KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General
KIMBERLY GRAHAM
Deputy Attorney General
PETER A. KRAUSE
Deputy Attorney General
State Bar No. 185098
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5328
Fax: (916) 324-8835
E-mail: Peter.Krause@doj.ca.gov
Attorneys for Defendants and Respondents State of California, Edmund G. Brown Jr., and the California Department of Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

SHERIFF CLAY PARKER, ET AL., Plaintiffs and Petitioners, **v.** **THE STATE OF CALIFORNIA, ET AL.,** Defendants and Respondents.	Case No. 10CECG02116 **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF** Date: January 18, 2011 Time: 8:30 a.m. Dept: 402 Judge: The Honorable Jeff Hamilton Trial Date: January 18, 2011 Action Filed: June 17, 2010

Defendants State of California, the California Department of Justice, and Attorney General Edmund G. Brown Jr. (collectively, the "State") respectfully submit the following memorandum in opposition to plaintiffs Sheriff Clay Parker, Herb Bauer Sporting Goods, California Rifle and Pistol Association, Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven Stonecipher's (collectively, "Plaintiffs') Motion for Summary Judgment or, In the Alternative, Summary Adjudication/Trial Brief.

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INTRODUCTION

In this action, Plaintiffs challenge the statutory definition of "handgun ammunition" as vague on its face and as applied. A statute cannot be found facially vague unless it is incapable of constitutional application in *any* circumstance. Here, that means Plaintiffs have the burden to show that the definition of handgun ammunition cannot validly be applied to any cartridge of ammunition. In an as-applied challenge, the mere existence of a statute, which may or may not ever be applied to the plaintiff, is not sufficient to create a ripe controversy. Instead, there must be a threat of enforcement or prosecution that is credible and immediate, and not merely abstract or speculative.

Plaintiffs' claims fail as a matter of law because (1) Plaintiffs and their ammunition expert (a retired NRA lobbyist with a bias against gun control laws) admit that numerous cartridges of ammunition are handgun ammunition within the meaning of the challenged definition, and (2) the two subdivisions at issue in the as applied challenge have not been enforced, making the cause of action manifestly unripe, as another court recently held.

Try as Plaintiffs might to complicate this action with 240 "undisputed facts" and to muddle the issues with a rhetorical debate over calibers versus cartridges (a distinction notably absent from the Complaint), the core analysis in this case is straightforward. There need not be a "list" nor universal agreement on every cartridge of ammunition that might constitute handgun ammunition; instead, the law requires only that the challenged statutes provide reasonable certainty as to what is proscribed. The challenged definition meets this test, which is underscored by the fact that Plaintiffs agree with the State on many of the cartridges it has identified as handgun ammunition.

The Court need not go beyond the record before it on this Motion. If a statute has any valid application, as Plaintiffs concede the challenged statutes do, it would be error to invalidate the law on the ground that it is vague on its face. It would be equally erroneous to issue an advisory opinion on an unripe as applied challenge. Accordingly, the State respectfully requests that the Court deny Plaintiffs' Motion and enter judgment for it on all causes of action alleged in the Complaint.

SUMMARY OF ALLEGATIONS IN THE COMPLAINT

Plaintiffs allege that three statutes adopted as part of Assembly Bill 962 (the "Anti-Gang Neighborhood Protection Act of 2009") are void for vagueness under the due process clause of the Fourteenth Amendment. (¶¶ 1-2.[1]) Specifically, they contend that many calibers of ammunition can be used in both handguns and rifles, so sections 12060, 12061, and 12318 of the Penal Code are fatally vague, both facially and as applied, because their definition of "handgun ammunition" – a definition imported from section 12323(a) of the Penal Code – fails "to provide any standard whereby a person of ordinary intelligence can understand and determine whether a given caliber of ammunition is 'principally for use' in a handgun." (¶ 3.) They assert that this alleged vagueness gives law enforcement officials "essentially unbridled discretion to interpret and apply the Challenged Provisions." (¶ 9.)

Subdivisions (3) through (7) of section 12061, and the entirety of section 12318, do not go into effect until February 1, 2011. (¶¶ 37-38.) Hence, the only provisions currently in effect are subdivisions (a)(1) and (a)(2) of section 12061, which restrict individuals convicted of certain crimes from handling handgun ammunition in the course of their employment, and prohibit display of handgun ammunition in a manner accessible to a purchaser. (¶¶ 35-36.) Plaintiffs do not allege that these provisions have been enforced, or even that they harbor a credible fear of enforcement, and introduce no such evidence on this Motion.

On these facts, Plaintiffs alleged three causes of action in their Complaint: (1) Due Process Vagueness – Facial, (2) Due Process Vagueness – As Applied, and (3) a Petition for Writ of Mandate. (¶¶ 88-109.) The State answered Plaintiffs' complaint and verified petition for writ of mandate on August 4, 2010. By failing to move for summary adjudication on their third purported cause of action, they effectively have abandoned that claim, leaving only the first two causes of action for the Court to resolve.

[1] All citations using only the paragraph symbol are to the complaint filed June 17, 2010.

ARGUMENT

I. LEGAL STANDARD APPLICABLE TO VAGUENESS CHALLENGES.

A statute is void for vagueness if: (1) it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or (2) it invites arbitrary and discriminatory enforcement. (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567.) The starting point of a vagueness analysis is:

> "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. A statute . . . cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.'" Therefore, "a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; *he must demonstrate that 'the law is impermissibly vague in all of its applications.*'" Stated differently, "'[a] statute is not void simply because there may be difficulty in determining whether some marginal or hypothetical act is covered by its language.'"

(*People v. Morgan* (2007) 42 Cal.4th 593, 605 [citations omitted] [italics added].)

To be constitutional, criminal statutes need only give "fair warning" that certain conduct is prohibited. "'A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" (*United States v. Wise* (9th Cir. 1977) 550 F.2d 1180, 1186.) The mere fact that a statute could have been written more precisely does not mean the statute as written is unconstitutionally vague. (*United States v. Powell* (1975) 423 U.S. 87, 94.)[2]

[2] Although Plaintiffs invite the Court to apply a stricter vagueness standard generally reserved for First Amendment cases (see generally *Sanchez v. City of Modesto* (2007) 145 Cal.App.4th 660, 679) by arguing that the challenged statutes infringe their Second Amendment right to keep and bear arms (Memorandum, pp. 4:19-5:3), no such claim is alleged or inferable from the allegations in the Complaint. Further, the challenged statues do not infringe any Second Amendment rights; they merely require transactions in handgun ammunition to occur face-to-face to help prevent felons and other prohibited persons from purchasing ammunition. As noted by the Supreme Court of the United States in *District of Columbia v. Heller* (2008) 554 U.S. 570, 128 S.Ct. 2783, 2816-2817, the right to bear arms under the Second Amendment does not cast doubt on the "longstanding prohibitions on the possession of firearms by felons." And even if Plaintiffs could articulate a Second Amendment concern, there is no authority for applying the elevated vagueness standard applicable to First Amendment challenges in that context.

II. PENAL CODE SECTIONS 12060, 12061, AND 12318 AND THE CHALLENGED DEFINITION.

The primary objective of statutory interpretation is to ascertain and effectuate the intent of the lawmakers. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 208.) Courts begin with the words of the enactment, giving effect to its "plain meaning," before resorting to extrinsic aids such as legislative history. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) Courts also construe statutes in context, giving effect to the usual and ordinary import of the language used. (*Longshore v. Ventura* (1979) 25 Cal.3d 14, 24.)

Although Plaintiffs purport to challenge sections 12060, 12061, and 12318 of the Penal Code, their challenge really is limited to the definition of "handgun ammunition," which is imported from Penal Code section 12323(a). Section 12323(a) provides that handgun ammunition is "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,[3] notwithstanding that the ammunition may also be used in some rifles." Blanks, as well as ammunition designed and intended to be used in "antique firearms" are excluded from this definition under the challenged statutes. (Pen. Code, § 12060(b).) (Hereinafter, the "Challenged Definition.")

III. PLAINTIFFS' FACIAL VAGUENESS CHALLENGE FAILS AS A MATTER OF LAW BECAUSE THEY ADMIT THAT THE CHALLENGED DEFINITION HAS SEVERAL VALID APPLICATIONS.

Plaintiffs' first cause of action seeks a declaration that sections 12060, 12061, and 12318 of the Penal Code are facially void for vagueness "because they fail to provide notice to persons of ordinary intelligence regarding which calibers of ammunition are 'handgun ammunition' and thus subject to" the challenged statutes. (Complaint, ¶ 91.) The declaration they seek is unavailable because, even if certain calibers (or cartridges) of

[3] Section 12001(a)(1) 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, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length."

ammunition present borderline cases, meaning that they are used as often in handguns as in rifles, that does not render the challenged definition unconstitutionally vague. Plaintiffs must do more than identify some instances in which application of the Challenged Definition might be uncertain or ambiguous.

A. Plaintiffs' Burden Under the Facial Vagueness Test.

Plaintiffs nowhere address their burdens, not only of persuasion and production on a summary judgment motion (see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850), but also to prevail on a facial vagueness challenge. Facial challenges to a statute's constitutionality require a demonstration that the provisions of the statute, despite careful interpretation, fatally collide with the Constitution. As numerous state and federal courts have observed, facial challenges are extremely difficult to prove. "Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." (*National Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 580 [quotation marks omitted].) The Supreme Court of California has similarly opined that:

> A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation.] '"To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. . . . Rather, petitioners must demonstrate that the act's provisions *inevitably pose a present total and fatal conflict* with applicable constitutional prohibitions."'

(*Arcadia Unified Sch. Dist. v. State Dep't of Educ.* (1992) 2 Cal.4th 251, 267 *quoting Pacific Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180-181; see also *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 48-49 [the rules set forth in *Pacific Legal Foundation* are "formidable rules insulating a statute from facial attack"; if an appellate court can conceive of a situation in which a statute could be applied constitutionally, the statute will be upheld; unless the statute presents a "present total conflict with constitutional provisions," any overbreadth is cured through "case-by-case analysis of the fact situations to which the statute is applied"].)

The "total and fatal conflict" element of a facial challenge has been called "the most important, for it requires plaintiffs to demonstrate "'that no set of circumstances exists under which the [law] would be valid.'" [Citations.] Our Supreme Court has put it even more plainly, stating that "a claim that a law is unconstitutionally vague can succeed only where the litigant demonstrates . . . that the law is . . . 'impermissibly vague in all of its applications.'" (*Personal Watercraft Coalition v. Board of Supervisors* (2002) 100 Cal.App.4th 129, 138.)

B. Plaintiffs Have Not Met Their Burden to Establish that the Challenged Definition is Invalid in All of its Applications and Unintelligible to Ammunition Vendors of Ordinary Intelligence.

As explained above, a facial challenge requires proof that the law is invalid in toto and therefore incapable of any lawful application. Here, the definition of handgun ammunition is not sufficiently specific unless an ammunition vendor of ordinary intelligence could not understand what ammunition is "principally for use in pistols or revolvers, notwithstanding that the ammunition may also be used in some rifles." Plaintiffs cannot meet their burden to demonstrate that the Challenged Definition is vague in all applications.

1. Plaintiffs' admissions that several cartridges of ammunition are used principally in handguns is fatal to their facial challenge.

a. Plaintiffs and their ammunition expert identified numerous cartridges of ammunition that are "principally for use" in handguns.

Plaintiffs assert that they do not know what cartridges of ammunition fall within the Challenged Definition, yet in deposition, plaintiffs Clay Parker, Steve Stonecipher, and Herb Bauer Sporting Goods identified *fifteen different cartridges* of ammunition between them that were used more often in handguns than in rifles.[4] (State's Supplemental

[4] Some plaintiffs and their expert dispute that 9mm Luger ammunition is used more often in handguns than long guns based upon its use in some submachine guns. The State's expert considered 9mm submachine guns in forming his opinions, but since they are available almost exclusively to law enforcement and the military in California (groups to whom the challenged statutes do not apply), he did not consider it a big factor. (Decl. of B. Graham, ¶¶ 7(f), 16(b), and 17.) Furthermore, Plaintiffs' expert admits that a submachine gun is defined as an "automatic or selective fire firearm *chambered for a pistol cartridge*" (State's Evidence, Exh. "D," Helsley Depo, p. 34:7-16), which definition confirms that 9mm Luger is a *handgun cartridge*.

Undisputed Material Facts ("UMF") Nos. 1-4, 8-11.) Even Plaintiffs' ammunition expert who, as discussed below, is biased against gun control legislation in general, and AB962 in particular, concedes that there are at least seven cartridges of ammunition that are handgun ammunition within the meaning of the Challenged Definition. (State's Supplemental UMF Nos. 2 & 9 [identifying .25 ACP, .45 GAP, 9mm Federal, 10mm Auto, .357 SIG, .44 Auto Mag, and .38 S&W as handgun ammunition].)

Under the legal standards articulated above, if the Challenged Definition can lawfully be applied to any ammunition, then sections 12060, 12061, and 12318 cannot be struck down on grounds of facial vagueness. Plaintiffs' concession that the Challenged Definition has valid applications is, therefore, dispositive of their facial vagueness challenge. (See *Pacific Legal Found.*, 29 Cal.3d at pp. 180-181 [holding that the plaintiff must establish that the challenged statute is invalid in all applications].)

The mere *possibility* that the Challenged Definition might be misapplied to cartridges of ammunition that are not "principally for use" in a handgun is an insufficient platform upon which to base a facial vagueness challenge. Any purported uncertainty about the challenged law must be "'cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 578 [citations omitted].)

b. Plaintiffs' ammunition expert is materially biased and his testimony and opinions should be regarded with skepticism.

The purpose of expert witness testimony in a vagueness challenge is to help the Court frame the legal questions, not to opine on the ultimate legal question in the case.[5] Here, that means helping to define terms of art and perhaps offering opinions on which cartridges of

[5] Opinion evidence about the meaning of a statute from an expert has long been held inadmissible. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46; see also *In re Brian J.* (2007) 150 Cal.App.4th 97, 120-121.) Whether a statute is so vague and ambiguous that it offends due process, and how its terms should be interpreted, are legal questions for the Court to decide, and the opinions of experts are of little to no relevance. (*Torres*, 33 Cal.App.4th at p. 46; see also *County of Yolo v. Los Rios Community Coll. Dist.* (1992) 5 Cal.App.4th 1242, 1257 [refusing to defer to opinions of county clerk and economics expert regarding meaning of statutory terms because statutory interpretation is the court's responsibility].)

ammunition are used more often in a handgun than a rifle. The ultimate decision on the meaning and vagueness of the statute, however, lie exclusively in the Court's discretion.

Plaintiffs' ammunition expert, Stephen Helsley, is indisputably possessed of vast amounts of knowledge and expertise relating to ammunition derived from years of studying firearms and working in law enforcement. However, it became apparent during Mr. Helsley's deposition that he is biased against gun control efforts in general, and this handgun ammunition law in particular. Mr. Helsley is volunteering his time on this case for Plaintiffs and is on call for the law firm representing them whenever they need his testimony. (State's Evidence, Exh. "D," Helsley Depo., pp. 15:1-8; 60:9-19.) He also spent seven years as the National Rifle Association's lobbyist in California. (Helsley Decl. in support of MSJ, ¶ 14.) During that time, he often was quoted in the press commenting negatively on legislative gun control efforts. (State's Compendium of Evidence, Exh. "D," Helsley Depo., pp. 133:18-135:7; 138:24-142:21 & Exhs. 6-8 thereto.)

But Mr. Helsley's partiality was brought into starkest relief when he was questioned about why he refused to help Senator Wright come up with a list of handgun ammunition for Assembly Bill 2358 and responded: "Because I'm not in the business of aiding gun control efforts, particularly ill-conceived ones." (Helsley Depo., p. 91:15- 91:25.)

These facts are mentioned not to impugn Mr. Helsley's character or integrity, but to make the Court aware that his testimony and opinions are colored by his viewpoints and thus are unlikely to help the Court frame the legal issues here in a neutral fashion.[6]

[6] Mr. Helsley's bias also is evinced by his evasion of questions concerning how ammunition is principally used in *California*, and of hypotheticals narrowing the scope of the inquiry from his "worldwide through time" perspective. Although he ultimately identified seven cartridges of ammunition as handgun ammunition, this number likely would have increased had he been willing to focus on California, the jurisdiction where the challenged statutes apply. For example, when Mr. Helsley was asked whether he considered 9mm Luger to be a handgun cartridge, he said no, largely because of its use submachine guns in other countries. (State's Evidence, Exh. "D", Helsley Deposition, pp. 156:8-157:18.) And though he eventually conceded that vanishingly few 9mm long guns were available for sale in California, in response to a hypothetical involving civilian use of 9mm Luger ammunition in California, he could not respond. (*Id.* at pp. 180:13-181:21.) Similarly, Mr. Helsley's opinion that the .380 ACP cartridge is not a handgun cartridge was based solely on its use in submachine guns outside the United States; he testified that he knew of no long guns that chambered that cartridge available in California. (*Id.* at pp. 161:15-18; 168:5-20.)

2. Even without Plaintiffs' admissions, the Challenged Definition passes constitutional muster.

Plaintiffs assert that the Challenged Definition is facially vague because they are unable to interpret its "principally for use" language. But substantially similar language has been upheld in cases construing drug paraphernalia and firearms statutes. (See, e.g., *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 500-502 (1982) ["designed for" and "marketed primarily for use" drug law not facially vague"]); *Posters 'N' Things, Ltd. v. United States* (1994) 511 U.S. 513, 520-521 ["primarily intended . . . for use" drug paraphernalia law not unconstitutionally vague where language is "to be understood objectively and refers generally to an item's likely use"]; *Richmond Boro Gun Club, Inc. v. City of New York* (2d Cir. 1996) 97 F.3d 681, 684-686 ["designed for" assault weapon law not facially vague where "persons have plain notice of the applicability of the law to [a] core group of weapons"].) The common theme in these cases is that, where the statutes had at least some valid applications, courts have refused to invalidate statutes on their face. (See, e.g., *Village of Hoffman Estates*, 455 U.S. at pp. 495 n.7, 502 [language of the challenged ordinance was "sufficiently clear to cover at least some of the items that [Plaintiff] sold," [a plaintiff] "must prove that . . . no standard of conduct is specified at all"].)

Here, the Challenged Definition provides a standard of conduct and the fact that borderline cases might arise if the Challenged Definition is ever improperly applied does not render it unconstitutionally vague on its face.[7]

Plaintiffs cite *Harrott v. County of Kings* (2001) 25 Cal.4th 1138 for the proposition that only an "official list" of handgun ammunition will cure the purported vagueness they

[7] Notably, numerous provisions in the California Penal Code, along with hundreds of other California statutes, use words like 'principally,' 'chiefly,' and 'primarily,' to define prohibited conduct, all without giving rise to vagueness concerns of the sort alleged by Plaintiffs here. (See, e.g., Pen. Code, § 453(b)(2) ["no device commercially manufactured primarily for the purpose of illumination shall be deemed to be an incendiary device"]; Pen. Code, § 635 [criminalizing manufacture of "any device which is primarily or exclusively designed or intended for eavesdropping"]; Pen. Code, § 12022.2 [criminalizing possession of ammunition "designed primarily to penetrate metal or armor"].)

identify. *Harrott* does not support Plaintiffs' position. In that case, the Supreme Court merely held that a trial court lacked the authority to declare a firearm to be a prohibited assault weapon under the Assault Weapons Control Act of 1989 (AWCA) when the firearm was not listed as a prohibited weapon in Penal Code section 12276 or the Code of Regulations. (*Id.* at p. 1151.) An amendment to the AWCA prohibited weapons with only "minor differences" from some of those listed, but the Court interpreted this amendment to mean that weapons with minor differences from listed weapons could be added by the Attorney General to the list of prohibited weapons through a procedure set forth in another provision of the AWCA. The Court reasoned that persons of ordinary intelligence could not be expected to know whether the differences between their firearms and those specifically listed in the AWCA were "minor" within the meaning of the statute. (*Id.* at pp. 1149-1153.) The Court explained that the AWCA did not define assault weapons "generically," but provided a list of firearms that was meant to be a "current and completely inclusive" list of those firearms deemed "assault weapons." Thus, pursuant to the AWCA's own structure, a defendant could not violate the statute by possessing a weapon not included on the all-inclusive list. (*Id.* at pp. 1144-1145.) AB962 is not structured like the AWCA, so *Harrott* provides no useful analogy.[8]

Finally, it is important to remember that the challenged statutes do not exist in isolation. They apply chiefly to ammunition vendors, who generally have superior knowledge as to which calibers and cartridges of ammunition are used more often in handguns than in rifles. The California Supreme Court has held that "where the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of

[8] Plaintiffs also rely heavily on an order granting partial summary judgment in a case decided in the Tennessee Chancery Court. (Motion, pp. 8-9, citing *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284.) Even if the State could decode that court's ruling and rationale from the myriad of documents submitted by Plaintiffs, the order has no precedential value and cannot be given such through the vehicle of judicial notice. (See State's Objections to Plaintiffs' Request for Judicial Notice.) Because the material is irrelevant to any material issue in this case, the Court should decline the judicial notice request and disregard the material.

members of the particular vocation or profession to which the statute applies." (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 765, *citing Perea v. Fales* (1974) 39 Cal.App.3d 939, 942 [standard of "conduct unbecoming an officer" was not specified in statute, but required certainty may be provided by the common knowledge of police officers].) Plaintiffs should be held to a standard of knowledge that the average ammunition vendor would have, not a person who knows little about firearms or ammunition.[9]

3. Plaintiffs do not even attempt to establish, as they must, that the definition of "handgun ammunition" is vague in all of its applications.

Plaintiffs aver that sections 12060, 12061 and 12318 are facially vague because they incorporate Penal Code section 12323(a)'s definition of "handgun ammunition." Curiously, however, Plaintiffs have not challenged the definitional statute itself – section 12323(a) –a statute that has been in effect without significant change since 1982. Plaintiffs likewise fail to explain how the Legislature's use of the phrase "handgun ammunition" is invalid in sections 12316, 12320, 12321, 12322 of the Penal Code (which deal with armor piercing handgun ammunition) or address what effect this Court's ruling would have on those statutes. Such issues should not be left to others to address. If Plaintiffs believe that the Challenged Definition is fatally vague on its face, it is their burden to explain why it cannot work in any context. They fail even to try. What is more, they admit that the definition has a valid application in section 12316.

In briefing their preliminary injunction motion, Plaintiffs offered the following rationale for why they were not challenging the definitional source statute - Penal Code section 12323(a):

> 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

[9] Although the plaintiff ammunition vendors and three non-party ammunition vendors assert in the most conclusory of terms that they do not know what cartridges of ammunition are handgun ammunition (see State's Objections to Evidence Nos. 1, 9-17, 18-26, 27-37, 87-95, 105-113, & 114-122), these assertions are belied by their own websites, which classify ammunition for sale as "handgun ammunition" and "rifle ammunition." (See State's Request for Judicial Notice, Exhs. "D," "F," "G," "H," & "I.")

> include additional language to allow individuals to determine whether ammunition is "handgun ammunition." For example, Penal Code section 12316[(a)(1)(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."

(State's Request for Judicial Notice ["RFJN"], Exh. "C," p. 9, fn. 10.) Plaintiffs' effort to distinguish the use of "handgun ammunition" in section 12316 from the references in the sections 12060, 12061, and 12318 is unpersuasive. The "clarifying language" Plaintiffs identify has no effect on the Legislature's basic definition of handgun ammunition in section 12323(a). Moreover, section 12316 was revised as part of the *same Assembly Bill* as sections 12060, 12061, and 12318.[10] (See A. B. 962, 2009-2010 Sess. (Cal. 2009).) For purposes of Plaintiffs' facial challenge, the legal question before the Court is binary – section 12323(a)'s definition of handgun ammunition either is or is not vague – Plaintiffs cannot have it both ways.

Given Plaintiffs' admission that the definition has a valid application in section 12316(a)(1)(B), and their failure to address why the Challenged Definition is not vague in other contexts, Plaintiffs tacitly concede that they cannot meet their burden to show that the Challenged Definition "is invalid in all of its applications."

C. There Is No Evidence that the State Will Enforce the Challenged Statutes Arbitrarily; Instead, the Evidence Shows that the State Is Taking a Measured Approach to Enforcement.

1. Plaintiffs offer no evidence of arbitrary enforcement.

Plaintiffs assert that the Challenged Definition invites arbitrary and discriminatory enforcement, and that without an "official list" of handgun ammunition, law enforcement

[10] "[I]it is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (*Stillwell v. State Bar* (1946) 29 Cal.2d 119, 123.)

officers will be unable to determine what ammunition is principally for use in a handgun. (Motion, pp. 12:8-15:16.) In their Complaint, Plaintiffs likewise allege that "because of the failure to clearly specify which calibers of ammunition should be regulated by the Challenged Provisions, law enforcement officials have unbridled discretion to interpret and enforce the Challenged Provisions." (Complaint, ¶ 86.) Plaintiffs provide no admissible evidence on any of these allegations in their motion, and instead base the allegations on the conclusory assertions of two law enforcement officers, one of whom admitted that he made *no attempt* to research or otherwise determine what ammunition might be covered by the Challenged Definition, and that he leaves enforcement of firearms laws at gun dealers and ammunition vendors to the California Department of Justice. (State Supp. UMF No. 6-7 & 13-14; see also State's Objections to Evidence Nos. 1-8, 80-86.)

2. The State will enforce the challenged statutes objectively, notwithstanding Plaintiffs' spurious attack on the State ammunition expert's methodology.

Contrary to Plaintiffs assertions, enforcement of the challenged statutes will not in any sense be arbitrary or discriminatory. Indeed, before enforcing the statutes, law enforcement will need probable cause to show that the ammunition at issue is used principally in pistols or revolvers consistent with the terms of the Challenged Definition. The challenged laws themselves thus provide the enforcement standard and a check and balance on law enforcement every time they wish to apply the challenged statutes.

Plaintiffs spend a great deal of time attacking and mischaracterizing the methodology that the State's firearms and ammunition expert, Blake Graham, used in identifying the calibers and cartridges that the State considers to be handgun ammunition within the meaning of the Challenged Definition. The record is clear that Mr. Graham used his training, research, and experience, and the expertise derived therefrom, to compile a short list of handgun calibers and, once Plaintiffs clarified that they were interested in specific *cartridges* of ammunition, the State compiled a list of handgun cartridges. (Graham Declaration, ¶¶ 10-17.)

Although the DOJ's Dealer Record of Sale and Automated Firearm System databases were used as a *starting point* to show which caliber handguns have been most common in terms of handgun sales over the past five years, Mr. Graham applied his experience and expertise to the list to narrow it to those cartridges and calibers that are principally used in pistols and revolvers. (Decl. of B. Graham, ¶ 14.) He was careful to exclude from his analysis and opinions any calibers and cartridges of ammunition (like .22 caliber) that were clouded by "dual use" issues, meaning that the ammunition might be used just as often in handguns as rifles. (*Id.*) Although Plaintiffs seek to leverage the State's current uncertainty about a few dual use cartridges for their own ends, it merely demonstrates that *the State is taking a careful, measured approach to enforcement* to avoid enforcing the statutes at issue as to cartridges that are not used principally in pistols or revolvers.[11]

Although Plaintiffs might not agree that all of the cartridges that the State considers to be handgun ammunition within the meaning of the Challenged Definition (though they are in harmony with many), that disagreement cannot be resolved in a facial challenge. Instead, it can only be addressed in a ripe as applied challenge after someone threatens to apply the Challenged Definition to cartridges that are demonstrably not "principally for use" in a handgun.

Plaintiffs cite a number of cases in which laws were struck down because they lacked sufficient clarity and left basic policymaking decisions to police officers. These cases, however, are materially distinguishable insofar as they truly gave officers unfettered discretion to enforce the statutes at issue. (See *City of Chicago v. Morales* (1999) 527 U.S. 41, 47 [loitering ordinance that provided "absolute discretion" to officers was "inherently subjective because its application depends on whether some purpose is 'apparent' to the

[11] Plaintiffs also seek to undermine Mr. Graham's conclusions based upon the fact that he purportedly did not take rifles into account. That assertion is patently false. As part of his research into ammunition that is used principally in handguns, he considered the number of rifles, submachine, and other long guns that chamber the cartridges on the State's list of handgun ammunition. (Decl. of B. Graham, ¶¶ 15-17.) Plaintiffs studiously avoided questioning Mr. Graham about that aspect of his research, however, even though he referred repeatedly to the rifle comparison. (See State's Compendium of Evidence, Exh. "C," B. Graham Deposition, pp. 257:9-17; 271:22-272:7; 272:18-273:24, 276:6-277:1; 293:13-294:11, & 358:14-22.)

officer on the scene"]); *Kolender v. Lawson* (1983) 461 U.S. 352, 360-61 [ordinance which gave "full discretion" to police "to determine whether the suspect has provided a 'credible and reliable' identification" was unconstitutionally vague].) Here, law enforcement's discretion is guided by statutory definitions and bound by the parameters of Penal Code sections 12323(a), i.e., the ammunition must be "principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person."

In contrast to cases in which officers were left to subjectively decide whether someone was "loitering," here they must have probable cause to believe that ammunition is principally for use in a handgun before taking enforcement actions.

D. The Only Purported Confusion that Exists Concerning Handgun Ammunition has been Fomented by Plaintiffs.

Plaintiffs spend a great deal of time in a rhetorical debate over the difference between calibers and cartridges of ammunition (Motion, pp. 17-18, 21-22), but this distinction has no bearing on any material issue in this case. The State does not dispute that "caliber" is merely a starting point for any discussion of ammunition and that "cartridge" is a more precise way of identifying ammunition. Plaintiffs are merely attempting to sow confusion where none exists. If anything, Plaintiffs themselves are to blame for the caliber/cartridge confusion because of their inartfully drafted complaint and discovery requests.

1. Plaintiffs' special interrogatories were vague and imprecise, which forced the State to construe their terms in a reasonable manner consistent with the allegations in the Complaint.

In their Complaint, Plaintiffs refer exclusively to the word "caliber" to define the purported vagueness of the Challenged Definition. Indeed, in almost every paragraph of the pleading, Plaintiffs aver that the Challenged Definition is vague because it "fails to provide notice of which ***calibers*** of ammunition" are regulated by the challenged statutes, or confers too much discretion on law enforcement officials because "of the failure to clearly specify which ***calibers*** of ammunition should be regulated." (See, e.g., Complaint, ¶¶ 2, 3, 5, 6, 8, 9, 11, 12, 14-17, 47-56, 58, 63-64, 73-84, 86.) The word "cartridge" appears nowhere in the Complaint.

In their Motion, however, Plaintiffs take the State to task for identifying "calibers" of ammunition in its response to one interrogatory. That interrogatory asked the State to:

> List all ***types*** of ammunition DEFENDANTS consider "handgun ammunition" for purposes of California Penal Code sections 12060, 12061, and 12318.

The State objected to the interrogatory as compound, overbroad, and vague as to the word "types," but rather than serve no response, it responded in good faith in a manner that was consistent with the Complaint's exclusive reference to calibers:

> 3. The term "types" is vague and ambiguous. The State is uncertain whether Plaintiffs are referring to calibers, rimfire, centerfire or other "types" of ammunition. *The State will construe the word "types" to refer to "calibers" throughout these responses.*
>
> Without waiving any of the foregoing general or specific objections, the State responds as follows: The State considers the following calibers to be "handgun ammunition" within the meaning of California Penal Code sections 12060, 12061, and 12318: .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, .32.

(See Exhibit 55 to Plaintiffs' Evidence in Support of Motion [italics added].)

In light of Plaintiffs' exclusive use of the word "calibers," and the vagueness of the question, the State's response was more than adequate. And of course, once Plaintiffs clarified that they were interested in *cartridges* not calibers, the State identified the cartridges it considered to be handgun ammunition under the Challenged Definition. It therefore is disingenuous for Plaintiffs to attempt to muddle the caliber/cartridge distinction and assert that the resulting "confusion" will somehow lead to arbitrary enforcement.

2. Plaintiffs' comparison of AB2358 with the State's interrogatory response is misleading and irrelevant to any material issue in the case.

Plaintiffs devote two pages of their motion to a discussion of the differences between the handgun ammunition calibers listed in AB2358 with those identified by the State in response to the vague interrogatory Plaintiffs served in this case. (Motion, pp. 22:9-24:5.) They punctuate this argument with rhetorical questions and conclude that the "confusion speaks for itself" and ask the Court to invalidate the challenged statutes on their face.

There is, of course, a simple explanation for the differences in the two lists. AB 2358 which, as explained below, is not legislative history, proposed to *delete the "principally for*

use" standard in Penal Code section 12323(a). That left lawmakers free to fashion a list of handgun ammunition that was not limited by the existing standard of "ammunition that is principally for use" in a pistol or revolver. Plaintiffs' effort to find a sinister explanation for the longer list of handgun ammunition in AB2358 begins and ends there.

IV. THE "LEGISLATIVE HISTORY" OFFERED BY PLAINTIFFS IS IRRELEVANT.

A. There is No Reason to Resort to Legislative History in this Case, and Even if There Were, Assembly Bills 2358 and 1276 are Neither Legislative History, Nor Otherwise Relevant to the Court's Analysis.

When a statute is not susceptible of more than one interpretation, resort to legislative history is unnecessary and improper. Generally, the analysis of statutory language ends once a court has determined that the words used are clear. (*Hughes v. Board of Architectural Exam'rs* (1998) 17 Cal.4th 763, 775 [judicial construction is unnecessary where statutory language is unambiguous and has only one reasonable construction]; *In re Steele* (2004) 32 Cal.4th 682, 694 ["Although legislative history often can help interpret an ambiguous statute, it cannot change the plain meaning of clear language"].)

Here, the State agrees with Plaintiffs' construction of the Challenged Definition as ammunition that is used "chiefly," "primarily," or "more often" in a handgun than in a rifle. (Motion, pp. 6:16 - 7:3.) Hence, there is no need to resort to the legislative history of AB962 or the Challenged Definition for guidance which, in any case, does not shed any light on the Challenged Definition, as Plaintiffs concede. (Motion, p. 11:2.) The purported history that Plaintiffs do cobble together from unrelated bills is *not* legislative history and does not support a finding of constitutional vagueness. It is, at best, shadowy hearsay and innuendo intended to bolster Plaintiffs' fragile vagueness theory and should be disregarded.

B. AB 2358 Proposed to Delete Penal Code Section 12323's "Principally for Use" Standard to Expand the Scope of Covered Ammunition, So Any Comparison with AB962 is Meaningless.

Plaintiffs spill much ink discussing the fact that the sponsor of AB 962 introduced legislation last year that would have replaced the "principally for use" language in section 12323(a) with a list of ammunition calibers. (Motion, pp. 11:17-12:7; 22:9-24:5.) Plaintiffs even attempt to rely upon a hearsay summary of the sponsor's alleged testimony on the bill,

on which they fail to provide evidence. (Motion, p. 11:26-12:2.) The Court should decline to admit or consider this irrelevant bit of "legislative history." (See State's Objections to Request for Judicial Notice; State's Objections to Evidence Nos. 123-125.) Again, nothing in the true legislative history of AB 962 (or the 1982 bill under which Penal Code section 12323 was adopted) speaks to the intent of the Legislature when they adopted the definition of handgun ammunition, so Plaintiffs' reliance on AB2358 is a red herring.

Even if Plaintiffs' summary of Assembly Member De Leon's testimony were accurate or admissible, "[c]omments made by an individual legislator . . . about unpassed legislation have little value as evidence of legislative intent behind the statute the legislation sought to amend." (*California Highway Patrol v. Superior Court* (2006) 135 Cal.App.4th 488, 506 fn.13.) Moreover, even if a legislator opined that an existing statute was vague, which did not occur here, his or her remark would not be probative of whether the statutes were vague in a *constitutional* sense. That is a legal question for the Court to decide. (See discussion in footnote 5, supra; *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 402, fn. 11 ["in construing a statute, [courts] do not consider the motives or understandings of either its author or the individual legislators who voted for it"].)[12] In sum, Plaintiffs' discussion of AB2358 is no more than inflammatory rhetoric.

C. AB1276 Is a Failed 1994 Measure that Legally, and Logically, Has No Bearing on Whether the Challenged Provisions are Vague in a Constitutional Sense.

Plaintiffs also attempt to divine legislative intent from a report on an unpassed piece of 1994 legislation wholly *unrelated* to AB962. Putting aside the general rule that unpassed bills have little value as evidence of legislative intent (*Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n* (1987) 43 Cal.3d 1379, 1396), a report on legislation considered *sixteen*

[12] Plaintiffs' cite *Carter v. California Dep't of Veteran's Affairs* (2006) 38 Cal.4th 914 for the proposition that where an author's statements are part of the debate on legislation and are communicated to other legislators, they may be considered evidence of legislative intent. That is not the issue. Plaintiffs seek to use Assembly Member De Leon's hearsay statement *not* as legislative history (meaning history of what the legislature intended "principally for use in a handgun" to mean when they enacted the statute in 1982), but instead to prove the truth of the matter asserted, i.e., that the Challenged Definition is vague. That is not a proper use of legislative history, even if the statement at issue qualified as such.

years ago is simply not relevant to the Challenged Definition's interpretation or the legal questions before the Court. (See State's Objections to Request for Judicial Notice, State's Objections to Evidence No. 126) Unless the report was considered by the legislators when voting on AB962, it is not a proper indicator of legislative intent. (See *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1340-1341 [refusing to grant judicial notice of letter written by consultant to State Bar taxation section which sponsored the bill, in the absence of a showing that the "views expressed therein were presented to the legislators who voted on the bill"].)

Were the Court nevertheless inclined to admit the AB1276 committee analysis, a statement that "it may be very difficult for dealers to determine which ammunition is 'handgun ammunition'" is a far cry from a finding of constitutional vagueness.

V. HERB BAUER SPORTING GOODS' AS-APPLIED VAGUENESS CHALLENGE IS UNRIPE AND JUDGMENT SHOULD BE ENTERED IN FAVOR OF THE STATE AS A MATTER OF LAW.

A. Legal Standard.

In an as-applied challenge, the plaintiff must plead and prove specific facts giving rise to the alleged constitutional violation. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) To prevail, the plaintiff must establish the particular application of the statute violates the plaintiff's constitutional rights. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404-405; *Coffman Specialties, Inc. v. Department of Transp.* (2009) 176 Cal.App.4th 1135, 1144-1145.) Plaintiff Herb Bauer Sporting Goods cannot meet this burden, and the Court should enter judgment in favor of the State on the second cause of action.

B. Because Subdivisions (a)(1) and (a)(2) of Section 12061 Have Not Been Applied Against Herb Bauer Sporting Goods, and There Have Been No Enforcement Threats, the Second Cause of Action is Unripe.

Plaintiff Herb Bauer Sporting Goods, Inc. alleges in the second cause of action that "subparagraphs (1) and (2) of Penal Code section 12061(a)[13] are void for vagueness as

[13] These subdivisions restrict individuals convicted of certain crimes from handling handgun ammunition in the course of their employment, and prohibit display of handgun ammunition in a manner accessible to a purchaser.

applied to [it] because these provisions fail to provide notice . . . regarding which calibers of ammunition are 'handgun ammunition' as defined in Penal Code section 12060(b) and 12323(a), and because such vagueness encourages arbitrary and discriminatory enforcement of these laws against Plaintiff." (Complaint, ¶100.) But in its Motion, Herb Bauer Sporting Goods all but concedes the infirmity of this claim, offering just a single paragraph of argument and *no evidence* in its defense.[14] (Motion, p. 25, ll. 1-10.)

The second cause of action is not ripe for adjudication. A viable declaratory relief action must present an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) "The concept of justiciability involves the intertwined criteria of ripeness and standing." (*California Water & Tel. Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 23.) "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." (*NRA v. Magaw* (6th Cir. 1997) 132 F.3d 272, 284 [pre-enforcement challenge to gun control law unripe].)

For a case to be ripe, the plaintiff must suffer direct and actual injury from the challenged portions of the allegedly unconstitutional law. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 736-737 ["questions as to the constitutionality of a statute [must be] necessary to the determination of a *real and vital controversy between the litigants in the particular case before it*"] [italics in original].) Mere dissatisfaction with legislative policy does not present a justiciable controversy. (See, e.g., *Zetterberg v. State Dep't of Pub. Health* (1974) 43 Cal.App.3d 657, 662 [no standing to challenge state statute where plaintiff has not suffered direct and actual injury]; see also *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 64 [the mere belief that state law is unconstitutional does not give rise to a ripe controversy].) In short, the legal issues must be framed with sufficient concreteness and immediacy to allow the Court to render a conclusive and definitive judgment, rather than an advisory opinion based on hypothetical facts or speculative future

[14] The only "fact" offered in support of the as applied challenge is that defendant DOJ issued an information bulletin in December 2009 that summarizes four new California firearms laws. The bulletin did not threaten enforcement against anyone, let alone Plaintiffs.

events. (*Pacific Legal Found. v. California Coastal Comm'n* (1982) 33 Cal.3d 158, 170-173.)

Here, the Court cannot know (and may not speculate about) how subparagraphs (1) and (2) of section 12061(a) might be applied to Herb Bauer Sporting Goods, what kinds of controversies may arise, or what parties might be involved. In fact, Barry Bauer, who submitted a declaration on behalf of plaintiff Herb Bauer Sporting Goods, fails to identify even a fear of prosecution under section 12061(a)(1) or (a)(2) and focuses instead on subparagraph (a)(3), which is not even at issue in the second cause of action:

> Because I do not know what ammunition is "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318, I fear that I will be prosecuted for unknowingly violating those statutes and will have my federal firearms license and California firearms dealers permit revoked. For example, I fear prosecution and license revocation if I do not record pursuant to Penal Code section 12061(a)(3).

(Declaration of Barry Bauer, ¶ 11; see also State's Objections to Evidence Nos. 15-17.) Although plaintiff Herb Bauer Sporting Goods claims to harbor a vague fear of prosecution, there is no evidence of a threat of enforcement or prosecution by the State or any other law enforcement authority. This was confirmed in deposition when Mr. Bauer conceded that his fears of prosecution had no basis in fact as there have been no threats of prosecution or enforcement by any law enforcement agency. (State's Supplemental UMF No. 5 & 12.)

At most, the second cause of action present a difference of opinion predicated on conclusory allegations, not a justiciable controversy. There is no evidence before the Court to suggest that Herb Bauer Sporting Goods' claims are in any respect ripe for adjudication. The second cause of action for as-applied vagueness "is insufficiently concrete and fails to touch the legal relations of parties with actual adverse legal interests." (*City of Santa Monica*, 126 Cal.App.4th at p. 64.) Accordingly, the Court should enter judgment for the State on the second cause of action on the ground that the claim is unripe.[15]

[15] In a vagueness challenge to AB962 substantially identical to this one, the United States District Court for the Eastern District of California recently dismissed as unripe plaintiff State (continued...)

VI. THE THIRD CAUSE OF ACTION SHOULD BE DISMISSED.

Plaintiffs have abandoned their third cause of action for a writ of mandamus. The Court should, therefore, dismiss that claim with prejudice and enter judgment in favor of the State on this cause of action.

CONCLUSION

The day may come when an actual threat of prosecution will present a court with a justiciable vagueness question relating to the definition of handgun ammunition under AB962. This, however, is not that case. If circumstances change, or enforcement of the challenged statutes gives rise to a ripe vagueness concern, then Plaintiffs can seek appropriate relief. Until then, the State respectfully requests that the Court deny this Motion and enter judgment as a matter of law against Plaintiffs on the three causes of action alleged in the Complaint.

Dated: January 3, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General
KIMBERLY GRAHAM
Deputy Attorney General

PETER A. KRAUSE
Deputy Attorney General
Attorneys for Defendants and Respondents State of California, Edmund G. Brown Jr., and the California Department of Justice

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(...continued)
Ammunition, Inc.'s as applied vagueness challenge to AB962 in general, and the definition of handgun ammunition in particular. (See State's Request for Judicial Notice, Exhs. "A"-"B.".)

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Sheriff Clay Parker, et al. v. The State of California**
No.: **10CECG02116**

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, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On January 3, 2011, I served the attached
DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF

DECLARATION OF KIMBERLY J. GRAHAM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF

DECLARATION OF PETER A. KRAUSE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF

DECLARATION OF BLAKE GRAHAM IN SUPPORT OF THE STATE'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION/TRIAL BRIEF

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION/TRIAL BRIEF; DECLARATION OF PETER A. KRAUSE IN SUPPORT THEREOF

DEFENDANTS' EVIDENCE IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF

(1) DEFENDANTS' RESPONSE TO SEPARATE STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION / TRIAL BRIEF; and (2) SUPPLEMENTAL STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION

(1) DEFENDANTS' OBJECTIONS TO EVIDENCE AND DECLARATIONS SUBMITTED IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION/TRIAL BRIEF; (2) [PROPOSED] ORDER THEREON

(1) DEFENDANTS' OBJECTIONS TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION/TRIAL BRIEF; (2) [PROPOSED] ORDER THEREON

by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight courier service, addressed as follows:

C.D. Michel
Clint B. Monfort
Sean A. Brady
Michel & Associates, P.C.
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802

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 January 3, 2011, at Sacramento, California.

Brenda Apodaca
Declarant

Brenda Apodaca
Signature