C.D. Michel - S.B.N. 144258
TRUTANICH • MICHEL, LLP
Port of Los Angeles
407 North Harbor Boulevard
San Pedro, California 90731
(310) 548-0410

Stephen P. Halbrook
LAW OFFICES OF STEPHEN P. HALBROOK
10560 Main Street., Suite 404
Fairfax, Virginia 22030
(703) 352-7276

Don B. Kates - S.B.N. 039193
BENENSON & KATES
22608 North East 269th Avenue
Battleground, Washington 98604
(360) 666-2688

Attorneys for Plaintiffs

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; WILLIAM LOCKYER, Attorney General of the State of California, et. al.,

Defendants.

CASE NO. 01CECG03182

PLAINTIFFS' REPLY TO OPPOSITION FOR PRELIMINARY INJUNCTION

Date: April 10, 2002
Time: 3:00 p.m.
Dept.: 98A

C.D. Michel - S.B.N. 144258
TRUTANICH • MICHEL, LLP
Port of Los Angeles
407 North Harbor Boulevard
San Pedro, California 90731
(310) 548-0410

Stephen P. Halbrook
LAW OFFICES OF STEPHEN P. HALBROOK
10560 Main Street., Suite 404
Fairfax, Virginia 22030
(703) 352-7276

Don B. Kates - S.B.N. 039193
BENENSON & KATES
22608 North East 269th Avenue
Battleground, Washington 98604
(360) 666-2688

Attorneys for Plaintiffs

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; WILLIAM LOCKYER, Attorney General of the State of California, et. al.,

Defendants.

CASE NO. 01CECG03182

PLAINTIFFS' REPLY TO OPPOSITION FOR PRELIMINARY INJUNCTION

Date: April 10, 2002
Time: 3:00 p.m.
Dept.: 98A

C.D. Michel - S.B.N. 144258
TRUTANICH • MICHEL, LLP
Port of Los Angeles
407 North Harbor Boulevard
San Pedro, California 90731
(310) 548-0410

Stephen P. Halbrook
LAW OFFICES OF STEPHEN P. HALBROOK
10560 Main Street., Suite 404
Fairfax, Virginia 22030
(703) 352-7276

Don B. Kates - S.B.N. 039193
BENENSON & KATES
22608 North East 269th Avenue
Battleground, Washington 98604
(360) 666-2688

Attorneys for Plaintiffs

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; WILLIAM LOCKYER, Attorney General of the State of California, et. al., Defendants.	CASE NO. 01CECG03182 **PLAINTIFFS' REPLY TO OPPOSITION FOR PRELIMINARY INJUNCTION** Date: April 10, 2002 Time: 3:00 p.m. Dept.: 98A

Plaintiff's hereby reply to Defendant's Opposition to Motion for Preliminary Injunction.

A. PROCEDURAL ISSUES

In addition to their other bases for standing, plaintiffs expressly sue as taxpayers and citizens. Independent of any other basis, such claims are remediable in equity and by declaratory

relief.[1]

1. Government Code Section 11350 Does Not Preclude Equitable Relief To Void Invalid Regulations, Nor To Require Formulation of Valid Ones.

Defendants appear to be arguing that Government Code section 11350 governs equitable as well as declaratory relief. On the contrary, no language of the statute suggests that, nor have defendants cited any case so holding, nor have we been able to find any case so holding or even intimating that assertion. In fact, Government Code section 11350 does *not* preclude the equitable (and/or declaratory) relief available in taxpayer and citizen mandamus proceedings. (Other bases for plaintiffs' standing are discussed below.)

Defendants claim *Los Angeles v. State Department of Public Health* (1958) 158 Cal.App.2d 425, 443 [322 P.2d 968], holds that Government Code section 11350 is the exclusive remedy for declaratory relief against regulations. We do not so read it. But assuming it so holds, that holding is overruled by *Woods v. Superior Court* (1981) 28 Cal.3d 668, 682 [170 Cal.Rptr. 484, 620 P.2d 1032], recognizing no impediment to relief against regulation under Government Code section 1060. Nor, in any event, is there presently a request for declaratory relief before the court.

2. Plaintiffs Have Alleged Irreparable Injury Sufficient To Justify Issuance Of A Preliminary Injunction.

Defendants argue that irreparable injury cannot exist unless a criminal prosecution is pending under the law challenged in this case. But, as stated in *Green, supra*, 29 Cal.3d at 144:

> where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result since *it is sufficient that he is interested as a citizen in having the laws*

---

[1] As to citizen's actions see, e.g., *Green v. Obledo* (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624 P.2d 256]; as to taxpayers actions see *Van Atta v. Scott* (1980) 27 Cal.3d 424, 447-450 [166 Cal.Rptr, 149, 613 P.2d 210] (taxpayer suit may generate mandamus and declaratory relief as well as injunction). Both forms of action are to be liberally allowed to permit otherwise uninvolved persons to challenge allegedly improper governmental activity. (*California Ass'n. for Public Education v. Brown* (1994) 30 CalApp.4th 1264, 1281 [36 Cal.Rptr.2d 404], *League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, 657, fn. 4 [9 Cal.Rptr.2d 416].)

executed and the duty in question enforced. [emphasis added.]

Thus *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610], recognized that citizens suing as such are entitled to preliminary equitable relief if their substantive legal claims are correct. In that case relief was denied only because the substantive claims were invalid. (Compare *Venice Town Council v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1563-64 [55 Cal.Rptr.2d 465] [upholding preliminary injunction on the ground that substantively valid claims were stated by citizens alleging standing as such].)

Over and above their entitlement to a preliminary injunction under the citizen-suit doctrine, the plaintiffs herein are personally suffering irreparable injury. Plaintiffs include a sporting goods store that deals in firearms, and a trade association of many such stores which wish to offer for sale firearms they own and/or wish to acquire for sale. If these firearms may legally be sold, these stores are entitled to preliminary injunction to avert financial detriment that cannot be rectified by damage suits since the defendants are immune.[2] Note also that, if these firearms may legally be offered for sale, by prohibiting sales defendants are depriving the owners of constitutional rights.[3] Irreparable injury is therefore clear.

Plaintiffs also represent innumerable individuals (including police officers) who are suffering irreparable injury because they cannot determine which of their firearms and magazines they can sell, or loan to friends. Neither can such individuals tell which firearms are "assault weapons" they cannot legally possess and must surrender. As a result of defendants' regulatory failures these individuals are continually at risk of (valid or invalid) arrest, prosecution and/or

---

[2] The formulation of APA-type regulations -- particularly regulations that just define the meaning of legislation -- is a quasi-legislative act for which absolute immunity exists under both California and federal law. (*Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1783-85 [58 Cal.Rptr.2d 668].)

[3] If their sale is legal, there is a commercial speech right to offer to sell the firearms (see, e.g., *Loska v. Superior Court* (1986) 188 Cal.App.3d 569 [233 Cal.Rptr. 213]) and a due process right to make the sale. (*Lynch v. Household Finance Corp.* (1972) 405 U.S. 540, 544 [92 S.Ct. 1113, 31 L.Ed.2d 424] [due process protects "the rights to acquire, enjoy, own and dispose of property"], *Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 728 [242 P.2d 617] (same); Compare *San Jacinto Savings & Loan v. Kacal* (5 Cir. 1991) 928 F.2d 697 [by driving plaintiff out of business, police deprived her of due process] and *North Georgia Finishing v. Di-Chem* (1985) 419 U.S. 601, 606-08 [95 S.Ct. 719, 42 L.Ed. 2d 751] [even temporary interference with the use of property implicates due process and may constitute a deprivation thereof].)

property confiscation by police and prosecutors who are also confused or misled by defendants' regulatory failures. (Compare *Pennell v. City of San Jose* (1988) 485 U.S. 1, 7-8 [108 S.Ct. 849, 99 L.Ed.2d 1] [where association representing large number of landlords in city brought the suit, the court accepted that one or another of its members would sooner or later be subject to operation of ordinance relating to landlord-tenant disputes].)

By failing to clarify the law -- or actually confusing what was clear in Senate Bill 23 ("SB 23") as enacted -- defendants' regulatory failure has irreparably injured those subject to the SB 23 requirements. Criminal laws must provide sufficient information to allow the citizenry to understand the laws and conform to them -- and for law enforcement officials to understand and enforce those laws as intended by the Legislature.[4]

Pursuant to their delusion that only a criminal defendant can show irreparable injury from their misconduct, defendants respond by asserting that a vague law is not invalid unless it is vague in all applications. This is irrelevant because plaintiffs are not by this motion seeking to invalidate any law! (See discussion in the next section of this memorandum.) Plaintiffs are alleging irreparable injury because defendants have failed to clarify the meaning of these laws *in all their applications,* which the Legislature relied on them to do, as indicated by among other things, the Legislative expressly requiring them to conduct an educational campaign to enable those represented in this suit to understand the law.

Last, but scarcely least, many of those represented are public officers who are irreparably injured because they cannot enforce the laws involved until defendants clarify what those laws mean. This point spotlights the irony of defendants' repeated queries as to whether criminal prosecutions are occurring under the specific provisions whose ambiguity we have spotlighted. What if it turns out that prosecutions are not occurring because prosecutors are unwilling to bring them when they themselves do not understand the law? The logical corollary of defendants' position is that the SB 23 laws might never be enforced because defendants refuse to perform their

---

[4] See, e.g., *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389-90 [250 Cal.Rptr. 515, 758 P.2d 1046] and *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269 [198 Cal.Rptr. 145, 673 P.2d 732], citing numerous prior U.S. and California Supreme Court cases.

duty to clarify the laws and police and prosecutors cannot sue to require defendants to perform that duty.

The proper remedy is for these laws to be clarified by civil proceedings like this suit.

This brings us full circle to the point with which our opening memorandum ended: this lawsuit, and issuance of preliminary relief in it, serves the public interest rather than deserving it. At the same time it averts the irreparable personal injuries being suffered by plaintiffs as discussed above.

B. SUBSTANTIVE ISSUES

1. Courts Construe Statutes To Avoid Constitutional Vagueness Problems, Even Though The Statute Might Not Necessarily Be Vague In All Its Applications.

An underlying premise of all plaintiffs' arguments is that the laws in question should be construed to produce certainty in order to avoid the danger that they might be held fatally vague when challenged in applications in which they are vague. Defendants think they have refuted our premise as premature. They cite a U.S. Supreme Court case to the proposition that a statute cannot be attacked for uncertainty unless it is vague in all its applications. If the matter were relevant, we would reply with U.S. Supreme Court caselaw limiting that proposition.

But that proposition is irrelevant because, to reiterate, we are not asking that the laws be invalidated, but only that they be construed to avoid the constitutional questions. The desirability of that approach was emphasized when the court did exactly what defendants say this Court ought not to do in *Harrott v. County of Kings* (2001) 25 Cal.4th 1138. The court there construed the assault weapon law to avoid a vagueness issue *and* flatly rejected defendants' point in the following language:

> . . . we reject the argument that a saving construction is unnecessary because the statute [is not vague in all its possible applications] . . . . This argument is based on a false premise. That premise is that we adopt a saving construction only if a statute would be unconstitutional on its face, that is, in *all* its applications. This premise is simply wrong. "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is just as reasonable."(*Harrott*, *supra*, 25 Cal.4th at

1138; italics by court; our underlining.)

That is exactly our position here -- except that we strongly deny that defendants' constructions of the laws at issue are just as reasonable as the alternative constructions we offer.

2. Courts Do Not Defer To Law Enforcement Interpretations of Criminal Statutes

Contrary to defendants' claim to deference "judges do not defer to the Attorney General's interpretation of Title 18." (*Evans v. U.S. Parole Com'n* (7th Cir. 1996) 78 F.3d 262, 265.) "We have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." (*Crandon v. United States* (1990) 494 US 152, 177-78 [110 S.Ct. 997, 108 L.Ed.2D 132] (Scalia, J., concurring).)

The classification of types of firearms according to the law is not a subject on which the federal courts defer to the federal Bureau of Alcohol, Tobacco, and Firearms (BATF). *United States v. Thompson/Center Arms* (1992) 504 U.S. 505 [112 S.Ct. 2102, 119 L.Ed.2d 308], holding a pistol and carbine kit not be short-barreled rifle, rejected BATF's interpretation even though "neither the statute's language nor its structure provides any definitive guidance." (*Id.* at 513; *See F.J. Vollmer Co., Inc. v. Higgins* (D.C.Cir. 1994) 23 F.3d 448, 452 [rejecting BATF's position that a machinegun receiver remanufactured as a semiautomatic remains a machinegun], later proceeding *F.J. Vollmer Co., Inc. v. Magaw* (D.C.Cir. 1996) 102 F.3d 591, 593 ["the Bureau's action was inconsistent with the governing statute and would have produced an 'incredible'result"].)[5] Far from deferring to BATF, *Vollmer II* noted: "Although . . . the Bureau had followed its interpretation of the Firearms Act since at least the early 1980s, we do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation." (*Id.* at 598.)

---

[5] Other decisions rejecting BATF firearm classifications include *United States v. Seven Miscellaneous Firearms* (D.D.C. 1980) 503 F.Supp. 565(BATF raid on NRA museum); *Davis v. Erdmann* (10th Cir. 1979) 607 F.2d 917, 920 (BATF position denying importation "a classic example of agency 'nit picking,' and an arbitrary and capricious action"); *United States v. Brady* (D.Colo. 1989) 710 F.Supp. 290, 293 (contrary to BATF, a device "as a matter of practicality and common sense would never be used for that purpose by a sane person").

3. The Uncontradicted Evidence Is That, In Reference To Shotgun Rounds, Penal Code Section 12020(c)(25) Refers Only To Standard 2.75 Inch Rounds.

Penal Code section 12020(c)(25)[6] defines a "large capacity magazine" (as that term is used in § 12020 (a)(2)) as one that has "the capacity to accept more than ten rounds...." The uncontradicted expert testimony here is that "in this country the magazine capacity of a shotgun is universally understood to be the number of *2.75 inch* rounds its magazine will hold. [Emphasis added.]" This has been true "[t]hroughout the 20th Century and to date in the U.S.," even though longer rounds are common, and shorter rounds invented in other nations are somewhat available here. A shotgun's owner would assume its magazine capacity means how many 2.75 inch rounds it holds, not how many shorter (or longer) ones it holds.[7]

Instead, say defendants, shotgun magazine capacity should be deemed variable, being measured not in terms of a single standard round length but of the length of whatever rounds the person having the shotgun possessed at the time. Thus defendants assert that even though a shotgun only holds six 2.75 inch rounds it would still be deemed a "large capacity" firearm if the person having it possesses the 1.5 inch Mexican rounds, 11 of which will fit in the shotgun.[8] (Though defendants don't discuss this, the logical corollary is that even if a shotgun will hold 11 standard 2.75 inch rounds it is *not* a "large capacity" shotgun, if the person possessing it only has 3 inch rounds, of which only ten will fit in the shotgun's magazine.)

The short answer to this is that Penal Code section 12020 (c)(25) has to do with the size (length) of a firearm's magazine -- a matter which is fixed -- rather than with the variable length of the various rounds that may fit it. Nor have defendants thought out the consequences of holding that a shotgun is legal or not depending on the length of the rounds present. Remember that the section 12020(a)(2) prohibition is against selling or loaning a large magazine capacity shotgun, not against owning it. Defendants see the legality of the sale or loan as depending on the length of

---

[6] All further statutory references are to the Penal Code unless other wise stated.

[7] Declaration of plaintiffs' expert Paul Dougherty, ¶¶ 14-16.

[8] Defendants' Opposition Memorandum, pp. 18-19.

the round the recipient receives with the shotgun. So how does a court decide whether the shotgun was legal if the person who acquired it did not buy or borrow any shells at that time? Or, what if the seller or lender had shells of one length but the acquirer had shells of a different length? How can the legality of a sale or loan be known if section 12020 (c)(25)'s definition of guns according to magazine size is viewed as varying according to ammunition size? Suffice it to repeat that laws should be construed so as to produce "fairer and more predictable consequences,"[9] not results that are confusing, "elusive and unpredictable," uncertain, impractical or absurd.[10]

Moreover, the obvious purpose of Penal Code section 12020(a)(2) is to flatly ban transfer of firearms based on *their* characteristics -- not to ban or allow transfer depending on variations in the length of the ammunition an owner happens to have. That purpose is effectuated by construing the statute in terms of a singly unvarying standard shell length but frustrated by construing it as varying where shells of non-standard length are used. It is, of course, "the fundamental rule of construction that statutes be interpreted to give effect to the Legislature's intent" rather than to "frustrate its purpose."[11]

We reiterate that the uncontradicted testimony is that in relation to shotguns, magazine capacity is "universally understood" to mean 2.75 inch rounds. It is axiomatic that, absent specific definition of a term in a statute, that term is to be read according to its "commonly understood meaning."[12] So it should be presumed that in relation to shotgun magazine capacity, section 12020 (c) (25)'s term "rounds" incorporates the universal understanding that the length of a

---

[9] *Escobedo v. Snider* (1997) 14 Cal.4th 1214, 1226 [60 Cal.Rptr.2d 722, 930 P.2d 979].

[10] *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105-07 [17 Cal.Rptr.2d 594, 847 P.2d 560], *People v. Simon* (1995) 9 Cal.4th 493, 517 [37 Cal.Rptr.2d 278, 886 P.2d 1271] ("the court must attempt to avoid a construction that will lead to unreasonable or arbitrary results." Emphasis added), *California School Employees Ass'n. v. Governing Board* (1994) 8 Cal.4th 333, 340, 341 [33 Cal.Rptr.2d 109, 878 P.2d 13221].

[11] *People v. Dayan* (1995) 34 Cal.App.4th 707, 716 [40 Cal.Rptr.2d 391], *California School Employees, supra*, 8 Cal.4th 333, *People v. Wells* (1996) 12 Cal.4th 979, 985 [50 Cal.Rptr.2d 699, 911 P.2d 1374].

[12] *City of Sacramento v. Workers' Compensation Appeals Board* (2002) 94 Cal.App.4th 1304, 1308 [115 Cal.Rptr.2d 63], *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 [90 Cal.Rptr.2d 260, 987 P.2d 727] ("Words used in a statute ... should be given the meaning they bear in ordinary use.")

standard shotgun round is 2.75 inches.

A further point of great significance is that the U.S. Sixth Circuit invalidated an ordinance banning shotguns having a magazine capacity of more than five rounds. *Peoples Rights Organization, Inc.* v. *City of Columbus* (6th Cir. 1998) 152 F.3d 522, 536 held this fatally vague for not specifying what length of rounds the magazine capacity should be measured with. That problem disappears if defendants are, as plaintiffs request, enjoined from prosecuting section 12020 (a)(2) cases on any other basis than that magazine capacity is to be measured in terms of the standard 2.75 inch shotgun round.

4. Defendants' Regulatory Definition Of "Flash Suppressor" Should Be Stripped Of Its Outre Elements.

The numerous problems with defendants' definition are detailed in two declarations (totaling 31 pages) by credible experts, one of them a 22 year DOJ firearms examiner whom DOJ employed to train its other examiners. Defendants seek to refute these facts by a 3 page declaration from a non-firearms examiner whose opinions about firearms have been found erroneous by three different judges in three separate cases, and whose veracity has been questioned in at least once. Further, this declaration is accompanied by a number of unauthenticated documents. (See our Objections to the Chinn Declaration and Request for Judicial Notice, and attachments thereto (filed herewith).)

Defendants argue that their Chinn declaration-cum-attachments show that "flash suppressor" is differently defined in differing firearms technical materials. While this is true to some extent, it is also irrelevant to the part of defendants' regulation defining flash suppressor to include any device that "redirects" flash. The concept of "redirecting" flash (as opposed to reducing it) is not a part of *any* definition presented by either side. As our expert attests, it does not appear in the technical materials DOJ says it relied on in formulating its regulation. (Johnson declaration, ¶ 5.) Nor do any of the other materials we have presented or that defendants now present with the Chinn declaration support their extension of the term flash suppressor to devices that only "redirect" flash rather than reducing it.

Equally unsupported is the part of defendants' regulation that misdefines the statutory term "flash suppressor" as including two very different devices, "muzzle brakes" and "compensators." Once again, all the documentary evidence confirms plaintiffs' expert declaration that, while these three devices may look alike, the other two are entirely different from flash suppressors in that their purpose is reducing recoil, not flash:

> Accordingly, definitions in firearms dictionaries of "muzzle brake" and "compensator" often cross-reference each other. But they do not cross-reference "flash suppressor" and vice versa (except occasionally to differentiate "muzzle brake" and/or "compensator" from "flash suppressor"). It bears emphasis that *this is as true of sources DOJ cites as justifying its definition as of the firearms technical literature in general.* **None** of the sources I have reviewed that DOJ cites to justify its definition confuse flash suppressor, on the one hand, with muzzle brakes and compensators on the other, nor do they include muzzle brakes and compensators when defining "flash suppressor."[13]

Review of the papers attached to the Chinn declaration shows that defendants could not find a single firearms reference source to support their extension of the concept flash suppressor to the entirely different devices called compensators and muzzle brakes (respectively).

Equally baseless is the assertion in defendants' unsworn, unexpert memorandum: "plaintiffs incorrectly assume that a firearm owner must be able to perform scientific testing upon a firearm in order to reasonably know whether a device [attached to a rifle] perceptibly reduces flash."[14] This is not something we "assume." It is *necessarily true* because the regulation wrongly extends the definition of "flash suppressors" to cover devices that actually reduce or redirect flash, even if not so intended and designed. How else could anyone determine whether a device on a rifle actually reduces or redirects flash than by test-firing the rifle, first with the device and then without?

The declarations of plaintiffs' experts prove, first, that such testing is the only way to determine whether a device actually reduces or redirects flash; and, second, that ordinary rifle owners are simply not in a position to do such testing.[15] In order to contradict these declarations

---

[13] Johnson declaration, ¶¶ 12 and 13; italics added; bold face in original. To the same effect see Shain declaration, ¶ 10.

[14] Defendants' Opposition Memorandum p. 15, fn. 7.

[15] Shain declaration, ¶¶ 10-19, 22-25 and 30; adopted also in Johnson declaration, ¶ 7.

defendants were obliged to submit competent expert evidence. Their failure to do that speaks for itself.

We respectfully submit that defendants should be limited by preliminary injunction to the conceitedly valid portion of their regulatory definition. That is to say, they should be limited to defining "flash suppressor" as a device intended to reduce flash, and precluded from acting on the erroneous inclusion within their definition of "muzzle brakes," "compensators" or devices of any kind based on redirecting flash.

We note that such a preliminary injunction is proper even if defendants were correct that our attack on their regulation must be based solely on the evidence defendants considered in formulating that definition. To reiterate, none of the firearms dictionaries and other technical documents defendants used supports them in defining "flash suppressor" to include "compensators" or "muzzle brakes" (respectively) or devices that merely redirect flash.

5. Injunctive Relief Is Required To Correct The "Threaded Barrel" Problem.

The great majority of pistols with threaded barrels are extremely low powered Olympic target pistols that are little more dangerous than an air rifle. (Yes, admittedly a .22 Short round can kill or severely injure if it wounds in the right place. So can an air rifle pellet.)

Olympic-type pistols are threaded to allow adding weights for the precision balance useful in competition shooting. Though these threads were not intended to do so, they are "capable of accepting a flash suppressor, forward hand grip or silencer" -- to quote section 12276.1(a)(4)(A) -- if any exist that have conformable thread dimensions.

Perhaps misadvised by their incompetent expert, defendants claim there is no problem because "Olympic precision pistols are expressly exempted from the definition of 'assault weapon' by Penal Code section 12276.1 (b) and (c)."[16] Had they read the cited sub-sections more carefully, defendants would have realized that sub section (b) does not itself exempt anything. It only provides a rationale (that they are Olympic target pistols) for exempting *the specific* pistols (c)

[16] Opposition Memorandum, p. 17: 5-6.

lists. Compare the unnamed, non-exempt Olympic pistols we list as examples in the margin.[17]

Defendants go on to suggest that "it is reasonable to expect the owner of such a pistol with a threaded barrel to consider and look into whether the threaded barrel is capable of accepting a flash suppressor, forward hand grip or silencer."[18] That is not at all reasonable, given the uncontradicted testimony of our experts:

> . . . if a pistol has a threaded barrel, that pistol is not "capable of accepting a flash suppressor, forward handgrip, or silencer" unless its threads match those of some flash suppressor, forward handgrip, or silencer that exists somewhere in the world. To know whether their pistols are "capable of accepting" any of those items, owners of pistols with threaded barrels must know: (a) the dimensions of the threads on their pistols' barrels; and (b) the dimensions of the threads on the flash suppressors, forward handgrips and silencers that exist all over the world. While it is possible for owners to determine (a), not even experts know, or can determine (b). *There are no books or written materials of any kind that catalog the thread dimensions of all, or most, or many, flash suppressors, forward handgrips, and/or silencers.*
>
> Absent such written materials, the only way owners could determine whether their pistols are "capable of accepting" those items would be to obtain a selection of flash suppressors, forward handgrips, and silencers to try to screw on the barrels of their pistols. *As to silencers, Penal Code section 12520 makes it a felony for an ordinary person not involved in law enforcement to handle them even momentarily. As to flash suppressors and forward handgrips for a handgun, they are rare and arcane objects that the ordinary gun owner would have no idea how to obtain.* The fact is that, outside of watching James Bond-type movies, ordinary handgun owners will never even have seen (much less closely examined) a silencer, flash suppressor or forward handgrip for a handgun. So, assuming the owner's pistol barrel had threads, how could s/he know or ascertain if somewhere in the world there exists a silencer, flash suppressor or forward handgrip whose threads fit it?
>
> There exists another problem for owners of precision target pistols beyond the impossibility of ascertaining thread dimensions for silencers, flash suppressors or forward handgrips. *Many such owners will not even know that their target pistols have a threaded barrel.* The threads are concealed by the weight or compensator that has been placed on them. Many owners will never have thought about how the compensator or weight is affixed on the end of the barrel. (Is it screwed on to threads, spot-welded or affixed in some other way?) Yet, unless they realize there are threads on the barrel under the compensator or weight, owners cannot anticipate that their target pistol may be classified as an "assault weapon" under section 12276.1 by reason of the threaded barrel. Many such precision target pistols are in the .22 target calibers. Many of them are .22 Shorts, the lowest

---

[17] GUN DIGEST 2002 lists the following currently produced Olympic type competition pistols that are not named in the exemption: on p. 292 - High Standard Trophy, Morini Model 84E and Pardini K22; on p. 294 - the Unique Models D.E.S. models 32U, 69U and 96U. There are many other non-exempt 20th Century Olympic-type pistols that are still in service, but are no longer currently produced. Penal Code section 12276.1 (b) and (c) exempt only certain of the Olympic pistols that were being produced when SB 23 was enacted in 1999.

[18] Opposition Memorandum, p. 17: 13-15.

> velocity of the .22 calibers. Owners are unlikely to think of their precision target pistol as a weapon at all, since it was designed and purchased for the exclusive purpose of putting holes in paper targets. Much less would they deem this low-powered pistol to be an "assault weapon." So, even if target pistol owners understood section 12276.1 (a)(4)(A), they would be unlikely to think that statute applicable to their firearms which were neither designed nor intended to be used in connection with a flash suppressor, forward handgrip, or silencer.[19]

Defendants suggest that if the owner of an Olympic pistol did not know its threads conformed to those on some silencer (etc.) s/he would be acquitted of possessing an unregistered assault weapon (Pen. Code, § 12280 (b).) Perhaps so, perhaps not. In any event the owner would have undergone the irreparable injury of an unjust prosecution. And the expensive Olympic pistol would be confiscated because it was not registered before the Jan. 1, 2001 deadline. This would itself be unfair and unjust since the owner would not have known that it had to be registered, given the facts just recited from the expert testimony.

To preclude such injustices defendants should be preliminarily enjoined from enforcing the threaded barrel provision except in situations where the gun owner can be shown to have had adequate knowledge from which the legal duty would spring.

6. The "Permanent Alteration" Is Withdrawn from this Motion.

Defendants' Opposition indicates agreement with our position regarding the statutory use of the term "permanent" in connection with magazine alterations. In light of this, the parties intend to attempt to enter into an arrangement that will obviate the need for injunctive relief on this issue. We therefore respectfully withdraw this issue from consideration as to the pending motion for preliminary injunction.

CONCLUSION

For the foregoing reasons, the preliminary injunction should issue as requested.

Date: April 3, 2002

TRUTANICH • MICHEL, LLP:

C. D. Michel
Attorneys for Plaintiffs

19 Dougherty declaration ¶¶ 6-9 (emphasis added).

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Haydee Villegas, am employed in the City of San Pedro, 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 407 North Harbor Boulevard, San Pedro, California 90731.

On April 3, 2002, I served the foregoing document(s) described as

PLAINTIFFS' REPLY TO OPPOSITION FOR PRELIMINARY INJUNCTION

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

X (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 San Pedro, 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 April , 2002, at San Pedro, California.

X (VIA 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 April 3, 2002, at San Pedro, 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 of this court at whose direction the service was made.

HAYDEE VILLEGAS