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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 DEMURRER TO PLAINTIFFS' AMENDED COMPLAINT** Date: February 19, 2003 Time: 3:30 p.m. Dept: 72 Before the Hon. Stephen J. Kane

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"The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Penal Code section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." Penal Code § 12275.5. Ten years after enactment of this landmark legislation, the California Legislature was compelled to act further: "It was the original intent of the Legislature in enacting Chapter 19 of the Statutes of 1989 to ban all assault weapons, regardless of their name, model number, or manufacture. It is the purpose of this act to

effectively achieve the Legislature's intent to prohibit all assault weapons." Senate Bill 23, Chapter 129 of the Statutes of 1999, Sec. 12.

As demonstrated again in plaintiffs' opposition to defendants' demurrer ("Pls.' Opp."), plaintiffs' current attack on California's protections against assault weapons by this lawsuit alleging unconstitutional vagueness amounts to nothing more than a continued policy disagreement with the Legislature as to what the assault weapons laws should be. Plaintiffs are simply dissatisfied with what the law requires. It is up to the Legislature, however, to determine how best to protect against the assault weapon threat to the health, safety, and security of the citizens of this state.

As to the legal treatment of this circumstance, at the threshold plaintiffs' general Constitutional vagueness challenge is simply not ripe. Plaintiffs cannot allege that the challenged assault weapons provisions are vague *on their face*, and plaintiffs have not alleged any instance in which a particular firearm was the subject of enforcement (or even threatened enforcement) such that the challenged provisions would be considered unconstitutionally vague *as applied*. In addition to the ripeness barrier to proceeding with this lawsuit, defendants' independent demurrer arguments that plaintiffs' substantive vagueness allegations are without merit as a matter of law stand virtually unrebutted by plaintiff. Either the ripeness deficiency or the substantive deficiencies would alone be sufficient to sustain defendants' demurrer.

Plaintiffs have had multiple opportunities to allege facts sufficient to support their claims, if indeed any existed: in their original Complaint, in their preliminary injunction briefing, in their Amended Complaint, and in their demurrer opposition. Plaintiffs are resting on their allegations, which this Court has already considered in denying plaintiffs' preliminary injunction request. As this Court has already stated, the day may come when an actual criminal prosecution may present a court with a justiciable vagueness challenge, but "this is not that case." Defendants request that the Court now proceed to sustain the demurrer without leave to amend.

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A. Plaintiffs' Alleged General Constitutional Vagueness Challenge To The Assault Weapons Law Is Not Ripe.

1. Plaintiffs' Argument[1] That The Challenged Provisions Are Unconstitutionally Vague On Their Face Is Without Merit.

Regardless of the applicable standard for which the respective parties argue, the most obvious way to dispose of plaintiffs' claim that the challenged assault weapons provisions are unconstitutionally vague on their face is to assess the challenged text on its face. *See, e.g., Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-503 (1982).

Looking only at the actual text of the provisions challenged here, plaintiffs can identify no word or phrase that would call into Constitutional question the provisions at issue. Even if plaintiffs were hesitant to make such an admission that the actual terms making up the challenged text are not vague in and of themselves, the allegations in the complaint serve to provide the concession: plaintiffs resort to alleged facts *outside the actual text* of the challenged provisions in making each of their Constitutional vagueness claims. *See* Am. Compl., ¶¶ 38-87. Assessment of the actual text of the challenged provisions by itself thus serves to defeat, without the need for further consideration, any argument that the challenged provisions are unconstitutionally vague on their face.

Correspondingly, *even taking into account plaintiffs' surrounding allegations*, the challenged provisions would easily satisfy a facial Constitutional vagueness test under any of the standards for which the respective parties advocate. Defendants contend, based on *Hoffman Estates*, that in evaluating a claim that legislation is vague on its face a court "should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 495. As described in defendants' demurrer brief (Dem. Br. 8:10-11:6), plaintiffs have not alleged, and cannot allege, that the challenged assault weapons provisions are "impermissibly vague in all applications."[2] Plaintiffs nonetheless argue in opposition that *Hoffman Estates* does not apply here

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1. Pls.' Opp., pp. 3:8-14:8, 16:13-21:5.

2. Plaintiffs' citation to *Harrott v. County of Kings*, 25 Cal. 4th 1138 (2001), for the proposition that they need not allege that the "flash suppressor" definition is vague in all applications because plaintiffs "are arguing for a specific interpretation (which would jettison the regulation)" is not persuasive. *See* Pls.' Opp., pp. 14:16-19, 14:26-28. The stated premises underlying the statutory construction in *Harrott* are not

and that a facial vagueness challenge is possible even if there are conceivably permissible applications of the provision in question. Pls.' Opp., pp. 18:21-20:16. The alternative standard for which plaintiffs apparently argue (*see* Pls.' Opp., p. 19:18-21) would allow a facial vagueness challenge if "vagueness permeates the ordinance."[3/] Even under plaintiffs' standard, however, plaintiffs cannot state a facial vagueness claim, because under no view of the challenged provisions can it be said that "vagueness permeates the ordinance."

Likewise, plaintiffs' extensive discussion (Pls.' Opp., pp 16:13-22:5) of the established mens rea requirement is incorrect and, in any event, academic. Plaintiffs apparently offer this discussion in support of their argument that the challenged provisions are vague on their face. As described above in this section, however, plaintiffs cannot allege facts showing either that (1) "the enactment is impermissibly vague in all of its applications" or, even under plaintiffs' alternative standard, that (2) "vagueness permeates the ordinance." No matter what level of review is applied, plaintiffs cannot plead facts to meet these standards and thus cannot allege the provisions are impermissibly vague on their face.

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present here. Likewise, plaintiff mistakes (Pls.' Opp., pp. 14:19-15:1) the import of defendants' exposure of the sham nature of plaintiffs' allegation that the "flash suppressor" definition is vague "in all applications." *See* Dem. Br., pp. 9:5-10:5, 10:23-26. Defendants were not attempting to define in the abstract what may necessarily suffice as reasonable knowledge of flash suppression, but were only illustrating the variety of ways by which a firearm owner may reasonably know that a device is a "flash suppressor" without having to comparison-test the device. Notably, plaintiffs do not attempt to defend their allegation that the "flash suppressor" definition is vague "in all applications."

3. Plaintiffs' argument (Pls.' Opp., pp. 18:4-9, 19:2-6, 19:26-28) against application of the *Hoffman Estates* standard based on the suggestion that only a business regulation, as opposed to a criminal law, was at issue there is without merit. The Supreme Court in *Hoffman Estates* expressly stated: "Flipside's facial challenge fails because, *under the test appropriate to either a quasi-criminal or a criminal law*, the ordinance is sufficiently clear as applied to Flipside." *Hoffman Estates*, 455 U.S. at 500 (emphasis added). Contrary to plaintiffs' argument, there was thus no "criminal nature" distinction between *Hoffman Estates* and the cases cited by plaintiffs in support of their argument against application of the *Hoffman Estates* "vague in all of its applications" facial vagueness standard. Indeed, review of the opinions confirms that the true features that distinguished the cases cited by plaintiffs from *Hoffman Estates* were (1) the absence of a mens rea requirement in the challenged provisions and (2) the challenged provisions' infringement upon substantive Constitutionally protected rights. *See City of Chicago v. Morales*, 527 U.S. 41, 55 (1998) (loitering ordinance infringing liberty right); *Kolender v. Lawson*, 461 U.S. 352, 353, 358 (1982) (loitering ordinance infringing Constitutional right to freedom of movement). As was the case in *Hoffman Estates*, the assault weapons provisions challenged here *do* have a mens rea element and *do not* infringe upon substantive Constitutionally protected rights.

Even if the applicable level of review were a relevant consideration here, plaintiffs' call for "strict scrutiny" review of the challenged provisions would be contrary to the law. Plaintiffs simply cannot evade the import of the mens rea requirement applicable to assault weapons prosecutions: "The People bear the burden of proving the defendant knew or reasonably should have known the firearm possessed the characteristics bringing it within the AWCA." *See In re Jorge M.*, 23 Cal. 4th 866, 887 (2000). As this Court correctly ruled in the preliminary injunction setting[4], there is no absence of a mens rea requirement here that would otherwise serve to trigger "strict scrutiny" review. *See People's Rights Organization v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998). Plaintiffs criticize this Court for its citation to *Springfield Armory v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994), for this proposition, and plaintiffs reach outside of the *Springfield Armory* opinion to contend that the challenged provision in that case did contain a mens rea element and nonetheless received strict scrutiny. *See* Pls.' Opp. 21:11-16. In fact, the Sixth Circuit in *Springfield Armory* did not need to (and did not) consider whether any particular mens rea element was present, in light of the deficiencies in the provisions before it. The Sixth Circuit's reference to a "relatively strict test" in that case was nothing more than recitation of the ordinary rule that criminal provisions are reviewed more closely for vagueness than are civil provisions. *Springfield Armory*, 29 F.3d at 252; *see, e.g., Hoffman Estates*, 455 U.S. at 498-99. In any event, plaintiffs' silence as to the Court's citation to *People's Rights Organization* for its conclusion confirms that the conclusion is not in dispute.[5] Plaintiffs' call for "strict scrutiny" review is meritless, and such review would not, in any event, substitute for proper pleading of facial vagueness.

By whatever standard, and by whatever level of review, plaintiffs cannot argue that they have sufficiently alleged that the challenged provisions are unconstitutionally vague on their face. As a result, plaintiffs cannot argue that any alleged facial vagueness challenge serves to establish

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4. Order Denying Request for Preliminary Injunction, pp. 4:27-5:18.

5. Plaintiffs' separate effort to avoid the import of the absence of a mens rea element in the *People's Rights Organization* case consists merely of a citation to a footnote discussion of a recklessness standard that is dictum and plainly directed to the limited circumstances there at issue. *See* Pls.' Opp., pp. 21:22-22:5. Indeed, in the main text just prior to the *People's Rights Organization* footnote cited by plaintiffs, the Sixth Circuit expressly acknowledged that a criminal provision's requirement of a negligent degree of fault represents a scienter requirement. *See People's Rights Organization*, 152 F.3d at 534.

ripeness.[6]

2. Plaintiffs Make No Attempt To Allege That The Challenged Provisions Are Unconstitutionally Vague As Applied.

The United States Supreme Court's observation in *Hoffman Estates* is illustrative: "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." *Hoffman Estates*, 455 U.S. at 503, n.21 (citation omitted). In other words, where a statutory prohibition is sufficiently certain on its face, those nonetheless dissatisfied with the statutory prohibition must await a particular ostensibly improper application of the statute before advancing a Constitutional vagueness argument.

Plaintiffs are apparently focusing their efforts to establish ripeness toward their argument that the challenged provisions are vague *on their face*. Defendants' demurrer arguments that plaintiffs cannot allege that the challenged provisions are unconstitutionally vague *as applied* stand unrebutted. The deficiencies identified by this Court in denying plaintiffs' preliminary injunction request remain. More than two years after the adoption of the challenged regulations, plaintiffs cannot allege a single instance in which a particular firearm was the subject of enforcement (or even threatened enforcement) that in plaintiffs' view would demonstrate the allegedly Constitutional shortcomings of the challenged provisions.

The many authorities cited by plaintiffs cataloguing the various ways that plaintiffs can satisfy a *standing* requirement are ineffectual to support an allegation that the challenged provisions are vague on their face, as discussed above. These same standing authorities likewise make no progress toward supporting a claim that the challenged provisions are unconstitutionally vague *as applied*. Pursuant to these authorities cited by plaintiffs, if plaintiffs could make a substantive

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6. The many authorities offered by plaintiffs apparently for the purpose of trying to establish the viability of their claim that the challenged provisions are unconstitutionally vague on their face are distinguishable in that either (1) they addressed actual or threatened enforcement of the ostensibly vague provision (i.e., vagueness as applied), (2) they addressed provisions that were vague in all applications, or (3) they did not address a Constitutional vagueness challenge at all, but instead addressed a substantive Constitutional challenge. Because these circumstances are not alleged in the case at hand, these authorities are of no avail to plaintiffs in their attempt to overcome their ripeness hurdle.

Constitutional challenge to the provisions in question, or if plaintiffs could allege that the provisions are unconstitutionally vague on their face, then these plaintiffs -- whose *standing* is unconstested -- would in such instances establish ripeness and proceed. In the absence of the ability to make such allegations, however, plaintiffs' only recourse would be a claim that the challenged provisions are unconstitutionally vague as applied. Without an instance of questionable enforcement, or even threatened enforcement, though, there simply is no application for the Court to evaluate, and the case is not ripe for adjudication.

Plaintiffs miss the point entirely in arguing (Pls.' Opp., pp. 8:5-9:20) that it should be defendants' burden to establish the absence of prosecution under the challenged provisions in defending against this lawsuit. Defendants do not contend that the challenged provisions are not being enforced. To the contrary, as acknowledged by plaintiffs. it is presumed that the challenged provisions are the subject of enforcement, and defendants fully support their enforcement. Defendants' argument is that, as a matter of pleading, a plaintiff challenging a criminal provision as unconstitutionally vague *as applied* must allege facts demonstrating an actual present harm or a significant possibility of future harm. Given that plaintiffs have had multiple opportunities but have been unable to identify a single instance in which a particular firearm was the subject of enforcement or threatened enforcement that in plaintiffs' view would demonstrate the allegedly Constitutional shortcomings of the challenged provisions enacted more than two years ago, this Court should conclude that plaintiffs cannot make the required allegations.[7]

Because plaintiffs cannot allege that the challenged provisions are unconstitutionally vague on their face or as applied, this Court should sustain defendants' demurrer without leave to amend.

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7. Even taking plaintiffs' description (Pls.' Opp., p. 9:3-28) of "grave past injustices in AWCA prosecutions" at face value, the Court should not be detained by this discussion. Given that the ostensible prosecution turned on whether the firearm in question was a *named* assault weapon, it is clear that the prosecution in question was under Penal Code section 12276, not any of the provisions challenged by this lawsuit. This discussion simply confirms that plaintiffs would allege any questionable instances of enforcement of the challenged provisions, if there were any.

B. Plaintiffs' Substantive Vagueness Challenges To The Assault Weapons Provisions Are Without Merit As A Matter Of Law.

Plaintiffs provide little response to the substantive failings as a matter of law identified by defendants in each of the four subject areas of the assault weapons provisions challenged by plaintiffs' lawsuit. Even leaving aside the ripeness pleading barrier, defendants' substantive challenges are independently sufficient to sustain the demurrer.

1. Defendants Argue No Contradiction To Plaintiffs' Allegations Other Than Contradictions Established By Plaintiffs' Own Allegations.

In this pleading context, contrary to plaintiffs' argument (Pls.' Opp., pp. 14:12-15:19), defendants do not contradict any of plaintiffs' factual allegations, other than to identify the contradictions contained in plaintiffs' own pleading.

In regard to plaintiffs' claim that the definition of "flash suppressor" is vague, plaintiffs' demurrer response argues (Pls.' Opp., p. 15:2-6) that defendants impermissibly contradict, in this pleading context, plaintiffs' allegations as to the difficulty of comparison testing flash suppressor devices. To the contrary, defendants' demurrer argument in this regard (Dem. Br., p. 9:5-19) *assumes the truth* of these allegations and then proceeds to explain why plaintiffs' surrounding allegations render their vague "in all applications" allegation a sham. *See* footnote 2, above. Plaintiffs make no attempt to rebut the remainder of defendants' substantive "flash suppressor" argument. *See* Dem. Br., pp. 13:15-15:28.

In regard to plaintiffs' claim that the threaded barrel capability provision is vague, plaintiffs' suggestion (Pls.' Opp.p. 15:12-19) that defendants mistakenly view *any* "Olympic-type competition pistol" to be exempt from the assault weapon definition under Penal Code section 12276.1(b), plaintiffs are of course themselves mistaken. Defendants' demurrer argument (Dem. Br., pp. 16:1-17:2) contemplates only those competition pistols listed in section 12276.1(c) to be exempted. Plaintiffs make no other attempt to rebut defendants' threaded barrel capability demurrer argument.

Plaintiff can identify no pleading contradiction created by defendants' demurrer arguments.

2. Plaintiffs' Shift In Their Demurrer Opposition From A Constitutional Vagueness Basis For Their Fourth, Fifth, And Sixth Causes Of Action To A State Law "Duty To Supervise And Administer" Approach Does Not Save Their Claims.

Plaintiffs essentially concede the validity of defendants' demurrer arguments against plaintiffs' fourth, fifth, and sixth causes of action (*see* Dem. Br., pp. 17:3-19:25), but argue that "[e]ven if it were true that these claims fail to show a dispute as to what the particular laws mean," plaintiffs allege that the Legislature "overtly relied" upon defendants to clarify the "murky laws" and that defendants have failed to do so. Pls.' Opp., pp. 15:21-16:10, 16:27-28. Plaintiffs' shift in approach does not serve to save plaintiffs' claims. If plaintiffs cannot state a Constitutional vagueness claim (as established by defendants' demurrer arguments and plaintiffs' concessions), plaintiffs cannot avoid dismissal by employing the "Constitutional" and "42 U.S.C. section 1983" labels as a vehicle for nonetheless advancing an impermissible state law declaratory relief challenge to the regulations outside the auspices of the exclusive authority for such a challenge.

According to plaintiffs, the thrust of their amendments was toward presentation of a Constitutional vagueness attack on the challenged provisions, in place of the regulatory approach featured in their original Complaint and preliminary injunction motion. *See* Pls.' Motion for Leave to File First Amended Complaint, pp. 3:2-14, 4:15-24. The amendments were in response to this Court's ruling on plaintiffs' preliminary injunction motion that the declaratory relief challenge to the regulations impermissibly exceeded the bounds of such a challenge set forth in Government Code section 11350. *See* Order Denying Request for Preliminary Injunction, pp. 3:19-4:12. Given plaintiffs' characterization of their amended claims, defendants did not rely upon Government Code section 11350 in making their demurrer arguments against plaintiffs' Constitutional claims. Now that plaintiffs are faced with dismissal of their claims by virtue of this demurrer, they are apparently attempting to resuscitate their impermissible declaratory relief challenge to the regulations. Because any such characterization of plaintiffs' present claims would unavoidably rely on allegations outside of the allowable parameters for such a claim set forth in Government Code section 11350 as described in this Court's preliminary injunction ruling and defendants' opposition to the preliminary

injunction motion[8], plaintiffs' regulatory criticism fails to state any claim.

Finally, as already addressed in defendants' demurrer brief (Dem. Br., pp. 19:20-25), even if plaintiffs had any intention (which they do not) of seeking *enforcement* of any challenged provisions by reference to a "duty to supervise and administer," their remedy would be to petition for a writ of mandate requiring enforcement. No "duty to supervise and administer" allegation would support plaintiffs' claim *not* to enforce the challenged provisions.

Plaintiffs cannot resuscitate their fourth, fifth, and sixth causes of action by a shift away from a Constitutional vagueness approach.

C. Conclusion

For the reasons stated here and in defendants' original demurrer brief, defendants request that this Court sustain their demurrer to plaintiffs' claims without leave to amend.[9]

Dated: February 11, 2003

Respectfully submitted,

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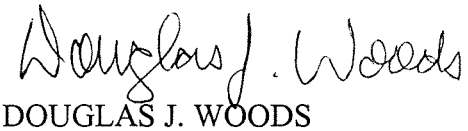

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8. Defs.' Opp. to Mo. for Prelim. Inj., pp. 8:19-11:2.

9. As a result of issues with defendants' counsel's computer system last week, plaintiffs' counsel agreed to extend the stipulated deadline for filing this reply until February 11, 2003.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: *HUNT, et al v. STATE OF CALIFORNIA, et al*
Case No.: **Fresno County Superior Court No. 01 CE CG 03182**

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, P.O. Box 944255, Sacramento, California 94244-2550.

On February 11, 2003, I served the attached **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEMURRER TO PLAINTIFFS' AMENDED COMPLAINT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid with the CALIFORNIA OVERNIGHT and FEDERAL EXPRESS addressed as follows:

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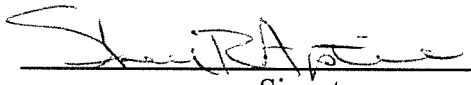
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 11, 2003, at Sacramento, California.

Sherry R. Augustine
Declarant



Signature