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 10 SUPERIOR COURT OF CALIFORNIA
 11 COUNTY OF FRESNO
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13 **EDWARD W. HUNT, in his official capacity as**
District Attorney of Fresno County, and in his
 14 **personal capacity as a citizen and taxpayer, et al.,**

15 Plaintiffs,

16 v.

17 **STATE OF CALIFORNIA, et al.,**

18 Defendants.
 19
 20

Case No. 01CECG03182

**DEFENDANTS' OPPOSITION
 TO EX PARTE APPLICATION
 FOR CONTINUANCE OF
 TRIAL OR TEMPORARY STAY
 OF PROCEEDINGS**

Date: April 22, 2008
 Time: 3:30 p.m.
 Dept: 97C
 Judge: Alan Simpson
 Trial Date: May 27, 2008
 Action Filed: September 18, 2001

21 **I.**

22 **INTRODUCTION**

23 Originally filed September 18, 2001, this action has been pending in the Fresno courts for
 24 more than six years and seven months. It is time for the claims remaining in this action to be
 25 resolved. Plaintiffs have failed to show good cause for further delay, and their ex parte
 26 application to continue the trial or stay the action should be denied.
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28 First, plaintiffs misplace their reliance on the pending decision of the United States Supreme
 Court in *District of Columbia v. Heller* as a ground for a continuance or stay. There has been no

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1 showing that the Supreme Court is likely to issue a decision that will be dispositive as to any
2 issue raised in this action. In particular, there has been no showing that the Supreme Court will
3 address the standard of review for bringing facial constitutional challenges. Plaintiffs' contention
4 that *Heller* may determine the standard of review in this action is purely speculative.

5 Second, a continuance would further extend the trial beyond the five-year mandatory limit
6 for civil actions. (Code Civ. Pro., § 583.310, et. seq.) Previous extensions have been made
7 pursuant to stipulation or court order, but plaintiffs make no showing that would authorize
8 further extending the time for trial. Absent some exception to the statutory limit, which plaintiffs
9 have not shown, the action must proceed to trial or be dismissed. (Code Civ. Pro., § 583.360.)

10 Finally, even if the Court continues or stays the trial, plaintiffs' request to continue "all
11 applicable trial related deadlines," should be denied insofar as it seeks a continuance of the
12 discovery cut-off. Plaintiffs offer no reason to continue discovery after more than six and a half
13 years of litigation.

14 II.

15 THE PENDING DECISION IN *DISTRICT OF COLUMBIA* v. *HELLER* DOES NOT 16 REPRESENT GOOD CAUSE TO FURTHER DELAY TRIAL IN THIS ACTION

17 Continuances of trials are "disfavored," and a court may grant a continuance "only on an
18 affirmative showing of good cause requiring the continuance." (Cal. Rule of Court, Rule
19 3.1332(c).) "A motion for continuance is addressed to the sound discretion of the trial court."
20 (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.)

21 Pointing to the pending *Heller* decision, plaintiffs rely on California Rule of Court
22 2.1332(c)(7) as a ground for continuance. Under this provision, good cause for a continuance
23 may be indicated if there has been "[a] significant unanticipated change in the status of the case
24 as a result of which the case is not ready for trial." (Cal. Rule of Court, Rule 3.1332(c).) But the
25 fact that the United States Supreme Court is considering the *Heller* case does not mean that this
26 case is not ready for trial. The standard of review for plaintiffs' claims is a question of law. This
27 case can go forward under existing authority regardless of any ruling by the Supreme Court in
28 *Heller*.

1 Contrary to plaintiffs' assertions, the law in California governing facial constitutional
2 challenges is settled and requires a plaintiff to show unconstitutionality in all circumstances
3 except in cases involving certain types of constitutionally protected conduct. As recently as
4 December 2006, the Fifth District California Court of Appeal, citing the United States Supreme
5 Court in *United States v. Salerno* (1987) 481 U.S. 739, held as follows:

6 In [*Salerno*], the Supreme Court stated that '[a] facial challenge to a legislative Act is,
7 of course, the most difficult challenge to mount successfully, since the challenger must
8 establish that no set of circumstances exists under which the Act would be valid.' The
9 court explained that the fact the federal Bail Reform Act, subject in that case to a
substantive due-process challenge, 'might operate unconstitutionally under some
conceivable set of circumstances is insufficient to render it wholly invalid, since we
have not recognized an "overbreadth" doctrine outside the limited context of the First
Amendment.'

10 (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 678-679, quoting *United States v.*
11 *Salerno, supra*, 481 U.S. at p. 745.)

12 In *Sanchez*, the Fifth District went on to reject the same expansive argument that plaintiffs
13 have made regarding the standard for reviewing facial challenges:

14 The only cases of which we are aware where it has been definitively stated that a facial
15 challenge could succeed on a showing falling short of the *Salerno* standard, however,
16 are those where the overbreadth of a law violated the First Amendment by chilling
protected speech [citing *Salerno*] and where a law imposed an undue burden on the
right to have an abortion [citation omitted]. Outside these areas, California courts
17 apply a *Salerno*-type approach to facial constitutional challenges in general. [Citations
omitted.] We agree there is no warrant for refusing to apply *Salerno* outside the First
18 Amendment overbreadth and abortion areas until a majority of the Supreme Court
gives clear direction to do so. [Citation omitted.] Consequently, we hold that the
19 *Salerno* standard for facial invalidation applies here, and defendants can succeed in
their facial challenge only by showing that the [California Voting Rights Act] can be
20 validly applied under no circumstances.

21 (*Sanchez v. City of Modesto, supra*, 145 Cal.App.4th at p. 679.)

22 *Sanchez* involved a facial challenge to the constitutionality of the California Voting
23 Rights Act on equal protection grounds. (*Sanchez v. City of Modesto, supra*, 145 Cal.App.4th at
24 p. 665.) Because the case did not involve the types of constitutional claims calling for a lesser
25 standard of review, the *Sanchez* court applied the *Salerno* test. Similarly, plaintiffs due process
26 facial vagueness claim must satisfy the *Salerno* "no set of circumstances" test.

27 At various points in their papers, plaintiffs assert that this case is not ready for trial or that
28 they would be severely burdened in their ability to adequately prepare for trial without a

1 continuance. (Application, p. 8:14-15; J. Davis Declaration, ¶ 9, p. 2:11-13.) But this merely
 2 indicates that plaintiffs are not as confident of their position on the standard of review as they let
 3 on. Plaintiffs offer no evidence that they are unable to present their case for determination under
 4 applicable law. As the above citation to *Sanchez* shows, plaintiffs must establish that the
 5 California regulations and statutes would be unconstitutionally vague *in all circumstances*. The
 6 plaintiffs' apparent unstated concern – that the applicable standard of review does not favor their
 7 case and that if the trial goes forward they will lose – is not a basis for a trial continuance.¹¹ (See
 8 Cal. Rule of Court, Rule 3.1332.)

9 This conclusion is underscored by a statement in the declaration of plaintiffs' counsel
 10 implying that this lawsuit will be dismissed or otherwise concluded if the ex parte application is
 11 denied. (J. Davis Declaration, ¶ 9, p. 2:11-13.) In his declaration, Mr. Davis states: "Should
 12 Plaintiffs request for continuance, and alternatively, for stay of the proceedings be denied,
 13 Plaintiffs intend on filing a new complaint for declaratory and injunctive relief, and/or an appeal
 14 of the Court's decision in this case." (*Ibid.*) The fact that plaintiffs may have concluded that it is
 15 no longer prudent to proceed with this litigation unless their hope for new authority from the
 16 Supreme Court comes to fruition is no basis to delay this action.

17 Moreover, it is pure speculation to assert that *Heller* will result in an opinion dispositive
 18 in this action. On its web site, the Supreme Court states that *Heller* is limited the following
 19 question: "Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-45-4504(a),
 20 and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with
 21 any state-regulated militia, but who wish to keep handguns and other firearms for private use in
 22 their homes?"¹² (Copy attached.) Of course, there is no basis for knowing in advance on what
 23

24 1. As one of their exhibits, plaintiffs attach a draft Joint Request for Clarification that the
 25 parties exchanged following the ruling on the Motion for Summary Judgment. (J. Davis Declaration,
 26 Exh. A.) But the draft was never finalized, and the defendants never signed a final version.
 Plaintiffs' submission of the draft is improper, and defendants request that the Court disregard it.

27 2. The Court may take judicial notice of the face page of the United State Supreme Court's
 28 docket in *Heller*, No. 07-290, and the Supreme Court's "Question Presented" in *Heller*. (Evid.
 Code, § 452, subd. (c).) The web page address for the Supreme Court (www.supremecourtus.gov)
 appears at the bottom of attached excerpt.

1 basis the Supreme Court will rule on this question or how it will phrase its final opinion. But the
2 issue being considered in *Heller* – Second Amendment rights of individuals – is clearly not the
3 same as the issue being considered in this action – i.e., whether certain regulatory and statutory
4 terms appearing in the Assault Weapons Control Act are so vague and ambiguous as to be
5 unconstitutional on their face.

6 Because plaintiffs have not made an affirmative showing of good cause supporting a
7 continuance or stay of the action, their ex parte application should be denied.

8 III.

9 A CONTINUANCE WOULD VIOLATE THE RULE REQUIRING THIS ACTION TO 10 BE BROUGHT TO TRIAL WITHIN FIVE YEARS FROM THE DATE OF FILING

11 “An action shall be brought to trial within five years after the action is commenced
12 against the defendant.” (Code Civ. Proc., § 583.310.) If an action is not brought to trial within
13 this time, it “shall be dismissed by the court on its own motion or on motion of the defendant,
14 after notice to the parties.” (Code Civ. Proc., § 583.360, subd. (a).) These requirements “are
15 mandatory and are not subject to extension, excuse, or exception except as expressly provided by
16 statute.” (Code Civ. Proc., § 583.360, subd. (b).)

17 Trial dates have previously been continued pursuant to stipulations and court orders.
18 Further, at the January 23, 2008 hearing on the parties’ discovery motions, the Court continued
19 the trial to May 27 on the oral motion of plaintiffs’ counsel.³ The parties may extend the time
20 within which an action must be brought to trial by written stipulation or oral agreement made in
21 open court. (Code Civ. Proc., § 583.330.) However, there are no existing stipulations or orders
22 authorizing continuances beyond the present trial date.

23 Under the Code of Civil Procedure, time is not counted for purposes of calculating the
24 five-year limitation under any of the following circumstances: (1) “[t]he jurisdiction of the court
25 to try the action was suspended”; (2) “[p]rosecution or trial of the action was stayed or enjoined”;
26 and (3) “[b]ringing the action to trial, for any other reason, was impossible, impracticable, or

27
28 3. At the January 23, 2008 hearing, defendants’ counsel objected to the continuance but did not raise the mandatory five-year rule as a ground for denial of the request.

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8 **III.**

9 **A CONTINUANCE WOULD VIOLATE THE RULE REQUIRING THIS ACTION TO**
 10 **BE BROUGHT TO TRIAL WITHIN FIVE YEARS FROM THE DATE OF FILING**

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VI.

CONCLUSION

The United States Supreme Court's pending decision in *District of Columbia v. Heller* does not support granting a continuance or stay in this action. There has been no showing that *Heller* will result in a ruling dispositive of plaintiffs' remaining claims. Further, a continuance would be contrary to the mandatory requirement that an action be brought to trial within five years from the date of filing. For these reasons, the ex parte application should be denied. But if the Court should continue or stay the trial for any reason, defendants request that no further discovery be allowed.

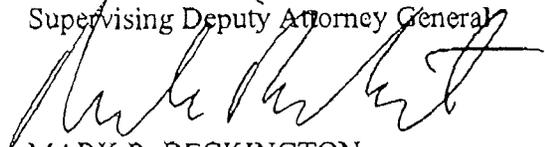
Dated: April 21, 2008

Respectfully submitted,

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50251903.wpd
SA2001CV1744

Case DECLARATION OF SERVICE BY FACSIMILE AND MAIL

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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. My facsimile machine telephone number is (213) 897-1071.

✓ **(BY FACSIMILE)** On April 22, 2008 at 9:43 AM., I served the attached **DEFENDANTS' OPPOSITION TO EX PARTE APPLICATION FOR CONTINUANCE OF TRIAL OR TEMPORARY STAY OF PROCEEDINGS** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine. Pursuant to rule 2.306(g)(4), I caused the machine to print a record of the transmission:

C.D. Michel, Esq.
Jason Davis, Esq.
Trutanich Michel, LLP
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802
Facsimile: (562) 216-4445

✓ **(BY MAIL)** I served the attached **DEFENDANTS' OPPOSITION TO EX PARTE APPLICATION FOR CONTINUANCE OF TRIAL OR TEMPORARY STAY OF PROCEEDINGS** by placing a true copy thereof enclosed in a sealed envelope with postage thereof fully prepared, in the internal mail system of the Office of the Attorney General, addressed as follows:

Don B. Kates Opposing Counsel BENENSON & KATES 22608 North East 269 th Avenue Battleground, WA 98604	Stephen P. Halbrook Law Offices of Stephen P. Halbrook 10560 Main Street, Suite 404 Fairfax, VA 22030
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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 April 22, 2008, at Los Angeles, California.

Angela Artiga

Declarant



Signature

50252607.wpd

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE



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MESSAGE/INSTRUCTIONS

Re: Hunt, et al. v. State of California, et al.
Fresno Superior Court Case No. 01CECG03182

Page (6) of Defendants' Opposition to Ex Parte Application for Continuance of Trial or Temporary Stay of Proceedings was inadvertently left out. Attached is a complete copy.

PLEASE DELIVER AS SOON AS POSSIBLE
FOR ASSISTANCE WITH THIS FAX, PLEASE CALL THE SENDER