)

Undisputed, aside from typographical errors.

70.	On June 16, 2000, Orange County Sheriff Michael S. Carona informed the Department of Justice that "The vagueness that flawed the first draft has not been corrected. The definition of "flash suppressor" has been made worse by deleting the references to 'compensator and muzzle brakes'." June 16, 2000 letter from Sheriff Michael S. Carona to Debbie Coffin, Analyst for the Department of Justice - Firearms Division. (Exh. EE.)	Undisputed.
71.	On July 24, 2000, Shasta County Sheriff Jim Pope informed the Department of Justice that there are current devices that come installed from the factory on sporting guns, such as the Browning BOSS system, and after-market devices that are designed, intended, and function as a muzzle recoil compensating device and are not intended to redirect muzzle flash from the shooter's field of vision. However, under the current proposed language, these devices would require sporting firearms that have been equipped or come from the factory with these devices to be registered as an assault weapon. I believe it will be difficult to show in a court of law that a certain device was intended to direct muzzle flash away from the shooter's field of vision without extensive testing and expert testimony. July 24, 2000, letter from Shasta County Jim Pope to Debbie Coffin, Analyst for the Department of Justice – Firearms Division. (Exh. FF.)	Undisputed.
72.	On November 2, 2000, Chuck Michel informed the Department of Justice that "the DOJ has been informing	Undisputed.

	dealers that it approved the Springfield M1A muzzle brake to replace the original flash suppressor because "BATF approved it." As you know, BATF has no objective criteria for such approval. In your three drafts of proposed regulations, no linkage to BATF was proposed. If you have formally approved the Springfield Muzzle Brake, I would like a copy of documentation to that effect." November 2, 2000 letter from Chuck Michel to David DeAlba, Senior Assistant Attorney General. (Exh. GG.)	
73.	On November 6, 2000, the Department of Justice issued a letter stating that the Springfield M1A 'muzzle brake/stabilizer' has been accepted by the Bureau of Alcohol, Tobacco, and Firearms and the California DOJ." November 6, 2000, letter to Mr. Patton from Dale A. Ferranto, Assistant Director Firearms Division. (Exh. HH.)	Undisputed.
74.	In an August 10, 2000, letter to George Getty, the Department of Justice stated that the Department of Justice strongly considers the Bureau of Alcohol, Tobacco, and Firearms (ATF) determination of a muzzle brake. ATF has advised that manufacturers are provided written documentation when their product has been determined to be a muzzle break. August 10 letter to George Getty from Pam Pauly, Field Representative for the California Department of Justice Firearms Division. (Exh. II.)	Undisputed.

75.	On October 31, 2000, the Department of Justice sent Steven Helsley a letter stating that "the Springfield muzzle break was tested by Ed Owen, Jr., of the BATF Firearms and Technology Branch, and been determined not to be a flash suppressor." And that the "Attorney General's office has adopted the BATF's determination and he can replace his flash suppressor with that muzzle break." October 31, 2000, letter to Steven Helsley from Timothy Rieger, Deputy Attorney General, Firearms Division. (Exh. JJ.)	Undisputed.
76.	On January 2, 2001, the Department of Justice sent Paul Gasparrelli a letter informing him that Browning BOSS. system would not be a "flash suppressor" because it is a brake, meaning a counter to the either rise or kick of the firearm, versus a flash suppressor which is designed to divert the flash away from the shooter's field of vision. January 25, 2001, letter to Paul Gasparrelli from Randi Rossi, Director of the California Department of Justice – Firearms Division. (Exh. KK.)	Disputed. The material cited by plaintiffs does not support their statement.
77.	On March 4, 2003, Chuck Michel sent a letter to the Department of Justice inquiring, among other things, as to whether such a device is a "flash suppressor." March 4, 2003, letter to Randy Rossi, Director of the California Department of Justice – Firearms Division. (Exh.LL.)	Undisputed.
78.	On March 17, 2003, the Department	Undisputed.

		of Justice responded to Chuck Michel's March 4, 2003, request, but failed to state whether the device was or was not a "flash suppressor." March 17, 2003, letter from the Timothy Rieger, Deputy Attorney General to Chuck Michel. (Exh. MM.)	
	79.	Under Code of Regulations § 978.20(b), "flash suppressor" includes devices found on civilian sporting arms, such as muzzle brakes and compensators. Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 43); DOJ Final Statement of Reasons. (Exh. N at p. 2.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 5) (Noting that an earlier draft of these DOJ regulations expressly excluded "compensators" and "muzzle brakes" from the definition of "Flash Suppressor" suppressor.")	Undisputed.
	80.	Muzzle brakes and compensators are devices used for the purpose of controlling recoil. Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. OO at ¶ 46-47.)	Undisputed.
	81.	Many civilian rifles are equipped with devices such as compensators and muzzle brakes. Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. OO at ¶ 48.)	Undisputed.
	82.	Muzzle brakes serve a legitimate sporting purpose in civilian use.	Undisputed.

	Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. OO at ¶ 48.)	
83.	Compensators serve a legitimate sporting purpose in civilian use. Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. OO at ¶ 49.)	Undisputed.
84.	Muzzle brakes and compensators may have the side effect of perceptibly reducing or redirecting muzzle flash from the shooter's field of vision. Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 43); DOJ Final Statement of Reasons. (Exh. N at p. 2.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 5); Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. OO at ¶ 43.)	Undisputed, but defendants dispute any inference that muzzle brakes and compensators *only* have "side" effects on flash. *See* Chinn Decl., ¶ 13.
85.	If it is determined that the device in question was not designed to or intended to perceptibly reduce or redirect muzzle flash from the shooter's field of vision, then the DOJ's analysis of whether it is a "flash suppressor" proceeds to a determination of whether the device nonetheless *functions* to perceptibly reduce or redirect muzzle flash from the shooter's field of vision. Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 24.)	Undisputed.
86.	All things being equal, the longer the barrel on a rifle is, the less flash it is likely to produce. Thus, by implication, replacing a barrel on a rifle with a longer barrel, all things	Disputed in part. The first sentence is accurate, but it does not imply the second sentence.

	being equal, will likely result in a reduction of flash. Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 15.)	
87.	An earlier draft of these DOJ regulations expressly excluded "compensators" and "muzzle brakes" from the definition of "flash suppressor." Rule Making File: Part B – Text of the Regulations Originally Noticed to the Public. (Exh. D at HUNT 02881.) DOJ's Final Statement of Reasons. (Exh. N at p. 2.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 5.).	Undisputed.
88.	Whether a muzzle brake, compensator or other device is *designed* or *intended* to be a "flash suppressor" may be determined by any of the following criteria: whether it is named or called a "flash suppressor" by the manufacturer; whether the patent materials indicated the device was designed or intended to reduce flash; whether the manual indicates the device was designed or intended to reduce flash; and whether the manufacturer's advertising materials indicate the device was designed or intended to reduce flash. Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. OO at ¶ 19); Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 24.)	Undisputed, except this is not an exclusive list.

Additional Material Undisputed Facts not Mentioned by Plaintiffs Which Preclude Granting Plaintiffs' Motion for Summary Adjudication:

	Additional Fact	Supporting Evidence
A.	The Legislature has defined some prohibited weapons or devices (short-barreled shotgun, short-barreled rifle, wallet gun, camouflaging firearm container, zip gun) expressly by reference to their design or intended use, but did not do so for the weapons and devices identified in Penal Code section 12276.1.	Penal Code § 12020(c)(1)(A), (c)(1)(B), (c)(1)(E), (c)(2)(E), (c)(4), (c)(9), and (c)(10).

III. MATERIAL FACTS RELATING TO PLAINTIFFS' CLAIM THAT DOJ'S REGULATIONS REGARDING THE DEFINITION OF "FLASH SUPPRESSOR" IS UNLAWFULLY VAGUE

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence		Defendants' Response and Supporting Evidence
89.	During the public comment period, written comments alleged that the proposed definition of "flash suppressor" lacked clarity, did not provide measurement standards, or testing procedures, and did not provide the ability to determine the difference between illegal flash suppressors and flash hiders and legal muzzle brakes and compensators. Rule Making File: Part R - Notice of Additional Supportive Reference Materials/Additional Material. (Exh. T at HUNT 03245-03254, 03339-03351, 03394-03406.)	Undisputed.
90.	DOJ does not test devices to determine if they meet the DOJ's regulatory definition of "flash suppressor." Defendants do not perform any test-firing to determine whether a device functions to perceptibly reduce or redirect muzzle	Disputed in part. The material cited by plaintiffs does not support their statement that there are "too" many variables.

flash from the shooter's field of vision. Defendants have never had any need to do so. It is Defendants' opinion that if there were any need for test-firing to determine whether a particular device functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision, Defendants would rely upon the United States Bureau of Alcohol, Tobacco, Firearms & Explosives. There are too many variables as to firearm and ammunition characteristics and shooter usage that may, in combination, affect whether a device functions to reduce or redirect flash from the shooter's field of vision. As suggested by Plaintiffs' interrogatories and Requests for Admissions, such variables include the burning rate of the powder used, the length of the barrel, cartridge, caliber, bullet weight, how the firearm is held, and type of sights. If the selection of any variable makes a perceptible difference, determination of whether a device functions to perceptibly reduce or redirect flash from the shooter's field of vision assumes typical shooting usage, and assumes the characteristics of commonly available firearms and ammunition. Of course, a shooter's actual usage of a device so that it functions to perceptibly reduce or redirect the flash from the shooter's field of vision would render the device a flash suppressor in that instance, even if the shooter's usage is unusual in some way and features of the particular firearm are uncommon.

Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶¶ 36, 51.) Defendants'

	Amended Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶¶ 36, 51.)	
91.	DOJ does not issue a partial or complete list of devices that meet the DOJ's regulatory definition of "flash suppressor." Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶37.) Defendants' Amended Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. QQ at ¶37.)	Undisputed.
92.	The Department of Justice has not provided any guidelines, policies, training or training materials to criminalists, criminalistics laboratories, the DOJ's Bureau of Forensic Sciences, or the California Criminalistics Institute to determine whether a device is a "flash suppressor." Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶¶81-82.) Defendants' Amended Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. QQ at ¶¶81-82.)	Undisputed.
93.	The California Department of Justice has determined that many devices are flash suppressors under the regulations. In all but one of those instances the Department of Justice has determined that the device was designed or intended to reduce or redirect flash, without determining if the device functioned to reduce or redirect flash, even if not designed or intended to do so. The Department of Justice presumes that those devices do function to reduce or redirect flash,	Undisputed.

	but that has not been the particular ground for their determination. In the only instance where the Department of Justice determined it was necessary to determine whether a device functioned to reduce or redirect flash, the Department of Justice determined it did not, and that the device was not deemed a flash suppressor. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶¶36-37.) Amended Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. QQ at ¶¶36-37.)	
93.	[*sic*] DOJ does not issue objective and measurable standards for the testing of "flash suppressors." Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶¶81-82.) Defendants' Amended Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. QQ at ¶¶81-82.)	Undisputed.
94.	DOJ does not provide any guidelines, policies, training, or training materials to criminalists or criminalistics laboratories as to how to identify "flash suppressors" and/or rifles having them. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶20, 21, 24, 27, 33, 37, 42, 43, 45, 46, and 51 .) Defendants' Amended Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. QQ at ¶¶20, 21, 24, 27, 33, 37, 42, 43, 45, 46, and 51.)	Undisputed.

95.	Referring to AB23, Deputy Attorney General Timothy Rieger stated during an interview on *Postmark* that "[a]s a result of those 'assault weapons' laws, there were different registration periods and there was some confusion, and the law was somewhat complex, but now that's all been resolved, for the most part anyway, and the registration periods are over, and the law is basically come to rest." Declaration of C.D. Michel in support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶2.	Undisputed, except Deputy Attorney General Timothy Rieger was referring to SB 23.
96.	Perceptible muzzle flash depends substantially on the cartridge being fired by the rifle. Defendants' Responses to Plaintiffs' Request for Admissions, Set One (Exh.OO at ¶ 21); Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶ 17.	Undisputed.
97.	Rifles in common calibers can use at least three or four, and often a dozen or more different ammunition cartridges using different powders. Declaration of Michael Shain in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 23(d).	Undisputed.

98.	Muzzle flash may be affected by barrel length. Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 15); Defendants' Amended Responses to Plaintiffs' Special Interrogatories. (Set One, Exh. QQ at ¶ 51.)	Undisputed.	
99.	Muzzle flash may be affected by bullet weight. Defendants' Amended Responses to Plaintiffs' Special Interrogatories. (Set One, Exh. QQ at ¶ 51.)	Undisputed.	
100.	Muzzle flash may be affected by the type of gunpowder used. Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 22); Defendants' Amended Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. QQ at ¶ 51); Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶ 17..	Undisputed.	
101.	The DOJ defines "perceptible" muzzle flash as "what is perceptible to the human eye." Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP. at ¶ 33.)	Undisputed.	
102.	The DOJ has declined to set any standard of visual acuity for the human eye for the purposes of perceiving muzzle flash. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 34.)	Undisputed.	

103.	The DOJ has declined to clarify the conditions under which a test for muzzle flash should take place. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 33-35; Defendants' Amended Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. QQ at ¶ 51); DOJ Final Statement of Reasons. (Exh. N at p.2) (also attached to Plaintiffs' First Amended Complaint as Exh. 5.)	Undisputed, except that defendants dispute any inference that a test is necessary.
104.	The DOJ does not perform any test-firing to determine whether a device functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 51.)	Undisputed.
105.	The DOJ does not possess equipment for the measuring of light. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 20.)	Undisputed.
106.	The DOJ is not aware of any police forensic laboratory that possesses or controls the equipment necessary to measure illuminance, foot candle equivalent, or any other method of measuring light that generally is accepted by the scientific community. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 21.)	Undisputed.

107.	Muzzle flash is generally not visible to the naked eye except in darkness. Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 7); Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. LL at ¶ 7.)	Undisputed.
108.	Civilian outdoor firing ranges are generally not open at nighttime, and insofar as they are open, they are lighted at nighttime. Declaration of Michael Shain in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 11	Disputed. The second part of the statement contradicts the first part.
109	[*sic*]	
110.	Indoor ranges will not permit rifle owners to turn off the lights and fire in darkness. Declaration of Michael Shain in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 12.	Undisputed.
111.	There is no one "field of vision" for a shooter firing a rifle. Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. OO at ¶ 12.)	Undisputed.
112.	A rifle may be fired either from the shoulder or from the hip. Defendants' Answer to First Amended Complaint for Declaratory and Injunctive Relief at ¶ 50.	Undisputed.

113.	The "field of vision" for a shooter firing a rifle differs depending on whether the rifle is being fired from the shoulder or the hip. Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN ¶ 12); Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 56.)	Undisputed.
114.	When a rifle is fired from the hip, the shooter's "field of vision" is much greater than when the rifle is fired from the shoulder. Defendants' Answer to First Amended Complaint for Declaratory and Injunctive Relief at ¶ 50.	Disputed in part. The evidence cited does not support plaintiffs' entire statement. The defendants admitted that the field of vision when firing from the hip is "greater," not "much greater."
115.	It is possible that a muzzle brake or compensator may redirect flash out of the field of vision of a person shooting from the shoulder, but may not do so when the shooter is firing the same rifle from the hip. Defendants' Answer to First Amended Complaint for Declaratory and Injunctive Relief at ¶ 50.	Undisputed.
116.	Rifles may be equipped with traditional iron sights or telescopic sights. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 51.)	Undisputed.
117.	A shooter's "field of vision" is different depending on whether the rifle is fixed with a telescopic sight. Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. NN at ¶ 14); Defendants'	Undisputed.

	Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 57); Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶ 37.	
118.	The Assault Weapons Identification Guide states that "[t]he purpose of this guide is to assist peace officers, firearms dealers, and the general public in the identification of 'assault weapons' and to promote the better understanding of the more significant recently enacted legislation." Assault Weapons Identification Guide ("AWIG".) (Exh. A at p. i (unpaginated first page).)	Disputed in part. The statement does not correctly quote the cited material.
119.	Pages 2 through 53 of the AWIG discuss Roberti-Roos Assault Weapons; pages 56 through 67 discuss AK and AR-15 series weapons, and pages 70 to 72 discuss the identification of an assault weapon by its general characteristics under Penal Code § 12276.1. AWIG. (Exh. A at p. 1-72.)	Undisputed.
120.	The only guidance that the AWIG provides in identifying an assault weapon by its general characteristics is stated verbatim under Penal Code § 12276.1. AWIG, (Exh. A at p. 70-72.)	Disputed. *See* AWIG, (Pls.' Ex. A, p. 70).

Additional Material Undisputed Facts not Mentioned by Plaintiffs Which Preclude Granting Plaintiffs' Motion for Summary Adjudication:

	Additional Fact	Supporting Evidence
B.	DOJ concluded "that the absence of statutorily defined specific measurement standards or a statutory	Rossi Decl., Ex. A, p. 15.

	requirement to establish those standards demonstrates a legislative intent to identify any device that reduces or redirects flash from the shooter's field of vision as a flash suppressor regardless of its name and intended/additional purpose."	
C.	DOJ determines whether a particular feature or device is a flash suppressor as defined in the regulation 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").	Chinn Decl., ¶ 7.
D.	Possible ways for others to learn whether a particular device functions as a flash suppressor as defined in the regulation include inspection of the device, consultation with DOJ or ATF, and review of product information provided by the manufacturer or distributed by the industry.	Chinn Decl., ¶ 11.
E.	There are many variables as to firearm and ammunition characteristics and shooter usage that may, in combination, affect whether a device functions to suppress flash, including the burning rate of the powder used, the length of the barrel, cartridge, caliber, bullet weight, how the firearm is held, and type of sights. DOJ's understanding of the statute is, if the selection of any variable makes a perceptible difference, determination of whether a device functions to suppress flash assumes typical shooting usage, and assumes the characteristics of commonly available firearms and ammunition.	Chinn Decl., ¶ 12.

IV. MATERIAL FACTS RELATING TO PLAINTIFFS' CLAIM THAT THE "PERMANENTLY ALTERED" EXCEPTION IS UNCERTAIN

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence	Defendants' Response and Supporting Evidence
121. The DOJ states that "[d]efining the six terms [including the term "permanently altered"] is necessary to promote a clear understanding of Penal Code section 12276.1. This understanding is crucial for private citizens who own firearms that could be subject to registration and also for firearms dealers who must be able to identify firearms that will be subject to the statutory restrictions on the sale and transfer of assault weapons." California Department of Justice Initial Statement of Reasons, Exh. E.	Undisputed.
122. The DOJ's draft regulation defined "permanently altered" within the meaning of Penal Code sections 12020, subdivision (c)(25) and Penal Code 12276.1, subdivision (c)(2) as "any irreversible change or modification." Defendants' Responses to Plaintiffs' Request for Admissions, Set One, Exh. OO ¶ 36; Rule Making File: Part B - Text of the Regulations Originally Noticed to the Public. (Exh. C at HUNT 02881.)	Undisputed.
123. The Department of Justice subsequently deleted the proposed definition of "permanently altered" from the regulations. Rule Making File: Part F - Notice of Modifications to Text / Modified Text of Regulations. (Exh. H.)	Undisputed.

124.	As a practical matter, there is no way to alter a magazine, or any other metal or plastic object, in a manner that is "irreversible." Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 47-51; Declaration of Stephen Helsley in Support of Plaintiffs' Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 6-8.	Undisputed.
125.	While reversing a plastic or metal magazine back to its original form may require a disproportionate expenditure of time and resources, any alteration of such an object can be reversed. Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 47-50; Declaration of Stephen Helsley in Support of Plaintiffs' Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 6-8.	Undisputed.
126.	"The listed means of alteration [including metalworking, machining, welding, brazing, soldering or application of bonding agents or adhesives] can be, but are not necessarily, permanent." Defendants' Amended Responses to Plaintiffs' Request for Admissions, Set One. [Exh. NN at ¶ 35]; Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶ 50.	Undisputed.

127.	Defendants' unpublicized position defines "permanent" as meaning "lasting or intended to last indefinitely without change" and "lasting a relatively long time." Defendants' December 12, 2002, Mem. of P. & A. in Support of Demurrer to Plaintiffs' Amended Complaint, p. 17-18.	Defendants dispute plaintiffs' characterization as an "unpublicized position" what was simply defendants' resort to a dictionary in the course of arguing, consistent with plaintiffs' position, that "permanent" does not mean "irreversible."
128.	The AWIG, provided to and relied upon by law enforcement personnel in identifying "assault weapons," also does not provide any guidance as to the meaning of "permanently altered." AWIG. (Exh. A at p. 81.)	Undisputed.
129.	Individual gun owners and firearms dealers have foregone attempts to "permanently alter" magazines as a result of the perceived vagueness of the term "permanently alter." Declaration of Marc Halcon in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 11(a)-11(e); Declaration of Stephen Helsley in Support of Plaintiffs' Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 6-8; Declaration of Lt. Col. Dana Drenkowsky in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 3-7.	Undisputed.
130.	DOJ advice letters are not publicized, and are only sent to persons seeking advice. Defendants' Responses to Plaintiffs' Request for Admissions, Set One,	Disputed in part. The second part of the statement is correct, but the first part of the statement depends on the recipient, as shown, for example, by the many examples of DOJ advice submitted in connection with plaintiffs' motion here. Additionally, the

	Exh. (OO at ¶ 34); Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. Exh. (PP at ¶ 91.)	answers to commonly asked questions are publicized in the "FAQ's" section of DOJ's website.
131.	On February 29, 1999, Assemblyman for the Seventy Fourth District, Howard Kaloogian, wrote a letter to Debbie Coffin, Analyst for the Department of Justice Firearms Division stating that the staff of the Armory of Orange have the skill and the tools to make what a reasonable person would consider a "permanent alteration" to a magazine. However, short of total destruction, there is no way to make an "irreversible change." February 28, 1999, letter to Debbie Coffin from Assemblyman Howard Kaloogian. (Exh. RR.)	Undisputed, aside from typographical errors.
132.	On February 8, 2000, Yuba County Sheriff Virginia Black submitted a letter to the Department of Justice stating that she agrees with Sgt. Robert Hatfield's assertions that "as for the 'irreversible modification' of magazines so that they could only hold 10 rounds, is an item that could prove to be non-existent. If a magazine body is welded, or a block soldered in place to prevent more than 10 rounds, another person can reverse this modification and make the magazine into one that could again hold more than 10 rounds." February 8, 2000 letter from Yuba County Sheriff Virginia Black to Debbie Coffin, Analyst for the Department of Justice – Firearms Division. (Exh. SS.)	Undisputed, aside from typographical errors.

133.	On February 17, 2000, Sonoma County Sheriff Jim Piccinini stated in a letter that the term "'irreversible' sets an unachievable standard. February 17, 2000, letter from Sonoma County Sheriff Jim Piccinini to Debbie Coffin, Analyst for the Department of Justice – Firearms Division. (Exh. TT.)	Undisputed.
134.	On February 23, 2000, Sheriff Les Weidman stated in a letter to the Department of Justice that "if the words 'permanently alter' were to be taken at face value, any person with the tools and knowledge needed to cut down a magazine and re-attach the bottom would have the tools and knowledge to re-extend the magazine. For this reason, to 'permanently alter' a magazine would be impossible to achieve if the term is taken literally, as it must be to be enforced." February 23, 2000, letter from Stanislaus County Sheriff Les Weidman to Debbie Coffin, Analyst for the Department of Justice – Firearms Division. (Exh. UU.)	Undisputed, aside from typographical errors.
135.	DOJ bulletins and advice letters are not binding and can, and have been, reversed and the opposite position taken by the DOJ and/or the Attorney General. Defendants' Responses to Plaintiffs' Request for Admissions, Set One. (Exh. OO at ¶ 34); Defendants' Responses to Plaintiffs' Special Interrogatories, Set One. (Exh. PP at ¶ 93.)	Undisputed.

Additional Material Undisputed Facts not Mentioned by Plaintiffs Which Preclude Granting Plaintiffs' Motion for Summary Adjudication:

	Additional Fact	Supporting Evidence
F.	Plaintiffs claim that DOJ should have issued a regulation defining a "permanent" alteration to mean an alteration "that cannot be altered or reversed except by physical alteration of the contours or dimensions of the magazine, e.g., alteration that involves physically changing the contours or dimensions of the magazine by metalworking, machining or supergluing (in the case of polymer (a type of plastic) magazines)."	Am. Compl., ¶¶ 74-75.
G.	As originally noticed to the public, the statutory term "permanently altered" was defined to mean "any irreversible change or alteration. After consideration of public comment, DOJ concluded that the proposed definition failed to provide any additional clarity to the statutory term. Furthermore, DOJ concluded that none of the comments considered provided additional clarity while maintaining the legislative intent. DOJ concluded the term "permanently altered" as used in the statute appears to be sufficiently understood without further definition.	Rossi Decl., Ex. A, p. 16; Chinn Decl., ¶¶ 17-18.

IV. [*sic*] MATERIAL FACTS RELATING TO PLAINTIFFS' CLAIM OF MISLEADING AND INCONSISTENT COMMUNICATIONS AND ACTIONS

A. FLASH SUPPRESSOR INCONSISTENCIES

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence	Defendants' Response and Supporting Evidence
136. The Browning BOSS system has the unintended effect of redirecting flash from the shooter's field of vision. Browning Boss Web page. (Exh. VV.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 23); Declaration of Torrey D. Johnson in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 31; Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication ¶ 39.	Disputed. 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 and, thus, does not function to perceptibly reduce or redirect muzzle flash from the shooter's field of vision. Chinn Decl., ¶ 15.
137. The Browning BOSS system was not intended to have the effect of redirecting flash from the shooter's field of vision. DOJ letter to Trutanich•Michel LLP, dated December 15, 2000. (Exh. WW) (Also attached to Plaintiffs' First Amended Complaint as Exh. 20); Browning Boss Web page. (Exh. ??? at p. 2) (Also attached to Plaintiffs' First Amended Complaint as Exh. 23); Declaration of Torrey D. Johnson in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 31.	Undisputed.
138. "It is also the opinion of the California Department of Justice that the Browning Boss system is not a flash suppressor but a recoil reduction device."	Undisputed.

	DOJ letter to Trutanich Michel LLP, dated (December 15, 2000, Exh. WW.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 20.)	
139.	The Springfield Armory "muzzle break" has the effect of redirecting flash from the shooter's field of vision. Photos of Springfield Armory "muzzle break," (Exh. XX.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 21-22); Declaration of Torrey D. Johnson in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 31.	Disputed. DOJ has confirmed that the Springfield Muzzle Break is not a flash suppressor, based on such determination by ATF. Chinn Decl., ¶ 15, Ex. B.
140.	The Springfield Armory "muzzle break" was not intended to have the effect of redirecting flash from the shooter's field of vision. Photos of Springfield Armory "muzzle break," (Exh. XX.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 21-22); Declaration of Torrey D. Johnson in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 31.	Undisputed.
141.	DOJ advice letters have stated that the Browning BOSS system and Springfield Armory "muzzle break" are not "flash suppressors" under Penal Code § 12276.1. DOJ letter to Trutanich Michel LLP, dated December 15, 2000, Exh. P (also attached to Plaintiffs' First Amended Complaint as Exh. 20); Declaration of Jess Guy in Support of Plaintiffs' Motion for Summary	Undisputed.

	Judgment or in the Alternative Motion for Summary Adjudication ¶ 39.	
142.	"Beginning in approximately 2000, the California Department of Justice has confirmed in a variety of informal contexts that the Springfield muzzle break is not a flash suppressor, based on the determination by the United States Bureau of Alcohol, Tobacco & Firearms." Defendants' Amended Responses to Plaintiffs' Special Interrogatories, Set One, (Exh. OO. at ¶ 83.)	Undisputed.
143.	The DOJ made the determination that the Springfield "muzzle break" is not a "flash suppressor" based upon the determination of the United States Bureau of Alcohol, Tobacco, Firearms & Explosives. Defendants' Responses to Plaintiffs' Special Interrogatories, Set One, Exh. PP at ¶ 89; Defendants' Amended Responses to Plaintiffs Request for Admissions, Set One, Exh. NN at ¶ 23.	Undisputed.

Additional Material Undisputed Facts not Mentioned by Plaintiffs Which Preclude Granting Plaintiffs' Motion for Summary Adjudication

	Additional Fact	Supporting Evidence
H.	Plaintiffs claim that the definition of "flash suppressor" in the regulation should be invalidated because the Springfield Muzzle Break and the Browning BOSS do function to redirect flash from the shooter's field of vision, but plaintiffs do not seek to reverse DOJ's determinations that they are not flash suppressors.	Am. Compl., ¶¶ 78, 80.

B. SASS AND CAPACITY TO ACCEPT MORE THAN 10 ROUNDS

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence		Defendants' Response and Supporting Evidence
144.	The Single Action Shooting Society, Inc. (SASS) is a group that sponsors western style shooting competitions generally using modern replicas of 19th Century lever-action rifles. Declaration of Boyd Davis in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 5;	Undisputed.
145.	SASS rifles have magazine capacities of more than ten rounds. Declaration of Boyd Davis in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 6; *Long Guns for End of Trail*, Cowboy Chronicle (Mar. 2001.) (Exh. ZZ.] (also attached to Plaintiffs' First Amended Complaint as Exh. 31.)	Undisputed.
146.	DOJ letters to SASS authorize non-California SASS members to bring such rifles into the state with them for the purpose of participating in SASS competitions. Declaration of Boyd Davis in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 7; DOJ letters to Boyd Davis, President of the Single Action Shooting Society, dated March 16, 2000 and November 1, 2000. (Exh. AAA and BBB.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 29 and 30); *Long Guns for End of Trail*, Cowboy Chronicle (Mar. 2001), Exh. ZZ (also attached to Plaintiffs' First Amended Complaint as Exh. 31.)	Undisputed.

147.	SASS also sponsors a competition in Fresno County. Declaration of Boyd Davis in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 8.	Undisputed.
148.	DOJ letters to SASS do not provide any rationale or explanation for allowing non-California SASS members to bring large capacity magazine rifles into the state. Declaration of Boyd Davis in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief; ¶ 9. DOJ letters to Boyd Davis, President of the Single Action Shooting Society, dated March 16, 2000, and November 1, 2000. (Exh. AAA and BBB.) (also attached to Plaintiffs' First Amended Complaint as Exh. 29 and 30.)	Disputed. The material cited by plaintiffs does not support this statement.
149	DOJ letters to SASS only refer to a particular SASS-sponsored competition in Riverside County. Declaration of Boyd Davis in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief; ¶ 10. DOJ letters to Boyd Davis, President of the Single Action Shooting Society, dated March 16, 2000, and November 1, 2000. (Exh. AAA and BBB.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 29 and 30.)	Undisputed.
150.	DOJ's letters to SASS only address the importation of large-capacity magazine rifles, not large-capacity magazine shotguns. Declaration of Boyd Davis in Support of Plaintiffs' Motion for Declaratory and Injunctive Relief, ¶ 11. DOJ letters to Boyd Davis, President of the	Undisputed.

Single Action Shooting Society, dated March 16, 2000, and November 1, 2000. (Exh. AAA and BBB.) (also attached to Plaintiffs' First Amended Complaint as Exh. 29 and 30.)

Additional Material Undisputed Facts not Mentioned by Plaintiffs Which Preclude Granting Plaintiffs' Motion for Summary Adjudication

	Additional Fact	Supporting Evidence
I.	Penal Code section 12020(c)(25) states, in part: "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: * * * (C) A tubular magazine that is contained in a lever-action firearm."	Penal Code § 12020(c)(25).

C. – WALTHER P22 – THREADED BARREL INCONSISTENCIES

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence		Defendants' Response and Supporting Evidence
151.	Carl Walther GmbH Sportwaffen designed a .22 caliber handgun ("Walther P22"), distributed and submitted for testing in California by Smith & Wesson Holding Corp. ("Smith & Wesson".) Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 7-11; California Department of Justice Handgun Testing Program Compliance Report for Walther P22 dated April, 11, 2002. (Exh. CCC.); Department of Justice memorandum dated April 29, 2002, (Exh. DDD.); Department of Justice Handgun	Defendants need not dispute this statement because it does not address a claim alleged in the Amended Complaint. *See Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 885 (1980), *rev'd on other grounds*, 453 U.S. 490 (1981).

	Roster Listing Fee Request and payment dated May 6, 2002. (Exh. EEE.)	
152.	The Walther P22 passed the tests and was placed on the Roster of Handguns Certified for Sale in California by the DOJ in early 2002. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 7-11; California DOJ Compliance Test Report and Memorandum, provided by the California Department of Justice on April 11, 2002, in response to a Public Records Act Request. (Exh. DDD.); DOJ Walther Timeline. (Exh. FFF.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
153.	The Walther P22 was made legally available for purchase in the California market. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 7-11; California DOJ Compliance Test Report and Memorandum, provided by the California Department of Justice on April 11, 2002, in response to a Public Records Act Request. (Exh. DDD.); DOJ Walther Timeline. (Exh. FFF.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
154.	The Walther P22 features an innovative barrel system intended to make it possible to easily switch between a 3.43" and a 5-inch barrel. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 7 &	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	14; DOJ Walther Timeline. (Exh. FFF.); DOJ E-mail from Ron Borgio to Lesa Saville dated July 22, 2002, (Exh. 666.)	
155.	"[T]he mere fact that the barrel is threaded is sufficient to put the owner on notice of the fact that the pistol may be able to accept a silencer." Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 15-16; Defendants' Memorandum of Points and Authorities in Support of Demurrer to Plaintiffs' Amended Complaint dated December 12, 2002, at p.12; March 18, 2003, Order regarding Defendants' Demurrer to First Amended Complaint at p. 5, ll. 4-20. (Exh. HHH.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
156.	The interchangable barrels on the Walther P22 required a threaded barrel and barrel nut locking system, which Smith & Wesson believed could not accommodate a silencer. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 7 & 14; DOJ Walther Timeline, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request. (Exh. FFF.); E-mail from Ron Borgio to Lesa Saville dated July 22, 2002. (Exh. GGG.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

157.	Despite this Court's order to the contrary (attached hereto as Exh. HHH), the DOJ continued to revise their opinion of whether the Walther P22 falls under the assault weapons statutes, and continued for many months to discuss the issue with Walther distributor. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 4-26; DOJ Walther Timeline, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request, Exh. Y - KK.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
158.	During this period of DOJ revision, the P22 remained on the Roster of Handguns Certified for Sale list in California. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 17-19; DOJ Walther Timeline, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request, (Exh. FFF.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
159.	Randy Rossi states in a letter to Smith & Wesson that "[t]he Attorney General's Office hopes to avoid taking unstipulated 17200 action in this matter. To avoid such action we would like to file a stipulated judgment and injunction. Any settlement stipulated to would include the following items: Smith and (sic) Wesson to assume the cost of the initial mailing to all currently (sic) documents owners of Walther P22s	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	. . . . Smith and (sic) Wesson to assume the cost of providing the retrofit solution for each handgun returned to the authorized facility . . . . Smith and (sic) Wesson to reimburse the Department of Justice for costs . . . ." Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 22; DOJ letter to Smith & Wesson dated May 24, 2004, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request. (Exh. III.)	
160.	Over 4,000 Walther P22 pistols were transferred into California before they were officially declared to be an "assault weapon." Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 20-22; DOJ Walther Timeline, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request, (Exh. EEE.); Handwritten notes relating to the Walther P22 provided by the California Department of Justice on November 5, 2004, (Exh. JJJ.); DOJ letter to Smith & Wesson dated May 24, 2004, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request. (Exh. III.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
161.	After the Walther P22 was officially declared to be an "assault weapon," the distributor was required to issue a recall, which was done at great	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	expense. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 20-25; DOJ Walther Timeline, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request, (Exh. EEE.); Handwritten notes relating to the Walther P22 provided by the California Department of Justice on November 5, 2004, (Exh. JJJ.); DOJ letter to Smith & Wesson dated May 24, 2004, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request. (Exh. III.) June 2, 2004, memorandum from Kurt Hindle to all Walther dealers. (Exh. KKK.) June 2, 2004, letter from Robert L. Scott to Randy Rossi. (Exh. LLL.)	
162.	California Department of Justice Special Agent Supervisor Ignatius Chinn was informed of the threaded barrel on the Walther P22 in July of 2002. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 12; DOJ Walther Timeline, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request. (Exh. FFF.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
163.	On January 29, 2004, the California Department of Justice Firearms Division Handgun Review Committee decided to remove the Walther P22 from the Certified for Sale list in California.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 17; DOJ Walther Timeline, provided by the California Department of Justice on November 5, 2004, in response to a Public Records Act Request. (Exh. FFF.)

D. PERMITTEE'S EMPLOYEE CONDUCT INCONSISTENCIES

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence	Defendants' Response and Supporting Evidence
164. On a number of occasions, DOJ has verbally informed licensed assault weapon retailers that permits issued to a corporate dealer would authorize employees of that corporation to legally sell "assault weapons" in the course of their duties. Such conduct is permitted under federal and California laws. Declaration of C.D. Michel in Support of Plaintiffs' Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 29-39; BATFE Ruling 73-19. (Exh. MMM.); BATFE Industry Circular, (Exh. NNN.);. U.S. Treasury Department, Rev. Rule 69-248. (Exh. OOO); Senate Bill 824 (2003) Analysis as amended April 30, 2003, (Exh. PPP.); DOJ letter to Trutanich Michel LLP dated July 7, 2003. (Exh. QQQ.); Trutanich-Michel LLP letter to DOJ dated July 22, 2003. (Exh. RRR.); August 22, 2003, letter from Timothy Rieger to Jason Davis. (Exh. SSS.); Trutanich Michel LLP letter to DOJ dated May 5, 2004. (Exh. TTT.); Declaration of Marc Halcon in Support of Plaintiffs' Motion for	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	Declaratory and Injunctive Relief, ¶ 7-9.	
165.	In the course of at least one investigation, the DOJ has taken the position that a corporate "assault weapons" dealer permit only grants authority to the single individual who actually signed the permit (typically the owner of the corporation) and those employees in his or her physical presence. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 31-39; DOJ letter to Trutanich•Michel LLP dated July 7, 2003, Exh. QQQ; August 22, 2003 letter from Timothy Rieger to Jason Davis, Exh. SSS; Trutanich•Michel LLP letter to DOJ dated May 5, 2004, Exh. TTT.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
166.	The DOJ policy of limited construction of the corporate permit has not been publicized. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 39.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
167.	The DOJ has not informed other permittees whether this limited construction of the corporate permit continues or not. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 31-39; DOJ letter to Trutanich Michel LLP dated July 7, 2003, (Exh. QQQ.); August 22, 2003, letter from Timothy Rieger to Jason Davis. (Exh. SSS.);	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

Trutanich • Michel LLP letter to DOJ dated May 5, 2004. (Exh. TTT.)

E. — ROBINSON ARMAMENT, CO. MODEL M96 RIFLE — PISTOL GRIP/CAPACITY TO ACCEPT INCONSISTENCIES

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence	Defendants' Response and Supporting Evidence
168. During the public comment period, written comments opposed the definition of "pistol grip that protrudes conspicuously below the action of the weapon" because the proposed definition was unclear. Rule Making File: Part R - Notice of Additional Supportive Reference Materials/Additional Material. (Exh. T at HUNT 03268-03285, 03360-03373, and 03407-03421.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
169. The text of the regulations originally noticed to the public defined "pistol grip that protrudes conspicuously beneath the action of the weapon" as any component that allows for the grasp, control, and fire of the firearm where the portion grasped is located beneath an imaginary line drawn parallel to the barrel that runs through the top of the exposed trigger." Rule Making File: Part B - Text of the Regulations Originally Noticed to the Public. (Exh. D at HUNT 02881.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
170. The Department of Justice subsequently amended the original definition of "pistol grip that protrudes conspicuously beneath the action of the weapon" to read: "Pistol grip that protrudes conspicuously beneath the action of the weapon" means a grip that allows for a pistol style grasp below the top of the	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	exposed portion of the trigger. Rule Making File: Part F - Notice of Modifications to Text / Modified Text of Regulations. (Exh. H.)	
171.	Subsequent to the First 15 day comment period, the Department of Justice amended their modified proposed regulation defining "pistol grip that protrudes conspicuously beneath the action of the weapon" to read: "pistol grip that protrudes conspicuously beneath the action of the weapon" means a grip that allows for a pistol style grasp in which the web of the trigger hand (between the thumb and index finger) can be placed below the top of the exposed portion of the trigger while firing." Rule Making File: Part H - Second Notice of Modifications to Text / Modified Text of Regulations. (Exh.J.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
172.	The DOJ maintains a Web page entitled "Frequently Asked Questions — Assault Weapon Registration." Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 40; DOJ FAQ Web page. (Exh. UUU.) (*Available at* http://ag.ca.gov/firearms/regagunfaqs.htm (Last visited September 19, 2006).	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
173.	The Web page informs the public that "[i]f the defining characteristics establishing a firearm as an SB 23 assault weapon are removed, it is no longer an assault weapon."	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 40; DOJ FAQ Web page. (Exh. UUU) (*Available at* http://ag.ca.gov/firearms/regagunfaqs.htm (Last visited September 19, 2006); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 3(a).	
174.	In March 2001, Robinson Armament Co. asked the DOJ to confirm that removing the pistol grip and other "defining characteristics" of their M96 model rifle would render it "no longer an assault weapon" under California law. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 41; March 21, 2001, letter from Alex J. Robinson to Randy Rossi. (Exh. VVV.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 3(b).	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
175.	The DOJ refused to confirm that removing the pistol grip and other "defining characteristics" of Robinson Armament Co.'s M96 model rifle would render it "no longer an assault weapon" under California law. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 42-44; April 25, 2001, letter from Nancy	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	Palmieri. (Exh. WWW.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 4.	
176.	In response to Robinson Armament Co.'s inquiry, the DOJ stated that "[n]othing in the Penal Code provides or exempts the removal of the offending part. Accordingly, sale of these weapons in California places the consumer at risk depending on the interpretation of the statute by the individual district attorney's office in which the consumer resides." Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 42-44; April 25, 2001, letter from Nancy Palmieri. (Exh. WWW.) Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 5.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
177.	On November 25, 2003, the California DOJ announced the seizure of a number of illegal "assault weapons" from a Laguna Niguel gun dealer. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 47-48; California Rifle & Pistol Association Media Release dated February 6, 2004 and November 25, 2003 Attorney General's Press Release. (Exh. XXX.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 9-10.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

178.	One of the guns on display in the Laguna Niguel dealer's store was a Robinson Armament model M96 rifle. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 48; California Rifle & Pistol Association Media Release dated February 6, 2004, and November 25, 2003; Attorney General's Press Release (Exh. XXX.).	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
179.	A DOJ Firearms Division agent used the store's transaction records to locate purchasers of the Robinson Armament M96 rifle. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 48; California Rifle & Pistol Association Media Release dated February 6, 2004, and November 25, 2003, Attorney General's Press Release. (Exh. XXX.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 10.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
180.	DOJ agents confiscated the Laguna Niguel dealer's firearms by threatening the dealer with criminal prosecution. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 49; California Rifle & Pistol Association Media Release dated February 6, 2004 and November 25, 2003, Attorney General's Press Release. (Exh.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	XXX.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 11.	
181.	The confiscation of at least one M96 rifle was videotaped. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 49; California Rifle & Pistol Association Media Release dated February 6, 2004, and November 25, 2003, Attorney General's Press Release. (Exh. XXX.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 11.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
182.	No compensation was offered for the seized M96 rifle. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 48; California Rifle & Pistol Association Media Release dated February 6, 2004, and November 25, 2003, Attorney General's Press Release. (Exh. XXX.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 10.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
183.	(A) Removal of the Penal Code § 12276.1 features renders a firearm no longer an "assault weapon" provided it is not a firearm listed by the Department of Justice by make and model as an "assault weapon." (B)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	The DOJ's definition of "pistol grip" requires a grip allowing "[t]he fingers to wrap firmly around the grip. The alternative Barrett 82A1 "thumb hold" exemplar cannot be considered an assault weapon pistol grip because the device allows only for the thumb, and not all the fingers, to grasp the device." Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 45-46; DOJ response letter to Trutanich Michel, LLP dated May 1, 2003, (Exh. YYY.); DOJ response letter to Trutanich Michel, LLP dated Dec. 17, 2003. (Exh. ???.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 8.	
184.	Subsequently, the DOJ Firearms Division reversed their agents' determination that the M96 rifles were illegal "assault weapons," and returned the confiscated weapons to their rightful owners. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 50-53; California Rifle & Pistol Association Media Release dated February 6, 2004. (Exh. XXX.); DOJ letter to Robinson Armament, Co. dated April 15, 2004. (Exh. ZZZ); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 14	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

185.	In April 2004, the DOJ informed Robinson Armament Co. that the M96 is not an "assault weapon" within the meaning of California Penal Code § 12276.1. Declaration of C.D. Michel in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶¶ 50-53; DOJ letter to Robinson Armament, Co. dated April 15, 2004. (Exh.ZZZ.); Declaration of Alex Robinson in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication, ¶ 14.	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

F. CAPACITY TO ACCEPT A DETACHABLE MAGAZINE

Plaintiffs' Allegedly Undisputed Material Facts and Allegedly Supporting Evidence		Defendants' Response and Supporting Evidence
186.	The text of the regulations originally noticed to the public defined "detachable magazine" as any magazine that can be readily removed without the use of tools." Rule Making File: Part B - Text of the Regulations Originally Noticed to the Public. (Exh. D at HUNT 02881.)	Undisputed.
187.	The Department of Justice subsequently amended the definition of "detachable magazine" to read: "detachable magazine" means any ammunition feeding device that can be removed readily from the firearm without disassembly of the firearm action or the use of a tool(s). For the purposes of this definition, a bullet or ammunition is not a tool. Ammunition feeding device includes any belted or linked ammunition.	Undisputed, aside from typographical errors.

	Rule Making File: Part F - Notice of Modifications to Text / Modified Text of Regulations. (Exh. H.)	
188.	Subsequent to the first 15-Day Comment Period, the Department of Justice subsequently amended the modified proposed definition of "detachable magazine" to read: "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."	Undisputed.
	Rule Making File: Part H - Second Notice of Modifications to Text / Modified Text of Regulations. (Exh. J.)	
189.	The Department of Justice has stated that "any magazine that requires the use of a bullet or any other tool for its removal is a fixed magazine, not a detachable magazine."	Undisputed.
	Rule Making File: Part R - Notice of Additional Supportive Reference Materials/Additional Material. (Exh. T at HUNT 03239.)	
190.	The Department of Justice has stated that "having to unscrew a single large bolt to reload the tubular magazine precludes that type of magazine from being considered "readily" removable. Thus, such a magazine would not be considered "detachable."	Undisputed.

	Rule Making File: Part R - Notice of Additional Supportive Reference Materials/Additional Material. (Exh. T at HUNT 03243.)	
191.	The Department of Justice has determined that a bullet or a cartridge is considered a tool because certain firearms have fixed magazines that can be removed utilizing a bullet or cartridge. Identifying a bullet as a tool allows these types of magazine[s] to appropriately remain fixed by definition. Rule Making File: Part R - Notice of Additional Supportive Reference Materials/Additional Material. (Exh. T at HUNT 03329 and 03330.)	Undisputed.
192.	By putting a screw through a rifle's magazine release so that it will not release without the use of a screwdriver, and then filling in the screw hole with epoxy or superglue so that the screw cannot be removed, even with the use of a tool, the rifle can then only be top-loaded through the open receiver in the same fashion as a fixed magazine rifle is loaded. Inquiry letter from Trutanich•Michel, LLP, to the DOJ dated Jan. 29, 2001. (Exh. AAAA.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 27); Response letter from the DOJ to Trutanich•Michel, LLP dated Feb. 22, 2001. (Exh. BBBB.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 28).	Undisputed, assuming the screw remains in place in this hypothetical scenario.
193.	The DOJ admits that the use of a screw as described above renders the magazine non-detachable for purposes of the regulation defining a "detachable magazine" — Penal Code	Disputed in part. The DOJ letter does not suggest that a rifle owner in such circumstances may be prosecuted *successfully*. DOJ does not consider a magazine attached to a receiver by a screw,

§ 12276.1 However, the DOJ letter then asserts that such an alteration violates "the spirit" of Penal Code § 12276.1, but fails to explain how this is so. Moreover, the DOJ letter warns that anyone failing to register a rifle so altered may be successfully prosecuted by any California district attorney.

Inquiry letter from Trutanich•Michel, LLP to DOJ dated Jan. 29, 2001. (Exh. AAAA.) (Also attached to Plaintiffs' First Amended Complaint as Exh. 27); response letter from DOJ to Trutanich • Michel, LLP dated Feb. 22, 2001. (Exh. BBBB.) (also attached to Plaintiffs' First Amended Complaint as Exh. 28).

requiring a screwdriver for removal, to be a detachable magazine. Chinn Decl., ¶¶ 20-21; Am. Compl., Ex. 28; Plfs' Mem. in Supp. of Mo. for Summ. Judgm. 15:20-21.

194. In response to an inquiry about a homebuilt firearm with a modification detachable magazine. The Department of Justice stated that "we would be happy to offer our opinion about such a modification, we can only do so after examining the modified receiver." The Department of Justice also stated that "a receiver with a magazine that is not 'readily detachable' is not subject to the ban on generic characteristics set forth in section 12276.1(a)(1)." But the DOJ subsequently states in the same letter that "you should be aware that a local district attorney who believed you wre manufacturing an assault weapon could file charges against you for violating Penal Code section 12280(a)."

December 21, 2005 letter from Alison Merrilees, Deputy Attorney General for the Firearms Division of the Department of Justice to an unknown consumer. (Exh. CCCC.)

Undisputed, aside from typographical errors.

195.	In response to an inquiry about modification of a firearm to avoid the "detachable magazine" liability, the Department of Justice stated that "if you build such a firearm, you do so at your legal peril. We have approved commercially manufactured firearms, such as the FAB-10, the Vulcan and the California Legal FN-FAL. We have also approved a commercial method of modifying a firearm with an open well performed by Evans Manufacturing. But we have never approved a non-commercial modification of a firearm with an open magazine well, such as the methods you described. Whether or not your firearm were permanently [sic] incapable of accepting a detachable magazine could be up to local law enforcement, and ultimately a jury of twelve citizens." E-mail from Alison Merrilees, Deputy Attorney General for the Firearms Division of the Department of Justice to California Citizen. (Exh. DDDD.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
196.	The Department of Justice has also used a standard, which it now deems to be the current standard, that a firearm with a magazine that requires a tool to be removed is still a detachable magazine if the modification is reversible. "An SKS with a permanently affixed magazine, and a pistol grip, does not meet the definition of assault weapon rifle. However, if the fixed mag can be removed with the use of a tool, then it is not permanently affixed and would be considered detachable, for purposes of assault weapon definition." April 28, 2006 e-mail from Sally	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	Carney to "Mr. Kastelic." (Exh. EEEE.)	
197.	After having approved a firearm, and subsequently changing their minds about the legalities of a modification to one firearm by Vulcan Arms, the Department of Justice refused to address the legalities of other firearms submitted for clarification to the Department of Justice. "We have received the two aforementioned exemplars for our approval. However, we will not offer an opinion about the legality of the lower receivers until you comply with the modifications we demanded to the original V 15 lower, (a rivet holding the magazine and lower receiver together at the front of the magazine area of the lower receiver).... March 22, 2006 letter from Ignatius H. Chinn, Special Agent Supervisor for the Firearms Division of the Department of Justice to Robert Hesse of Vulcan Arms. (Exh. FFFF.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
198.	After a failed attempt to regulate "non-assault weapons" as "assault weapons," the Department of Justice changed their policy on the definition of "detachable magazines" in order to broaden the definition of "assault weapons." Department of Justice's change in policy caused the Department to begin working with anti-firearm advocates in the drafting of new regulations to construe the "assault weapon" laws more strictly than they had previously been interpreted by the Department. May 24, 2006, letter from Alison Merrilees to Gene Hoffman Jr. regarding three "Important Notices"	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

promulgated by the Department of Justice via the Department of Justice – Firearms Division website. (Exh. GGGG.) E-mail correspondence between Alison Merrilees and Luis Tolley of Project Concern International and Briel Siebel of the Brady Center. (Exh. HHHH.)

199. On June 27, 2006, the Department of Justice promulgated proposed regulations defining "capacity to accept a detachable magazine" as meaning "capable of accommodating a detachable magazine, but shall not be construed to include a firearm that has been permanently altered so that it cannot accommodate a detachable magazine."

Text of Proposed Regulations defining "capacity to accept a detachable magazine." Exh. IIII.)

Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

200. This new definition is contrary to previous opinions issued by the Department of Justice.

August 15, 2006 letter from Chuck Michel to Jeff Amador at the Department of Justice in opposition to the proposed regulations and exhibits thereto. (Exh. JJJJ.) August 15, 2006 letter from the Fifty Caliber Institute to Jeff Amador at the Department of Justice in opposition to the proposed regulations and exhibits thereto. (Exh KKKK.) August 15, 2006 letter from the California Association of

Firearms Retailers to Jeff Amador at the Department of Justice in opposition to the proposed regulations and exhibits thereto. (Exh LLLL.) August 16, 2006 transcript of Public Comments regarding the definition of

Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.

	terms used to identify assault weapons. (Exh. MMMM.)	
201.	Despite the conflicts detailed in the letters of opposition to the proposed regulations, the Department of Justice maintains the "permanently alter" policy as it applies to modifications to a firearm's "capacity to accept a detachable magazines." September 28, 2006 printout of the Department of Justice Website identifying the May 9, 2006 "Important notice" as an active link. (Exh. NNNN.)	Defendants' response to Plaintiffs' Allegedly Undisputed Material Fact No. 151 is incorporated herein by reference as though fully set forth at length.
202.	The Department of Justice's policy regarding public advice on "assault weapon" laws is to not provide clear regulations so that the laws can be interpreted in many ways by the 58 district attorneys and other law enforcement bodies, stating in nearly every public response that "you should be aware, however, that the receiver may be illegal if it has any of the characteristics listed in Penal Code 12276.1. Also, a local prosecutor in one of California's 58 counties could decide to prosecute you for possession of an assault weapon, regardless of our opinion about the legality of the firearm." Letters from the Department of Justice in response to inquiries from the general public. (Exh. OOOO.)	Disputed. Plaintiffs' characterization of DOJ policy is not supported by, and indeed is contradicted by, the material cited.

Dated: January 8, 2007

Respectfully submitted

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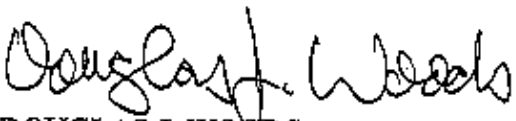

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