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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER,

Plaintiffs and Petitioners,

vs.

THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25,

Defendants and Respondents.

CASE NO. 10CECG02116

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: September 29, 2010
Time: 3:30 p.m.
Location: Dept. 97A
Judge: Hon. Jeffrey Y. Hamilton
Action Filed: June 17, 2010

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PROCEDURAL AND FACTUAL BACKGROUND

This case brings a constitutional vagueness challenge to three sections of the California Penal Code that regulate the transfer and handling of "handgun ammunition."

On June 16, 2010, Plaintiffs Sheriff Clay Parker, et al., filed this action for Declaratory and Injunctive Relief and Petition for Writ of Mandate challenging the validity of Penal Code sections 12060, 12061, and 12318 (the "Challenged Provisions"). Defendants subsequently filed their Answer to Plaintiffs' Complaint on August 2, 2010. On August 19, 2010, the sponsor of the Challenged Provisions, Assemblyman Kevin De Leon, amended pending Assembly Bill 2358 ("AB 2358") in an attempt to address the admitted vagueness of the Challenged Provisions. On August 31, 2010, that legislation failed.

As the parties have been unable to agree upon a shortened briefing schedule to resolve this case on the merits via summary judgment, and as Plaintiffs are subject to irreparable harm by the ongoing and pending enforcement of unconstitutional criminal statutes, Plaintiffs now move this court for a preliminary injunction prohibiting enforcement of the Challenged Provisions.[1]

Passed in 2009, Assembly Bill 962 ("AB 962") added sections 12060, 12061, and 12318 to the California Penal Code[2] and implemented a statutory scheme for the transfer and handling of "handgun ammunition."[3] Section 12060 contains the definitions applicable to sections 12061 and 12318. Section 12061 requires "handgun ammunition" vendors[4] to: (1) preclude prohibited employees (persons prohibited by law from possessing firearms) from accessing "handgun ammunition;" (2) store "handgun

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[1] Although California Code of Civil Procedure § 526(b)(3) generally prevents a court from issuing preliminary injunctive relief to prevent the enforcement of public statutes, such is not the case when the question of a statute's constitutionality is at issue. (*Cohen v. Bd. of Supervisors* (1986) 178 Cal.App.3d 447, 453.)

[2] All further statutory references are to the California Penal Code unless noted.

[3] Assem. Bill No. 962 (2009-2010 Reg. Sess.) is codified at Penal Code §§ 12060, 12061, 12316, 12317, and 12318. The amendments to Penal Code §§ 12317 and 12318 are not challenged in this suit. A copy of AB 962 is attached hereto as Exhibit "1."

[4] Section 12060(c) defines a "vendor" as: "any person, firm, corporation, dealer, or other business enterprise that is engaged in the retail sale of any handgun ammunition, or that holds itself out as engaged in the business of selling any handgun ammunition.

ammunition" out of the reach of customers; and (3) record specific information about every transfer of "handgun ammunition" made by the Vendor and obtain a thumb print from the customer. Section 12318 requires that all sales and transfers of "handgun ammunition" be conducted in a "face-to-face" transaction.

Section 12060(b) provides the definition of "handgun ammunition" specifically applicable to sections 12061 and 12318. It provides: "'Handgun ammunition' means handgun ammunition as defined in subdivision (a) of Section 12323, but excluding ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code." Section 12323(a), in turn, defines "handgun ammunition" as: ". . . ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, as defined in subdivision (a) of Section 12001[5], notwithstanding that the ammunition may also be used in some rifles."

Thus, "handgun ammunition," for purposes of the Challenged Provisions, is defined by section 12060(b) as all ammunition "*principally for use* in [handguns] . . . , notwithstanding that the ammunition may also be used in some rifles."[6] (Emphasis added.)

The problem is, it is impossible to determine whether a specific ammunition type is "principally for use" in handguns. All modern centerfire and rimfire ammunition for use in rifles and handguns consist of the same components. (Declaration of Mike Haas ("Haas Decl.") at p. 3, ¶ 10; Declaration of Stephen Helsley ("Helsley Decl.") at p. 5, ¶ 17; Exhibit "11.") Ammunition available in virtually all calibers can be and is used safely in both rifles and handguns. (Haas Decl. at p. 3, ¶ 9; Helsley Decl. at p. 12, ¶ 47.)

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[5] Section 12001(a) provides: "As used in this title, the terms 'pistol,' 'revolver,' and 'firearm capable of being concealed upon the person' shall apply to and include any device designed to be used as a weapon...." (For convenience, "pistols, revolvers, and other firearms capable of being concealed upon the person" are hereafter referred to in this Complaint as "handgun(s).")

[6] Excluding ammunition "designed and intended" to be used in "antique firearms," and blanks. (Cal. Pen. Code section 12061(b).)

The Challenged Provisions do not state what "ammunition 'principally for use' in a handgun" means, nor do they specify what ammunition is "principally for use" in handguns. (See Exhibit 1.) Additionally, packaging for ammunition most often has no label associating its use with either a "handgun" or a "rifle." (Haas Decl. at pp. 3-4, ¶¶13-14; Helsley Decl. at pp. 12-13, ¶¶ 50-51.) Nor is there any common understanding in the firearms industry or among experts as to whether each of these thousands of types and calibers of ammunition are "principally for use" in a handgun and thus "handgun ammunition" under the Challenged Provisions. (Haas at p. 4, ¶ 16; Helsley at p. 12, ¶ 48.)

And, in any event, whether a type of ammunition is "principally" used in handguns is in part a temporal determination. Even if it could initially be determined whether an ammunition type was principally used in handguns, that will change and/or fluctuate with time as the ammunition's usage changes in response to hunting seasons and insofar as demand for particular ammunition types changes with the popularity of different handgun and rifle models or different shooting sports. (Haas Decl. at p. 4, ¶ 18; Helsley Decl. at p. 12, ¶ 49.)

DISCUSSION

I. PLAINTIFFS ARE LIKELY TO PREVAIL BECAUSE THE CHALLENGED PROVISIONS DO NOT PROVIDE ADEQUATE NOTICE TO THE PUBLIC NOR PROVIDE SUFFICIENT STANDARDS FOR LAW ENFORCEMENT

In determining whether preliminary injunctive relief is appropriate, courts consider two interrelated factors: (1) the likelihood that plaintiff will prevail on the merits at trial; and (2) the relative balance of harms likely to result from the granting or denial of interim injunctive relief. (*White v. Davis* (2003) 30 Cal. 4th 528, 554.) The court's determination must be guided by a "mix" of these two factors; as such, the greater Plaintiffs' showing on one, the less that must be shown on the other to support relief. (*Butt v. Cal.* (1992) 4 Cal.App.4th 668, 678.)

"The Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution, each guarantee that no person shall be deprived of life, liberty, or property without due process of law. This constitutional command requires 'a reasonable degree of certainty in legislation, especially in the criminal law . . . .' " (*People v. Heitzman* (1994) 9 Cal.4th 189, 199 (quoting *In re Newbern* (1960) 53 Cal.2d 786, 792).)

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Though not binding on this Court, courts in other jurisdictions have also found these terms to have similar meaning, and their reasoning is persuasive. In *State ex rel. Martin v. Kansas City*, the court interpreted "mainly" to mean "more than half" when it addressed the meaning of the phrase "mainly within," regarding an ordinance permitting the city's annex of certain property found "mainly within" the city. The court held that "[i]f 'within' means surrounded, "mainly within" a city would mean that a common perimeter of *more than fifty percent* was present. (*Martin, supra*, 317 P.2d at p. 811) (emphasis added).) Likewise, the Court of Special Appeal of Maryland said, "[w]e believe the word 'primarily,' as used in [the statute], possesses a common and generally accepted meaning. Webster's New World Dictionary defines 'primarily' as 'mainly; principally.' " (*Schrader, supra*, 517 A.2d at p. 1146.) The court went on to clarify that "in quantifiable terms, 'primarily' is *commonly understood* to suggest a figure representing more than 50 percent." (*Ibid.* (emphasis added).)

So for any given caliber or type of ammunition to qualify as "handgun ammunition" under the Challenged Provisions, that ammunition would have to be used in handguns more than fifty percent (50%) of the time. But there is no means for a person of ordinary intelligence to ascertain whether this is true for any particular type of ammunition. (Declaration of Barry Bauer ("Bauer Decl.") at ¶¶ 3-6; Declaration of Steven Stonecipher ("Stoneciper Decl.") at ¶¶ 3-6.) Most types of ammunition can be and are used safely in both rifles and handguns, and it is often the case that packaging for ammunition that *can* be used in a handgun is not labeled as such. (Haas Decl. at pp. 3-4, ¶¶9, 13-14; Helsley Decl. at pp. 12-13, ¶¶ 47, 50-51.)

In fact, even experts cannot determine this. There exists in the firearms industry no generally accepted definition of "handgun ammunition," nor any commonly understood delineation between "handgun ammunition" and other ammunition that equates to the "principally for use" in handguns language upon which the Challenged Provisions rely. (Haas at p. 4, ¶ 16; Helsley at p. 12, ¶ 48.)

Without sufficient guidelines as to what constitutes "handgun ammunition," persons of ordinary intelligence cannot be expected to know which types of ammunition the Challenged Provisions regulate. Without the benefits of such standards, individuals and vendors must guess as to whether any given type of ammunition is used in handguns more than fifty percent (50%) of the time – at any particular point in time – under changing market conditions.

2. Absent an Official List of Regulated Ammunition, it Is Impossible for Persons of Ordinary Intelligence to Determine Which Types Are "Principally for Use in Handguns"

The definition relied upon by the Challenged Provisions is unworkable. Unworkable definitions for tangible items that do not inform ordinary persons as to which items fall within the scope of the definition must fail for vagueness. Where a person is unable to determine for himself whether his particular item possesses those characteristics making it illegal under such a statute, and where an expert's opinion is required to make this determination, absent something like an official list of regulated items, the statute cannot be said to provide either fair notice or meaningful guidelines to a person of ordinary intelligence.[8]

The California Supreme Court's decision in *Harrott v. County of Kings*, (2001) 25 Cal.4th 1138, is instructive. In *Harrott*, the California Supreme Court addressed the limitations of the Assault Weapons Classification Act ("AWCA"), finding its language failed to fully inform persons of ordinary intelligence which firearms were regulated as "assault weapons" by the statute. (*Harrott, supra*, 25 Cal.4th at p. 1153.) As mandated by the AWCA, the Attorney General created the Assault Weapons Identification Guide ("the Guide"), designating by manufacturer markings those firearms deemed to be assault weapons regulated under the Act. (*Id.* at p. 1142-43.) The trial court determined the plaintiff's firearm constituted an "assault weapon" under Penal Code section 12276 on the ground it was an "AK series" weapon, despite the fact that expert witnesses for both sides agreed the firearm's manufacturer markings did not match those in the Guide. (*Id.* at p. 1143.)

The Court of Appeal reversed the lower court's decision on due process grounds, basing its ruling on the "difficulty an ordinary citizen might have, when a gun's markings are not listed in the Identification Guide, in determining whether a semiautomatic firearm should be considered an assault weapon under the AWCA." (*Harrott, supra*, 25 Cal.4th at pp. 1146-1147.) The Court concluded that ordinary citizens are not responsible for determining the meaning of unclear statutory language without

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[8] This line of reasoning was recently adopted by the California Court of Appeal in *People v. Saleem* (2d Dist. 2009) 180 Cal.App.4th 254, 273-74 [102 Cal.Rptr.3d 652, 667], review granted Mar. 10, 2010. Review of this decision by the California Supreme Court was dismissed on September 1, 2010, in light of recent amendments to Penal Code section 12370 (Stats. 2010, ch. 21). Therefore, a publication order may be forthcoming.

the benefit of clear guidelines. (*See Id.* at p. 1153.)

In this case, individuals and vendors, including Plaintiffs, are unable to determine for themselves whether a given type of ammunition is "handgun ammunition," as no reasonable person can determine which types of ammunition are used more than fifty percent (50%) of the time in a handgun. (Bauer Decl. at ¶¶ 3-6; Stonecipher Decl. at ¶¶ 3-6.) Moreover, the Challenged Provisions' definition of "handgun ammunition" is problematic because *even experts* are unable to determine with any certainty whether a given type of ammunition has in fact been fired more than 50% of the time out of a handgun as opposed to a long gun. (Haas Decl. at p. 5, ¶¶ 19-20; Helsley Decl. at p. 13, ¶ 53-54.) Although the controlling standard requires the Challenged Provisions, in and of themselves, to provide notice to persons of ordinary intelligence as to what ammunition is regulated *without* the need for independent market research, it is virtually impossible, even through *painstaking research and analysis*, to establish *with legal certainty* that any type of ammunition suitable for use in both handguns and long guns is fired through or loaded into handguns more often than long guns. (Haas Decl. at p. 5, ¶¶ 19-20; Helsley Decl. at p. 13, ¶ 53-54.)

B. The Legislative History of the Challenged Provisions *Confirms Vagueness*

1. A Previous Attempt to Rely on "Principally for Use in Handguns" Exposed the Vagueness Problems of the Challenged Provisions

Nothing in the legislative history of section 12323 or AB 962 clarifies the "principally for use" in handguns language relied upon by the Challenged Provisions. There is, however, revealing language in the legislative history of Senate Bill 1276 (hereafter SB 1276), a failed measure introduced in 1994 to implement provisions regulating the transfer of "handgun ammunition" similar to those appearing in the Challenged Provisions.[9] The Bill Analysis conducted by the Senate Committee on Judiciary for SB 1276 contains a "comment" on the definition of "handgun ammunition" provided in section 12323 which reads, in relevant part:

> Existing Penal Code section 12323 was added in 1982 and defines handgun ammunition as 'ammunition principally for use in pistols and revolvers . . . notwithstanding that the ammunition may also be used in some rifles. . . . However, it may not be suitable for

[9] The relevant legislative history of SB 1276 is attached hereto as Exhibit "5."

> defining handgun ammunition in general. It may be assumed that many ammunition calibers are suitable for both rifles and handguns. **Without additional statutory guidance, it may be very difficult for dealers to determine which ammunition is "handgun ammunition"** for purposes of the requirements added to Penal Code section 12076. (Exhibit 5.) (Emphasis added.)

The legislative history of AB 962 contains nothing to clarify the Legislature's intent as to the scope of the definition for "handgun ammunition" as adopted by and used in the Challenged Provisions. But the history of SB 1276 provides compelling evidence of that very same definition's vagueness as applied to the Challenged Provisions.[10]

2. The Legislature Recognized the Vagueness Problems in the Challenged Provisions and Tried But Failed to Fix Them This Year

In 2010, the author of AB 962 and the Challenged Provisions, Assemblyman Kevin De Leon, introduced legislation that would have expanded the application of 2009's AB 962. (Assem. Bill No. 2358 (2009-2010 Reg. Sess.) ("AB 2358").)[11] Subsequent to the filing of this litigation by Plaintiffs, Assemblyman De Leon amended AB 2358 in the last days of the legislative session, working frantically with Defendant DOJ to revise the Challenged Provisions by amending Penal Code section 12323(a) to replace the "principally for use in" language with a "list of ammunition calibers" that would be considered "handgun ammunition" under the Challenged Provisions. The "list amendment" was obviously the result of Defendant DOJ's discussions with Assemblyman De Leon about DOJ's own recognition of the merits of this suit. (Declaration of Clinton B. Monfort ("CBM Decl.") at p. 3, ¶¶ 14-

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[10] Plaintiffs note they do not challenge Penal Code section 12323(a) itself, as it is referenced by Penal Code sections other than the Challenged Provisions which include additional language to allow individuals to determine whether ammunition is "handgun ammunition." For example, Penal Code section 12316(b) follows the reference to section 12323(a) with the following: "Where ammunition or reloaded ammunition may be used in both a rifle and a handgun, it may be sold to a person who is at least 18 years of age, but less than 21 years of age, if the vendor reasonably believes that the ammunition is being acquired for use in a rifle and not a handgun." The Challenged Provisions do not include such "clarifying" language. Nor could this language be applied to the Challenged Provisions, as PC section 12061 mandates that "handgun ammunition" be stored where it cannot be accessed by customers, i.e., a Vendor could not have a reasonable belief as to whether a potential purchaser would intend to use that ammunition in a handgun or rifle.

[11] Copies of AB 2358, as amended on August 19, 2010 and August 30, 2010, are attached hereto as Exhibits "2" and "3," respectively and incorporated herein.

15; Exhibits 2-4, 9-10.) Though the proposed list of ammunition calibers would have presented its own legal problems if it had passed, AB 2358 failed to pass in the Senate, for numerous reasons. (CBM Decl. at p. 3, ¶ 14; Exhibit 4.)

Even though AB 2358 failed passage, testimony provided during consideration of the bill provides further compelling evidence of the vagueness of the Challenged Provisions. At a Senate Public Safety Committee hearing on AB 2358 held on August 23, 2010, Assemblyman De Leon stated that "throughout the year, [the legislature] had been listening to gun dealers, as well as vendors, regarding their concerns about AB 962." Assemblyman De Leon revealed that the most common complaint, a complaint that was raised *the previous year in committee*, is that the existing definition of 'handgun ammunition' is *too vague*, and that we want to *bring some clarity to the law* for California vendors. (*Hearing on A.B. 2358 Before the S. Pub. Safety Comm.*, 2010 Leg., 2009-2010 Reg. Sess. (Cal. 2010) (statement of Assem. Kevin DeLeon, Sponsor).) Assemblyman De Leon's testimony confirmed that the "list of ammunition calibers" was provided to them by Defendant DOJ. (*Ibid.*) Assemblyman De Leon's own testimony confirms the widespread and openly voiced confusion surrounding the definition of "handgun ammunition" contained in the Challenged Provisions, and demonstrates the inability of Defendants or the legislature to produce a workable definition of "handgun ammunition" in either of the past two legislative calendar years. The sponsor of the Challenged Provisions has publicly confirmed that the Challenged Provisions fail to provide reasonable notice as to what ammunition is "handgun ammunition." (*See ibid.*)

C. No California Courts Have Interpreted "Handgun Ammunition;" But *Harrot* Confirms that the Challenged Provisions Fail to Provide Sufficient Notice of Prohibited Conduct

The third prong of *Heitzman* focuses on the way in which courts have previously construed the challenged statutory language. Unfortunately, there are no court decisions interpreting Penal Code §12323(a) or the Challenged Provisions to guide us. Nor has the regulatory agency charged with licensing firearm retailers been able to provide clarification to its licensees.[12]

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[12] The DOJ Firearms Bureau licenses and regulates firearm retailers in CA. DOJ also provides licensees with information about their responsibilities and changes in the law. On December 30, 2009, DOJ published an "Information Bulletin" providing a brief overview of AB

III. THE CHALLENGED PROVISIONS ENCOURAGE ARBITRARY AND DISCRIMINATORY ENFORCEMENT BASED ON EACH POLICE OFFICER'S SUBJECTIVE UNDERSTANDING OF THE LAW

The Challenged Provisions are *also* unconstitutionally vague because they encourage arbitrary and discriminatory enforcement of the law by police and prosecutors. The U.S. Supreme Court has noted that "the requirement that a legislature establish minimal guidelines to govern law enforcement" is the defining consideration of the vagueness doctrine. (*Kolender, supra*, 461 U.S. at 357-58.) "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-09.) "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." (*Kolender, supra*, 461 U.S. at pp. 357-358).)

In *City of Chicago v. Morales*, petitioner City of Chicago enacted a Gang Congregation Ordinance which prohibited criminal street gang members from loitering with one another in any public place. (*City of Chi. v. Morales* (1998) 527 U.S. 41, 45 (hereafter *Morales*).) The case makes clear the importance of "definiteness and clarity" in the law, characteristics that the challenged provisions lack. The ordinance defined "loitering" as "remaining in any one place with no apparent purpose." (*Id.* at p. 47.) The Chicago Police Department promulgated detailed guidelines that purported to prevent arbitrary or discriminatory enforcement of the ordinance. (*Id.* at p. 48.) For instance, they confined arrest authority to designated officers, established detailed criteria for defining street gangs and membership in such gangs, and provided for designated but publicly undisclosed enforcement areas. (*Id.* at pp. 48-49.)

Despite attempts to clarify the scope of the term "loitering," the Supreme Court of Illinois struck down the ordinance because it did not "meet constitutional standards for definiteness and clarity" because it "provides absolute discretion to police officers to determine what activities constitute loitering." (*Morales, supra*, 527 U.S. at pp. 61, 64.) Upon review, the U.S. Supreme Court confirmed the holding, finding the law unconstitutionally vague. (*Id.* at p. 64.)

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962. (Exhibit 8.) Tellingly, despite retailer inquiries, this Bulletin did not clarify what "handgun ammunition" is under the Challenged Provisions. Nor could it have - none of the Challenged Provisions, nor any other provision of the law, confer authority upon an agency or other entity to promulgate regulations to clarify them.

Like the Gang Congregation Ordinance in *Morales,* the lack of clarity as to which ammunition is considered "handgun ammunition" violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." (*Kolender, supra*, 461 U.S. at p. 358.) And the DOJ has stated that it *will not and cannot* adopt a policy as to what types of ammunition are "handgun ammunition."[13]

Because there are no official guidelines regarding which types of ammunition are "*principally* for use in [handguns]," each law enforcement officer must look beyond what is reasonably apparent and try to make his or her own determination as to whether more than fifty percent of a particular type of ammunition is used in handguns. (Declaration of Clay Parker ("Parker Decl.") at ¶¶ 3-7.) As such, like the Gang Congregation ordinance in *Morales*, each of the Challenged Provisions unlawfully "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat," encouraging arbitrary and discriminatory enforcement of the law in violation of due process. (*Kolender, supra*, at p. 359.)

IV. THE HARM SUFFERED BY PLAINTIFFS IF PRELIMINARY INJUNCTION IS DENIED FAR OUTWEIGHS THE HARM SUFFERED BY DEFENDANT IF PRELIMINARY INJUNCTION IS GRANTED

In evaluating the relative harm to the parties upon the granting or denial of a preliminary injunction, the court may consider any of several factors: "(1) the inadequacy of any other remedy; (2) the degree of irreparable injury the denial of the injunction will cause; (3) the necessity to preserve the status quo; [and] (4) the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause." (*Cohen v. Bd. of Supervisors* (1985) 40 Cal.3d 277, 286 fn. 5 (hereafter *Cohen*).)

A. Absent an Injunction, Plaintiffs Risk Prosecution for Unknowing Violations and Will Suffer Irreparable Harm without Adequate Legal Remedy

"To qualify for preliminary injunctive relief plaintiffs must show irreparable injury, either existing or threatened." (*City of Torrance v. Transitional Living Ctrs. for L.A.* (1982) 30 Cal.3d 516, 526 (citing Cal. Code Civ. Proc. § 526(a)(2).) Irreparable harm is usually present where plaintiff will

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[13] Following passage of AB 962, Plaintiffs' counsel contacted counsel for the DOJ's Bureau of Firearms for clarification. Counsel for the DOJ's Bureau of Firearms responded that it "did not know" and "could not say" whether ammunition inquired about was "handgun ammunition" under the Challenged Provisions. (CBM Decl. at p. 2, ¶¶ 3-5, 8; See exhibits 6, 7.)

suffer an injury for which adequate compensation is difficult, if not impossible, to ascertain. (*Pellissier v. Whittier Water Co.* (1st Dist. 1922) 59 Cal.App. 1, 7; *Wind v. Herbert* (2nd Dist. 1960) 186 Cal.App.2d 276, 285 (citing Cal. Code Civ. Proc. § 3422).) The Ninth Circuit Court of Appeals has recognized time and again that, "constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." (*Nelson v. NASA* (9th Cir. 2007) 530 F.3d 865, 881 (citing *Monterey Mech. Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702, 715).) Due to the unconstitutional vagueness of the Challenged Provisions, Plaintiffs are, and will continue to be, unfairly subject to the dire consequence of criminal prosecution in violation of due process. (Bauer Decl. at ¶ 7; Stonecipher Decl. at ¶ 5.) The existence and ongoing arbitrary enforcement of the Challenged Provisions invites irreparable harm upon Plaintiffs and those similarly situated.

The California Supreme Court has further recognized that a showing that plaintiff has "discontinued [a] method of conducting . . . business as alleged because of fear of arrest and prosecution" under a constitutionally unsound law is sufficient to show irreparable injury. (*McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal.2d 595, 599.) The passage of the Challenged Provisions has forced those Plaintiffs engaged in the business of selling or otherwise transferring ammunition to non-exempt persons in California to contemplate whether to discontinue certain business practices and to begin preparations for the Challenged Provisions to take effect. For instance, Plaintiffs Able's Sporting, Inc., and RTG Sporting Collectibles, Inc., have indicated that they will, out of a necessary abundance of caution and because they cannot know which types of ammunition are regulated by the Challenged Provisions, cease *all* transfers of ammunition that can be used in both handguns and long-guns to non-exempt persons in California. (Giles Decl. at ¶¶ 3–8; Wright Decl. at ¶¶ 3-9.) Discontinuing these transfers will result in a significant loss of profits from Plaintiffs' California markets during the pendency of this action and beyond. (Giles Decl., ¶ 8; Wright Decl., ¶ 8-10.) In the absence of preliminary injunction, then, these Plaintiffs face a Hobson's Choice: either discontinue these ammunition transfers in California and risk the loss of massive profits and business goodwill, or continue transfers and risk prosecution under the Challenged Provisions. Either "choice" is stark, and the remedy for the harms invited by either is not readily calculated in monetary terms.

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Because these Plaintiffs are forced to alter their business methods out of genuine fear of unjust prosecution, irreparable harm exists and a preliminary injunction should issue.

B. A Preliminary Injunction is Necessary to Preserve the Status Quo, Pending Adjudication of the Merits at Trial

The balance of harms tips in favor of the party seeking injunctive relief when the granting of such relief is necessary to preserve the status quo. California courts have long recognized the status quo to mean "the last peaceable, uncontested status which preceded the pending controversy." (*People v. Hill* (1st Dist. 1977) 66 Cal.App.3d 320, 331 (quoting *United R.R. v. Super. Ct.* (1916) 172 Cal. 80, 87).) Moreover, the California Supreme Court has recognized that preliminary injunctions preventing the enforcement of statutes in effect for only a short time at the point of hearing a request for such relief effectively *maintain* the status quo. (*King v. Meese* (1987) 43 Cal.3d 1217, 1227.) Because the Challenged Provisions have yet to take effect, or have been in effect for only a short time, the status quo will be preserved only by the granting of preliminary injunctive relief.

C. Public Interest Will Be Served, Not Harmed, by Preliminary Injunction

A third consideration in the balance of harms analysis is "the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause." (*Cohen, supra*, 40 Cal.3d at p. 286, fn. 5.) Where the public interest would be harmed by the issuance of a preliminary injunction, courts are understandably reluctant to grant such relief. When the public interest is *served* by injunction, however, the balance of harms should tip in the movant's favor.

Plaintiffs recognize that it is generally in the public interest for courts to refrain from interfering in the enforcement of laws adopted by duly elected representatives out respect for the separation of powers. (*City of Santa Monica v. Super. Ct. of LA Co.* (2d Dist. 1964) 231 Cal.App.2d 223, 226 (hereafter *Santa Monica*). However, Plaintiffs point out that this interest is not served when an admittedly vague law imposes the dire consequence of criminal sanctions upon unwitting persons in violation of their rights to due process. The Challenged Provisions invite arbitrary and discriminatory enforcement of the law as each officer relies on his or her subjective understanding of the "principally for use" language; where one officer may witness the transfer of ammunition suitable for use in both handguns and long-guns and cite the transaction as a violation of the Challenged Provisions, another

officer may witness an identical transaction and determine that a transfer of such ammunition is not touched by the law. Such circumstances would manifestly create confusion in the public mind and would have a natural tendency to create disrespect for law enforcement officers unable to apply the law in a uniform manner. (*Santa Monica, supra*, 231 Cal.App.2d at 226.) Viewed in this light, it is apparent that preliminary injunction will serve the public interest by delaying the enforcement of the Challenged Provisions until it is determined whether they provide sufficient standards to guide law enforcement in a consistent application of the provisions, thereby promoting proper respect for the rule of law.

D. Defendants Will Suffer no Harm if Injunctive Relief is Granted and any Potential Harm is Minimal and Does Not Outweigh the Harm to Plaintiffs Absent Such Relief

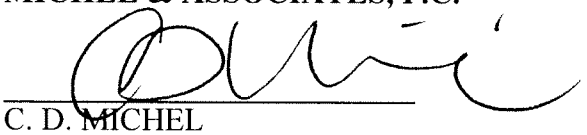
Given the substantial likelihood that Plaintiffs will succeed on the merits, the harm to Defendants in delaying enforcement of the statute is slight. The public has no interest in enforcing an unconstitutional law, as an "unconstitutional law is void and is as no law." (*Ex parte Siebold* (1880) 100 U.S. 371, 376.) Unlike Plaintiffs, who will continue to suffer the *threat of unjust criminal prosecution* under laws with which they do not and cannot know how to comply, Defendants will incur *no injury* by the granting of preliminary injunctive relief. The relief Plaintiffs seek merely asks Defendants to delay the enforcement of a likely unconstitutional law—a law in which Defendants have no legitimate interest enforcing. There would be no action required of or monetary loss to Defendants, and Defendants would not be deprived of any particular benefit. As such, the balance of harms continues to tilt in Plaintiffs' favor, and preliminary injunction is proper.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court grant preliminary injunctive relief pursuant to California Code of Civil Procedure section 527, enjoining Defendants, their employees, agents, and persons acting with them or on their behalf, from enforcing California Penal Code sections 12060, 12061, and 12318 pending final adjudication of this case at trial.

Dated: September 7, 2010

Respectfully Submitted,
MICHEL & ASSOCIATES, P.C.



C. D. MICHEL
Attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Valerie Pomella, 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 September 7, 2010, I served the foregoing document(s) described as

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION 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:

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255
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 September 7, 2010, at Long Beach, California.

_X_ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on September 7, 2010, at Long Beach, California.

__ (VIA FACSIMILE TRANSMISSION) As follows: The facsimile machine I used complies with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, copies of which is attached to this declaration.
Executed on September 7, 2010, California.

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

VALERIE POMELLA