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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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT** Date: February 1, 2007 Time: 3:30 p.m. Dept: 72 Before the Honorable Alan Simpson

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Defendants Attorney General Bill Lockyer, the State of California, and the California Department of Justice ("DOJ") hereby submit this reply memorandum in support of their motion for summary judgment or, alternatively, summary adjudication in this action. Plaintiffs have either abandoned or virtually abandoned each of their non-"flash suppressor" claims, and their many points of *dissatisfaction* with DOJ's "flash suppressor" definition are insufficient to create any triable issues of material fact and avoid summary judgment in favor of defendants.

I. PLAINTIFFS PRESENT NO DISPUTED ISSUE OF MATERIAL FACT TO PREVENT SUMMARY ADJUDICATION FOR DEFENDANTS ON PLAINTIFFS' FIRST CAUSE OF ACTION FOR ALLEGED UNLAWFUL EXPANSION OF THE "FLASH SUPPRESSOR" TERM.

Plaintiffs' opposition in support of their "unlawful expansion" claim ignores the governing standard of judicial deference (*see* Defs.' SJM Mem. 9:6-15), and none of plaintiffs' offered arguments suggests the "flash suppressor" definition is arbitrary, capricious, or lacking in evidentiary support.

Plaintiffs' first argument (Pls.' SJM Opp. 4:7-5:9), that "Defendants' thesis is that the Legislature erred," misstates defendants' point. Defendants' thesis is not that the Legislature made a mistake when it listed "flash suppressor" as an assault weapon feature, but instead simply that the Legislature meant what it said. Rather than arbitrarily selecting from among the varying definitions in the industry references, as plaintiffs advocate, DOJ defined the term "flash suppressor" according to the plain meaning of its terms, and consistent with the statutory purpose, as a device that suppresses flash.[1/] Contrary to plaintiffs' concern, the confirmed absence of an established industry-wide definition when the law was passed does *not* mean that the Legislature's term did not have a fixed meaning, *i.e.*, as a device that suppresses flash.[2/] Notably, plaintiffs do not themselves advance any argument that the Legislature erred – *no party* argues that the Legislature's term "flash suppressor" is impermissibly vague. *See* Pls.' SJM Opp. 5:5-9. Plaintiffs' straw argument here does not identify any material

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1. Correspondingly, far from contesting defendants' argument, plaintiffs' citations to *People v. Zamudio*, *United States v. Harris*, and *United States v. Colon-Ortiz*, drive home defendants' point that it was proper to define "flash suppressor" according to its terms.

2. For example, if the "flash suppressor" term had been left undefined by regulation, the same devices would still be considered flash suppressors, and the same assault weapons with such flash suppressors would still be subject to control. Of course, the presence of the regulation helps assure that firearms owners are fairly on notice as to the meaning of the "flash suppressor" term.

disputed fact, and it does not prevent summary adjudication in favor of defendants on plaintiffs' "statutory expansion" claim.

Plaintiffs' unsupported proposition (Pls.' SJM Opp. 5:10-6:17) that intent is inherent in the concept of "suppression" does not support their argument against including within the "flash suppressor" definition devices that *function* to suppress flash. If, as plaintiffs claim, "by definition . . . 'flash *suppressor*' . . . applies only to intended effects and excludes unintended effects," where is such definition to be found? Plaintiffs betray their own discomfort with their point in adding the word "project" to "fire suppression project" in trying to use a dam analogy to argue that "suppression" must denote an intended effect. Why add the word "project" to the analogy if "suppression" must necessarily denote an intended effect?[3/] Nor is plaintiffs' concern that rifle barrels could be considered "flash suppressors" under the challenged definition anything more than another straw argument. Rifle barrels are not "flash suppressors" because they are not "devices" at the threshold under the challenged definition, not because any effect on flash is unintended.

Notably, plaintiffs make a dramatic concession in stating: "Plaintiffs never claimed that something designed to suppress flash is not a flash suppressor if it was *also* designed to be a muzzle brake or to have some other function as well." *See* Pls.' SJM Opp. 6:10-12. Their present concession is contrary to their previous position that the term "flash suppressor" and the terms "muzzle brake" and "compensator" were mutually exclusive.[4/] In any event, with this concession plaintiffs' extensive arguments as to allegedly improper control of "muzzle brakes" and "compensators" simply boil down to plaintiffs' same dissatisfaction with including within the "flash suppressor" definition devices that *function* to suppress flash. Plaintiffs' concession confirms defendants' point that there is no talismanic protection for "muzzle brakes" or "compensators," and that no statutory conflict is created simply because devices labeled "muzzle brake" or "compensator" may come within the "flash suppressor"

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3. In any event, the analogy falls short of its apparent purpose in that it is not immediately clear how a dam would have the "effect of precluding [suppressing?] wildfires on downstream acreage." *See* Pls.' SJM Opp. 5:17-19. One would not call a dam a "fire suppressor," not because any fire suppression effects are unintended, but rather because a dam does not "suppress" fires.

4. *See, e.g.*, Am. Compl., ¶ 41 ("Those devices also have established technical meanings which differentiate them from a 'flash suppressor.'"); Pls.' SJM Mem. 4:5-7 (claiming "distinction between true flash suppressors and compensators or muzzle brakes").

definition.

Plaintiffs' argument (Pls.' SJM Opp. 6:18-8:16) that the "flash suppressor" definition "violates the statutory intent to use terms that are accessible to people of ordinary knowledge and intelligence" takes the cited cases out of context in plaintiffs' zeal to enlist their due process argument for double duty in support of their "statutory expansion" claim. Elsewhere, plaintiffs have already acknowledged that the Legislature's purpose in enacting SB 23 was to close loopholes in the original assault weapons law that firearms manufacturing interests had exploited by simply using alternative model names and numbers not listed among the rifle, pistol, shotgun models identified as assault weapons under Penal Code section 12276. *See* Pls.' SJM Sep. St., No. 4. Here, however, plaintiffs attempt to portray SB 23 as remedial legislation supposedly designed to correct a previous ostensible lack of clarity in the assault weapons law. This due process argument is out of place in this "statutory expansion" claim context, and is belied by the true statutory purpose already acknowledged by plaintiffs. In any event, of course, as explained at length in response to plaintiffs' due process arguments, there is no valid argument that a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited by the "flash suppressor" definition.

Plaintiffs' argument (Pls.' SJM Opp. 8:17-9:11) that no other definition of "flash suppressor" has used the word "redirect" fails to apply the governing standard. Plaintiffs make no attempt to explain why use of the word "redirect" would render the "flash suppressor" definition arbitrary, capricious, or lacking in evidentiary support, and tellingly plaintiffs make no attempt to address defendants' explanation (Defs.' SJM Mem. 11:16-12:1, 12:26-27) that the word "redirect" was chosen in favor of the word "conceal" (which was used instead of the word "reduce" in a number of firearms reference definitions) *in order to protect against overbroad application of the "flash suppressor" definition.* Use of the word "reduce" alone, as favored by plaintiffs, would have been insufficient because, as noted in a number of public comments, in one ultimate sense light is not reduced, but only redirected. *See* Declaration of Randy Rossi ("Rossi Decl."), Ex. A, p. 28. In any event, in addition to the examples of firearms references using "conceal," rather than "reduce," even one of the references cited by plaintiffs speaks in terms of flash suppressors "disrupting" flash, in addition to "reducing" it. *See* Declaration of Ignatius Chinn ("Chinn Decl."), Ex. A, p. 45; Am. Compl., Ex. 8. There is simply no

basis for plaintiffs' argument that exclusive use of the word "reduce" was required. Plaintiffs' views on the fine points of word choice would have been a fair subject for comment in the course of the rulemaking process, but do not in this deferential context provide a basis for asking this Court to invalidate the definition.

Plaintiffs' argument (Pls.' SJM Opp. 9:12-10:10) against including within the "flash suppressor" definition devices that *function* to suppress flash because no prior firearms reference expressly included "unintended" flash reduction in a "flash suppressor" definition again fails to apply the governing standard. Plaintiffs reluctantly admit that a number of the standard firearms reference materials defined "flash suppressor" according to function. *See* Pls.' SJM Opp. 9:17-19; Decl. of Torrey D. Johnson, ¶ 30; Decl. of Jess Guy, ¶ 38.[5/] Plaintiffs nevertheless argue that such definitions implicitly excluded devices that suppress flash unintentionally. But the evidence is undisputed that the firearms reference definitions were *not* limited solely to devices designed or intended to suppress flash, as plaintiffs advocate. Under Government Code section 11342.2, DOJ was not at liberty to impair the scope of the statute and thus properly defined the term "flash suppressor" according to its terms as a device that suppresses flash.[6/] There can be no valid argument that including within the "flash suppressor" definition devices that *function* to suppress flash, in addition to those designed or intended to suppress flash, was arbitrary, capricious, or lacking in evidentiary support.[7/]

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5. The excerpt offered by plaintiffs (Pls.' SJM Opp. 9:24-25) is not the best example of the phenomenon. *See* John Quick, *Dictionary of Weapons and Military Terms* ("A device attached to the muzzle of a weapon which reduces the amount of visible light or flash created by burning propellant gases."); W.H.B. Smith & Joseph E. Smith, *The Book of Rifles* (3rd Ed. 1963) ("A prong type arrangement fitted to the muzzle of weapons which reduces muzzle flash."); The United States Army John F. Kennedy Center for Special Warfare (Airborne), *U.S. Army Special Forces Foreign Weapons Handbook* (1 January 1967) ("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 gases reduces the flash."); Steindler, *The Firearms Dictionary* (1970) (defining "Flash Hider" 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. Also known as FLASH SUPPRESSOR.") (Chinn Decl., Ex. A, pp. 29, 50, 54, 58; Am. Compl., Exs. 9-11).

6. Plaintiffs provide no response to defendants' argument (Defs.' SJM Mem. 10:12-22) that where the Legislature intends to limit a weapon device's definition to how it is "designed" or "intended" to be used, as opposed to how it may function, section 12020 makes clear that the Legislature knows how to do so.

7. Plaintiffs' circular argument (Pls.' SJM Opp. 10:1-10, 1:8-15, 2:17-3:2) based on the Legislature's language in Penal Code section 12275.5 misconstrues that language and also reintroduces plaintiffs' recently disavowed theme that the term "flash suppressor" and the terms "muzzle brake" and "compensator" were mutually exclusive. Section 12275.5 is a declaration of purpose which states, as plaintiffs emphasize, it is not the intent "to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports

Plaintiffs do not identify any material disputed facts in connection with their "statutory expansion" claim. The existence of the various definitions in the reference materials is undisputed, the bases for DOJ's decision are undisputed, and plaintiffs' policy criticisms cannot suggest that DOJ's judgment in establishing the "flash suppressor" definition was arbitrary, capricious, or lacking in evidentiary support. Defendants are thus entitled to summary adjudication on this claim.[8/]

II. PLAINTIFFS PRESENT NO DISPUTED ISSUE OF MATERIAL FACT TO PREVENT SUMMARY ADJUDICATION FOR DEFENDANTS ON PLAINTIFFS' "FLASH SUPPRESSOR" VAGUENESS CLAIM

Plaintiffs' argument (Pls.' SJM Opp. 10:19-12:5) that defendants have not shown that Californians can know if their rifles have "flash suppressors" given the "aberrant" definition of "flash suppressor" gives short shrift to defendants' presentation (Defs.' SJM Mem. 14:1-15:18) and misunderstands the due process standard applicable to plaintiffs' *facial* challenge to the provision.

Defendants have responded to each of plaintiffs' asserted criticisms of the "flash suppressor" definition. Defendants have provided DOJ's approach as to each of plaintiffs' criticisms. Defendants have explained, as a matter of law, the validity of DOJ's approach to each criticism and the valid application of the challenged "flash suppressor" definition. Plaintiffs' policy criticisms do not suggest *at all* that a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited, let alone in all applications.

On this *facial* challenge to the "flash suppressor" definition, plaintiffs simply do not have veto

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or recreational activities," but it also states that it is restricting specified assault weapons "based upon a finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." The Legislature then proceeded to identify such assault weapons subject to control, first by manufacturer and model in section 12276, then by reference to objective features in 12276.1. Section 12275.5 is thus the Legislature's introduction to its identification of those firearms for which it has found "such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." It is not, as plaintiffs argue, an implicitly carved-out exception to the express identification of assault weapons subject to control for firearms or devices for which there is a legitimate "civilian" use. Any such legitimate "civilian" use is already contemplated, and determined to be outweighed, in the Legislature's express identification of assault weapons subject to control.

8. Plaintiffs' argument (Pls.' SJM Mem. 10:11-18) that the "function" element of the "flash suppressor" definition renders the "design" or "intent" element of the definition mere surplusage is a *non sequitur*. There is no issue here as to *interpretation* of the challenged "flash suppressor" definition; plaintiffs' claim is that a portion of the definition is *invalid*. In any event, although devices designed or intended to suppress flash will ordinarily also function to suppress flash, it remains helpful to include "design" and "intent" in the definition to avoid any implication that proof of design or intent to suppress flash would be insufficient to establish that a device is a "flash suppressor." *See* Rossi Decl., Ex. A, pp. 50-51.

power over the legitimate product of the public rulemaking process based on *abstract conjecture* as to *hypothetical* instances in which the "flash suppressor" definition *might* be unfairly applied. In order to wipe a challenged law off the books on alleged vagueness grounds, a plaintiff must prove the challenged provision to be impermissibly vague in all applications. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). As the United States Supreme Court explained in reversing a judgment granting declaratory and injunctive relief in a pre-enforcement facial challenge to a drug paraphernalia ordinance: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.* To illustrate, the Supreme Court observed: "The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine is of no due process significance unless the possibility ripens into a prosecution." *Id.* at 503, n.21 (citation omitted).[9/] All of plaintiffs' variations on their basic criticisms of the "flash suppressor" definition are of this nature, and thus are insufficient to defeat summary adjudication in favor of defendants on this claim.[10/]

For example, plaintiffs' criticism of Agent Chinn's testimony (Pls.' SJM Opp. 11:6-12:5) as only that "*someone* could tell by 'visual inspection' of *some* unspecified devices on rifles that they do not function to reduce or redirect flash" ignores the variety of ways a person of ordinary intelligence has

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9. Plaintiffs do not respond to this dispositive authority, other than to assert (Plfs.' SJM Opp. 18:1) that the "doctrine is inapplicable here for reasons discussed, infra." That discussion never materializes in plaintiffs' opposition brief. If plaintiffs are referring to their quotation from *Harrott v. County of Kings*, 25 Cal. 4th 1138, 1153 (2001), the effect of the reference is actually the opposite of what plaintiffs intend. The California Supreme Court's discussion actually confirms the governing standard in referring to a statute that would "be unconstitutional on its face, that is, in *all* its applications." *Id.* (emphasis in original). Perhaps seeking to avoid their burden on their facial challenge, plaintiffs ultimately request (Plfs.' SJM Opp. 17:23-18:17) that this Court *construe* the challenged "flash suppressor" definition, following the model in *Harrott*. Unlike the analysis in *Harrott*, however, which addressed a provision that was susceptible to two possible constructions, one of which would render the provision constitutional, and one of which would be unconstitutional in whole or part, here the *meaning* of the challenged "flash suppressor" definition is undisputed. Plaintiffs' claim is that collateral circumstances render the provision fatally uncertain. The *Harrott* construction analysis does not provide plaintiffs with an end run around their burden on their facial challenge.

10. Plaintiffs' unsupported suggestion (Plfs.' SJM Opp. 18:1-3) that they need not show the "flash suppressor" definition is impermissibly vague in all applications on their facial challenge because the challenged provision is not a *statute* ignores that the challenged provision at issue in *Hoffman Estates* was a local ordinance and ignores the stature of administrative rulemaking as a legislative act. *See Dabis v. San Francisco Redevelopment Agency*, 50 Cal. App. 3d 704, 706 (1975); *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 401, 410-411 (1976) ("a regulation adopted by a state administrative agency pursuant to a delegation of rulemaking authority by the Legislature has the force and effect of a statute").

a reasonable opportunity to know what is prohibited, and correspondingly demonstrates their fundamental misunderstanding of the governing standard. It would be irresponsible – and it is unnecessary – for defendants to claim in the abstract in response to plaintiffs' facial challenge, that all people, or even that all "ordinary" people (as plaintiffs put it), can evaluate all devices and determine if they are flash suppressors by visual inspection alone. It is sufficient that persons of ordinary intelligence have "a reasonable opportunity to know what is prohibited." *Harrott*, 25 Cal. 4th at 1151.

Correspondingly, plaintiffs' criticism that Agent Chinn fails to specify any device upon which a visual evaluation could be performed, or to specify any person capable of performing such an evaluation, is irrelevant on this facial challenge, and in any event is wrong on the facts. DOJ has determined that the Browning BOSS does not function to suppress flash based in part on visual inspection of the device. Chinn Decl., ¶ 15. In addition, defendants have confirmed to plaintiffs:

> Depending on the device in question, there are many, many firearms dealers, private firearms owners, employees of firearms manufacturers, law enforcement personnel, and others who may be able to determine – by inspection only, without reference to manufacturer or industry materials or consultation with other persons – whether a device perceptibly reduces or redirects muzzle flash from the shooter's field of vision.

Pls.' Ex. QQ, p. 12:1-16. Defendants identified such persons employed by DOJ as including at least Special Agent Supervisors Cris Abad and Ignatius Chinn. *Id.*, pp. 10:14-11:3.

Plaintiffs' criticism and claim that rifle owners have no way of knowing if devices on their rifles function to suppress flash in the absence of scientific testing *are belied by plaintiffs' own arguments and evidence. See, e.g.*, Am. Compl., pp. 19:22-20:2; Plfs.' SJM Mem. 3:17-21, 14:6-19; Declaration of Torrey D. Johnson, ¶¶ 13, 31, 33; Declaration of Jess Guy, ¶¶ 21, 39, 41; *see also* Duncan Long, *The Complete AR-15/M16 Sourcebook* (Chinn Decl., Ex. A, pp. 65-68, Am. Compl., ¶ 39, Ex. 14). How can plaintiffs' argue that such determination is impossible when the ability to make such determination is central to their claims? A party opposing summary judgment may not create a triable issue of material fact by contradicting its prior statements. *Preach v. Monter Rainbow*, 12 Cal. App. 4th 1441, 1451 (1993). It is not that plaintiffs cannot make a determination according to the challenged provision; it is just that the challenged provision is not what plaintiffs want it to be.

In the same vein, plaintiffs' various quibbles (Pls.' SJM Opp. 13:3-17:22) as to whether

assistance was or is available from DOJ or ATF likewise ignores the variety of ways a person of ordinary intelligence has a reasonable opportunity to know what is prohibited, and correspondingly demonstrates their fundamental misunderstanding of the governing standard. Possible obstacles that may arise in the course of evaluating whether a hypothetical device in given circumstances is within the "flash suppressor" definition, even if real, are simply insufficient to support plaintiffs' facial challenge to the provision. Ordinary methods available for determining whether a particular device functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision include inspection of the device, consultation with DOJ or ATF, review of product literature provided by the manufacturer or distributed by the industry, or any other credible, authoritative sources of information regarding the device, which may include dealers or even other firearms owners. *See* Chinn Decl., ¶ 11. In a given instance, all or some, *or even none*, of these may suffice. If in a given instance none of these sources are sufficient to reasonably put a firearm owner on notice that a device in question falls within the "flash suppressor" definition, then there can be no mens rea and no prosecution. But such questions cannot be evaluated now, in the abstract. The hypothetical possibility of such instances is not a basis for eliminating the provision in question. If a firearms owner confirms by any of these available methods that a device functions to perceptibly reduce or redirect flash from the shooter's field of vision, then such owner would fairly be subject to prosecution.[11/]

Plaintiffs' ostensible disputed facts regarding possible obstacles to confirmation that a device functions to suppress flash do not create material disputed issues because they cannot suggest that the "flash suppressor" definition must necessarily be impermissibly vague in all applications. Accordingly, defendants are entitled to summary adjudication on this claim.[12/]

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11. Defendants welcome plaintiffs' emphasis (Pls.' SJM Opp. 12:15-13:2) on evaluation of the challenged language itself, which confirms defendants' threshold point that there is no valid claim that the language of the flash suppressor definition is itself vague. *See* Defs.' SJM Mem. 14:3-6. But plaintiffs overreach when they suggest access to DOJ and ATF guidance is irrelevant to the due process issue of whether a firearm owner has a reasonable opportunity to know what is prohibited by the "flash suppressor" issue. Again, this is not a case of a challenged provision being uncertain in *meaning*, as was the case in plaintiffs' cited decisions disapproving of resort to outside resources to establish meaning. In this case, plaintiffs' claim is that collateral circumstances render the challenged provision fatally uncertain.

12. Plaintiffs' complaint regarding the time period between the effective date of the "flash suppressor" definition and the assault weapon registration deadline is a red herring. The due process issue is whether, in all applications, firearms owners do not have a reasonable opportunity to know whether their devices function to suppress flash.

III. PLAINTIFFS PRESENT NO DISPUTED ISSUE OF MATERIAL FACT TO PREVENT SUMMARY ADJUDICATION FOR DEFENDANTS ON PLAINTIFFS' REMAINING CLAIMS.

Plaintiffs' argument (Pls.' SJM Opp. 18:18-20:2) in support of their Fifth Cause of Action alleging that DOJ should have issued a regulation to define the term "permanently altered" in the exception to the definition of "large-capacity magazine" established in Penal Code sections 12020(c)(25) and 12276.1(d)(2) abandons any pretense of legal argument and unabashedly requests that this Court order defendants to do what plaintiffs believe, as a matter of policy, defendants *should* do. Plaintiffs do not address (1) any question as to whether a person of ordinary intelligence has a reasonable opportunity to know what is prohibited in connection with the statutory "permanently altered" term; (2) any question, on this facial challenge, as to whether the term "permanently altered" is impermissibly vague in all applications, if at all; (3) the authorities cited by defendants requiring extreme deference to an agency decision *not* to issue a regulation; or (4) defendants' explanation for DOJ's determination not to issue a regulation defining "permanently altered." *See* Defs.' SJM Mem. 15:19-16:26. Plaintiffs' claim has devolved into a request that the Court order DOJ to issue a regulation reciting the common dictionary understanding of the word "permanent," which is not in controversy. This is not what plaintiffs seek in their Amended Complaint. In any event, defendants would be hard-pressed to explain to the Office of Administrative Law why it is "reasonably necessary" to promulgate a dictionary definition as a regulation, even if defendants wanted to. *See* Gov. Code § 11342.2. In no event is there any justification for *ordering* defendants to do so.

Plaintiffs make no opposition argument in support of their Claim 1 in the Sixth Cause of Action, that DOJ's determinations that two devices are *not* flash suppressors are inconsistent with the "flash suppressor" definition. *See* Defs.' SJM Mem. 17:3-18:2. Plaintiffs purport to "dispute" defendants' undisputed material facts on this issue in their opposition separate statement, but their "disputes" argue only that DOJ's determinations that the Springfield Muzzle Break and Browning BOSS are *not* flash suppressors are wrong. Defendants' argument here, however, is that – right or wrong – plaintiffs' remedy, if any, would be to challenge such ostensibly erroneous determinations by petition for writ of mandate or otherwise, *not* to seek wholesale invalidation of "flash suppressor" definition.

Plaintiffs' abbreviated argument (Pls.' SJM Opp. 20:3-11) in support of their Claim 2 of their

Sixth Cause of Action, that DOJ allegedly has not fulfilled a duty to exercise supervisory power over district attorneys and law enforcement to assure that arrests and prosecutions are carried out in a manner consistent with the regulatory definition of the term "detachable magazine" to mean a magazine "that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required," does not present any triable issue of material fact. The only source of "inconsistency" here is plaintiffs' mischaracterization of defendants' statements. DOJ does not consider a magazine attached to a receiver by a screw, requiring a screwdriver for removal, to be a detachable magazine. Chinn Decl., ¶¶ 20-21. There is no basis for any order granting declaratory or injunctive relief requiring DOJ to correct a position it has never taken.[13/]

Plaintiffs make no opposition argument in support of their Claim 3 of their Sixth Cause of Action, that DOJ had created confusion by authorizing members of the Single Action Shooting Society, Inc. to bring modern replicas of 19th Century lever-action rifles into California for the purpose of participating in SASS western style shooting competitions. As defendants explained (Defs.' SJM Mem. 19:3-20:1), this claim is moot.

Accordingly, there are no triable issues of material fact on any of these remaining claims, and each is subject to summary adjudication in favor of defendants.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant summary judgment in favor of defendants.

Dated: January 22, 2007

Respectfully submitted,

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Attorney General of the State of California

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Attorneys for Defendants

13. Plaintiffs' counsel's unspecified declaration that his office "has been contacted by at least two persons that have been threatened with criminal prosecution, and have had their firearms seized for the same reason" (Declaration of Jason A. Davis, ¶ 5) does not create any triable issue of material fact or in any way rebut defendants' argument on this claim.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

No.: **01CECG03182**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On January 22, 2007, I served the attached **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION ON PLAINTIFFS' AMENDED COMPLAINT** by placing a true copy thereof enclosed in a sealed envelope with the Golden State and Federal Express, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 22, 2007, at Sacramento, California.

Francina M. Stevenson
Declarant

Francina M. Stevenson
Signature

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