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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE 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 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION**

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INTRODUCTION

Plaintiffs do not seek to substitute their judgment for the DOJ's, as Defendants argue. Rather, Plaintiffs seek to harmonize, *inter alia*, the regulatory definition of "flash suppressor" with the term's conventional meaning – the one intended by the Legislature, and bring it back within the expressly restricted scope of authority the Legislature delegated to DOJ.

Defendants rely on Penal Code §12275.5, which states the Legislature's intent in passing California's Robert-Roos Assault Weapons Control Act of 1989 ("Act"). But Defendants omit the key provision of that code section, a provision which informs this debate and expressly restricts, in unambiguous terms, Defendants' scope of authority to promulgate regulations:

> It is the intent of the Legislature in enacting this chapter to place restrictions on the use of *assault weapons* and to establish a registration and permit procedure for their lawful sale and possession. *It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities*. (Pen. Code §12275.5 (emphasis added).)

The material facts relied upon by Plaintiffs show that the regulations improperly cover and condemn firearms or parts that *are* designed and intended for legitimate sports or recreational activities. These facts are undisputed and supported by ample evidence. (Plaintiffs' Undisputed Separate Statement of Material Facts ("UMF") ¶¶89-120.) Accordingly, DOJ's regulations are invalid.

ARGUMENT

I. PLAINTIFFS ABANDON THEIR CHALLENGE TO THE REGULATORY DEFINITION OF "DETACHABLE MAGAZINE"

A partial dismissal relating to this claim will be filed shortly.[1]

II. PLAINTIFFS CHALLENGE TO THE DEFINITION OF "FLASH SUPPRESSOR"

Administrative rulemaking is subject to judicial deference. Review is permitted, however, to

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[1] Defendants have evidently recognized the ambiguities inherent in their definition of "detachable magazine." As a result, Defendants recently promulgated two drafts of proposed new regulations to further define terms used in the statute relating to "detachable magazine" – a third version is forthcoming. In light of these new regulatory efforts, Plaintiffs abandon their challenges to the definition of "detachable magazine" for now, and will renew them in combination with a challenge to the new regulations, if necessary.

determine whether an agency exceeds the scope of its delegated authority, and whether the regulatory action is reasonable rather than arbitrary, capricious, or lacking in evidentiary support. (*Brock v. Superior Court* (1952) 109 Cal. App. 2d 594, 605.) The DOJ regulations fail on both counts.

A. The Regulations Exceed the Expressly Limited Scope of the Authority Delegated to DOJ by the Legislature

When reviewing whether an administrative regulation is consistent and not in conflict with the statute, the issue is whether the regulation alters or amends the governing statute or case law, or enlarges or impairs its scope. In short, is the regulation is within the scope of the authority conferred? If it is not, it is void. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 109.) Contrary to Defendants' bald assertions, an express statutory basis exists for limiting the scope of the term "flash suppressor" to exclude devices that are *primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities*. (Pen. Code §12275.5.)

"[N]o regulation adopted is valid or effective unless *consistent and not in conflict with the statute* and *reasonably necessary* to effectuate the purpose of the statute." (Gov. Code §11342.2.) Defendants claim that the Legislature gave the DOJ "broad" authority to promulgate regulations under the act. (Opp. 9:5-10.) Defendants misrepresent the scope of the statutory authority granted them. DOJ's authority to pass regulations is limited. DOJ may only adopt regulations that are "*necessary and proper* to carry out the *purpose and intent* of [the Act]." (Pen. Code §12276.5(i).) The express purpose of the Act is *not* ". . . to place restrictions on the use of those weapons *which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities*." (Pen. Code §12275.5.)

Undisputed facts demonstrate that the term "flash suppressor," as it defined by Defendants, restricts the use of weapons that are primarily designed and intended for hunting, target practice, and other legitimate sports or recreational activities: (UMF ¶¶89-120.)

B. The Regulations Unlawfully Expand the Meaning of the Term "Flash Suppressor" and Are Not Reasonably Necessary

In determining "reasonable necessity," the "question is whether the agency's action was

arbitrary, capricious, or without reasonable or rational basis." (*Communities for a Better Environment,* supra, 103 Cal.App.4th at 110.) Defendants state that there was no common industry definition of "flash suppressor" as a muzzle attachment designed to reduce flash when the Regulations were promulgated. (Defendants Points and Authorities in Opposition to Plaintiffs Motion for Summary Judgment ("Opp."). at 4:26.)

This is blatantly false. Nearly every definition cited and relied upon by the Defendants is based upon the flash *reduction* concept. None are based upon the concept of *redirection* - as Defendants have incorporated into their definition of "flash suppressor." (Plaintiffs' Separate Statement of Undisputed Material Facts in Support of Defendants' Motion For Summary Judgement ¶¶8-21.) Further, case law defines "flash suppressor": "[a] flash suppressor, as its name indicates, reduces the visible flash produced when the rifle is fired."[2] (*U.S. v. Olmstead* (1987) 832 F.2d 642.)

Nonetheless, Defendants state that "given the varying definitions in the industry references DOJ was left to define the term 'flash suppressor' according to its terms, and the statutory purpose, as a device that [perceptibly] suppresses flash." (Def. Opp. At 10:4-6.) Thus, Defendants admit the existence of varying definitions of industry references from which a definition could be adopted.

DOJ neither adopted an existing definition, nor used the commonalities of the varying definitions. Instead, Defendants arbitrarily, capriciously, and without reasonable or rational basis created an original definition of "flash suppressor" that interfered with exempted weapons.[3] Such, action was not necessary, especially since both the industry and case law have established existing definitions.

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[2] See also *Coleman v. Com.*, Not Reported in S.E.2d, 2003 WL 22703262 (Va.App.), fn. 1. ("A flash suppressor is a 'piece that goes on the end of the gun to make less flash when the fire shoots out the barrel.'" Plaintiffs' this case pursuant to Cal. Rules of Court 8.1115(b).

[3] The Legislature expressly stated its intent to restrict military-type assault weapons, not firearms used for recreational purposes. "Flash suppressors," for example, are restricted because they are designed for military purposes, i.e., to suppress the flash so that the enemy cannot see where the shot was fired from and return fire. Hunters or target shooters do not need "flash suppressors" because neither animals nor targets shoot back. By including muzzle brakes, et al., within its bastardized definition of "flash suppressor,"the DOJ not only created ambiguity where none existed, but did so in a manner that directly conflicts with the Legislature's expressed intent.

C. The Definition of Flash Suppressor Violates Due Process

Defendants claim that Plaintiffs can identify no word or phrase in the statute or "flash suppressor" definition that the regulation into constitutional question. (Opp. 14:12-14.) Plaintiffs, however, challenge multiple aspects of the definition, including the phrase "from the shooters field of vision" due to the fact that no starting point of reference relating to the location of the firearm when fired (i.e. from hips, shoulder, as viewed through a scope) is provided in the statute – nor is a standardized scientific means of measurement identified. (UMF 89-120.)

Citing Government Code §11342.2, Defendants argue that the "DOJ is not at liberty to deviate from such intent by establishing some hypothetically permissible level of perceptible flash as preferred by plaintiffs." (Opp. 14:23-25.) Yet Defendants themselves ignore the Legislature's intent, which restricts the scope of the DOJ's regulatory capacity.

Defendants state a reasonable person could determine whether a device is a "flash suppressor"without test firing the firearm, or by inspecting the device, yet provide no description of what the reasonable person is looking for during the inspection. (Opp. at 15:17.). Defendants further state that the public can seek clarification of whether a device is a "flash suppressor" from the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives.[4] (Opp. at 15:17.) But this instruction or general standard of application from the DOJ is not set forth in the challenged regulation.

The argument is meritless in any event since no state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a "regulation"[5] under the Administrative Procedure Act ("APA")

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[4] The ATF, however, uses a different definition. In *U.S. v. Smith* (2003) 70 Fed.Appx. 804, 807-808 the court cited the following sworn testimony of Steven Toth, a Supervisor and Special Agent with the ATF:

> Q: Would you tell the jury what a flash suppressor is?
> A: It just hides the muzzle flash when you pull the trigger.
> Q: So when you shoot a gun at night, would a flash suppressor make it look any different?
> A: Yes. Instead of seeing a big flame shooting out, it is going to diffuse it so that you are not going to see exactly where it shot from.

Plaintiffs' cite *U.S. v. Smith* pursuant to Cal. Rules of Court 8.1115(b).

[5] "Regulation" means *every* rule, regulation, order, or *standard of general application* or the amendment, *supplement*, or revision of any rule, regulation, order *or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to*

unless it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA. (Gov. Code §11340.5(a).)[6]

Defendants also suggest that a device can be determined to be a "flash suppressor" by reviewing 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. (Opp. at 15:6-11.) But at the same time, it was the "absence of any established industry-wide definition of 'flash suppressor' that created a need to provide a definition by regulation." Thus, any literature relied on by the public would be useless since it would not be based upon California's regulatory scheme.

Additionally, such literature does not address devices that were not designed or intended to be "flash suppressors." For example, possible variables as to a firearm and ammunition characteristics (e.g. changes in barrel length) and shooter usage can bring a firearm within the definition of an "assault weapon." (Pls's SJM Mem. 7:2-18, 9:1-23; Am. Compl., ¶¶50, 51, 55.) Defendants emphasize this risk by stating that "if the selection of any variable would make a perceptible difference . . . the mens rea requirement would prevent prosecution for use of a device that may function to suppress flash. (Opp. at 15:20-16:3.) Plaintiffs should not have to face criminal prosecution, however, in order to determine the law's meaning. (*Babbitt v. United Farm Workers National Union* (1979) 442 U.S. 289, 302.)

Undisputed facts show that the term "flash suppressor" – as defined by the DOJ – is vague in all of its applications. There is no way for an ordinary person, or even law enforcement authorities, to determine whether a device functions to redirect or reduce flash. Defendants contend that the definition is not vague in all of its applications because a gun owner could reasonably determine whether a device functions to redirect or reduce flash by asking a gun dealer or credible friend. This is problematic because, Plaintiffs and others seeking to comply with the law's mandate cannot seek

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govern its procedure. (Gov't Code §11342.600.) (Emphasis added.)

[6] Additionally, as described in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, the federal ban on "flash suppressor" was repealed pursuant to it's sunset provisions. (Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), took effect in 1994 and was repealed in 2004.)

advice from law enforcement personnel and agencies who also do not know what these laws mean. ("UMF") ¶¶89-120.)

Since Plaintiffs cannot seek advice regarding the meaning of the term "flash suppressor" from law enforcement agencies, they cannot obtain reliable information from gun dealers or friends – who themselves may be relying upon agency information. There is simply no accurate way for Plaintiffs to determine whether their weapons have a device that redirects or reduces flash.

III. PLAINTIFFS' FIFTH COA REQUIRES ADOPTING A REGULATION TO CLARIFY THE MEANING OF "PERMANENTLY ALTER"

Plaintiffs' fifth cause of action relates to Defendants' failure to promulgate a regulation clarifying the "permanently altered" language in Penal Code §12020(c)(25). That statute provides that firearms and feeding devices may be sold if they have been "permanently altered so [the feeding device] cannot accommodate more than 10 rounds . . . ." It is impossible to alter a weapon or feeding device because given sufficient time and effort, any modification is reversible. (UMF ¶¶121-136.) Defendants' failure to promulgate a regulation clarifying the meaning of the term "permanently altered" has caused confusion and uncertainty among firearms owners and dealers. Defendants contend that they have done nothing to suggest that compliance with the permanently altered escape clause would require irreversible alterations to the weapon or magazine, and that Plaintiffs are concocting a dispute where none exists.

Again, the DOJ is tasked with the duty of adopting "those rules and regulations that *may* be necessary or proper to carry out the purposes and intent of this chapter. (Pen. Code §12276.5(c).) As the regulations were originally noticed to the public, the DOJ believed that it was necessary and did propose that the statutory term "permanently altered" be defined to mean "any irreversible change or alteration." (Chinn Decl., ¶17; Rossi Decl., Ex. A, p. 16.) Subsequently, the DOJ determined that their proposed definition failed to provide any clarity while maintaining legislative intent. Instead of revising the definition to actually provide clarity, the DOJ determined that the term "permanently altered" would be sufficiently understood without further definition. (*Id.*)

Defendants admit that "specified means of altering a magazine so that it cannot accommodate more than 10 rounds (metalworking, machining, welding, brazing, soldering, or application of

bonding agents or adhesives) is ordinarily permanent." (Opp. at 16:24-17:3.) Defendants also state that "DOJ cannot definitively classify such methods as "permanent" because non-permanent alterations using such methods are possible in given instances." (Opp. at 17:1-3.) Yet, despite the fact that the DOJ initially believed that it was necessary to adopt a regulation defining "permanently alter," they failed to adopt a clear standard by which "detachable magazines" can be "permanently altered" – as expressly permitted by statute.

Followed to its logical conclusion, Plaintiffs must either comply with the law as stated and damage their property, or defy the law, and risk criminal prosecution. Thus, Plaintiffs cannot comply with the law, because the plain language of the statue is vague. That Defendants have not threatened Plaintiffs with criminal charges does not mean that no controversy exists over the law's meaning. Plaintiffs should not have to face criminal prosecution in order to determine what the law means. (*Babbit, Supra,* 442 U.S. at 302.)

IV. SINCE THE ACT CREATES CRIMES WITH NO SCIENTER AND IMPOSES STRINGENT PENALTIES, A STRICT TEST FOR VAGUENESS IS REQUIRED

Defendants argue that a vagueness claim lacks merit if the questionable provision is not impermissibly vague in *all* applications. (Def. Mem. at 12, citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates* (1982) 455 U.S. 489, 494-95.) The ordinance in *Hoffman Estates* required a business to obtain a license to sell drug paraphernalia, violation of which was punishable by fine only. In that case, an official advised the business of the included products under the ordinance. Instead of obtaining a license, or filing an administrative proceeding, the business filed suit. (*Id.* at 493.)

Hoffman Estates held: "The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." (*Id.* at 498.) It continued:

> Thus, economic regulation is subject to a less strict vagueness test . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. (*Id.* at 498-99.)

The Act here, however, is no mere economic regulation with civil penalties and a knowledge element, but instead is a felony crime requiring only a "should have known" mental state. In short, Defendants reliance upon *Hoffman Estates* is misplaced. The holding in that case actually *supports* a *less tolerant* view of the vague regulations at issue here because: (1) the mens rea test is weak and (2) the criminal penalty is high. (Pen. Code §12280.) Both factors require greater scrutiny.

For example, a later Supreme Court case, *Kolender v. Lawson* (1983) 461 U.S. 352, 353-54, held as vague on its face a requirement that persons who loiter provide a "credible and reliable" identification. Since the police determined what was "credible and reliable," the provision lacked any standard and was vague. (*Id.* at 361.) Moreover, the *Kolender* majority rejected the dissent's argument that a statute "should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications" and explained:

> [W]here a statute imposes criminal penalties, the standard of certainty is higher. . . . This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. *See, e.g.,* . . . *Lanzetta v. New Jersey* (1939) 306 U.S. 451. (*Id.* at 358 fn.8)

The above is buttressed by another *post-Hoffman Estates* case, *City of Chicago v. Morales* (1999) 527 U.S. 41, which declared a prohibition on loitering after police have ordered dispersal and one of the persons is a "criminal street gang member" facially vague. The following holding is dispositive of the issue here: "Even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." (*Id.* at 52.)

The law in *Morales* "does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional." Nonetheless, "the vagueness of this enactment makes a facial challenge appropriate." A plaintiff need not "establish that no set of circumstances exists under which the Act would be valid," which "has never been the decisive factor in any decision of this Court . . . ." "Since we . . . conclude that vagueness permeates the ordinance, a facial challenge is appropriate." (*Id.* at 52-55.)

Morales observes: "Vagueness may invalidate a criminal law for either of two independent

reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." (*Id.* at 56.) Besides not providing notice, the ordinance violated "the requirement that a legislature establish minimal guidelines to govern law enforcement." (*Id.* at 60.) Like here, the law "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." (*Id.*) Further, the "Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" (*Id.* at 60, quoting *United States v. Reese* (1876), 92 U.S. 214, 221.) The net cast by the DOJ's regulations on "flash suppressors" violates this legal maxim on its face.

Similarly, the court in *Forbes v. Napolitano* (9th Cir. 2000) 236 F.3d 1009, invalidated on its face a prohibition on certain medical procedures due to the vagueness of the terms "experimentation," "investigation," and "routine." Based on the above precedents, *Forbes* held that the strict test for vagueness applies *regardless of* whether constitutionally-protected conduct is involved:

> If a statute subjects transgressors to criminal penalties, as this one does, vagueness review is even more exacting. . . . In addition to defining a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement. . . . Without such standards, a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to the risk of arbitrary deprivation of their liberty. . . . Regardless of what type of conduct the criminal statute targets, the arbitrary deprivation of liberty is itself offensive to the Constitution's due process guarantee. (*Id.* at 1011-12 (citations omitted).)

Here, the DOJ "flash suppressor" regulation and the lack of a regulation defining "permanently alter" run afoul of the above-cited authorities and are easily distinguishable from the regulations in *Hoffman Estates*. Accordingly, the regulations at issue should be declared invalid.

V. SUMMARY ADJUDICATION IS PROPER BECAUSE DEFENDANTS FAILED TO ADMINISTER SB23 CONSISTENTLY

The established pattern of unnecessarily confusing behavior constitutes a continuing danger to Plaintiffs and others similarly situated. Plaintiffs are entitled to an injunction that will bar Defendants from issuing statements not in accordance with SB 23 regulations. (Plaintiffs' Points

and Authorities in Support of Summary Judgment, 13:10 - 19:22.)

CONCLUSION

Accordingly, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment or summary adjudication and deny Defendants' summary judgment.

Date: January 22, 2007

TRUTANICH • MICHEL, LLP

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Attorney for Plaintiffs'

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

On January 22, 2007, I served the foregoing document(s) described as

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION

on the interested parties in this action by placing
[ ] **the original**
[X] **a true and correct copy**
thereof enclosed in sealed envelope(s) addressed as follows:

Douglas J. Woods
Attorney General's Office
1300 "I" Street, Ste. 125
Sacramento, CA 94244-2550

___ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on January 22, 2007, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

_X_ (OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on January 22, 2007, at Long Beach, California.

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

___ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

CLAUDIA AYALA