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IN THE 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 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL** Date: January 18, 2011 Time: 8:30 a.m. Location: Dept. 402 Judge: Hon. Jeff Hamilton Trial Date: January 18, 2011 Date Action Filed: June 17, 2010

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I. THE CHALLENGED PROVISIONS REQUIRE A HEIGHTENED STANDARD OF CLARITY THAT DEFENDANTS EFFECTIVELY CONCEDE CANNOT BE MET

The Challenged Provisions completely prohibit one of the most common methods in which an essential component of a functional firearm is purchased. They impose criminal penalties for violations and are devoid of any limiting scienter requirement in the majority of these provisions.

And, where a law "implicates" or "relates to" constitutionally protected conduct, a facial vagueness challenger may prevail *even if there is some situation* to which the law could validly be applied. (See *Am. Acad. of Pediatrics* (1997)16 Cal.4th 307, 342-348; *Village of Hoffman Estates v. Flipside* (1982) 455 U.S. 489, 494-495; *Richmond Boro Gun Club, Inc. v. New York* (1996) 97 F.3d 681, 684.) Further, when a "statute imposes criminal penalties, the standard of certainty is higher." (*Kolender v. Lawson* (1983) 461 U.S. 352, 358 fn. 8.) Because the Challenged Provisions implicate Second Amendment rights *and* levy criminal sanctions, they should be overturned if they are vague in the "generality of cases." (See *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502.)

As the state is unable to provide *any argument* as to how the Challenged Provisions would pass constitutional muster under a heightened vagueness standard, Defendants seek to avoid invocation of a higher standard by claiming Plaintiffs "did not plead" any constitutional protections in the Complaint. But as Defendants are no doubt aware, Plaintiffs are not required to spell out every legal standard or test that may be applied by the Court in evaluating their claims.[1] In any event, Plaintiffs' Complaint plainly states that the Second Amendment necessarily protects the right to buy and transact in ammunition for this very purpose.[2] Defendants' only argument against the application of heightened scrutiny is offered in a footnote, suggesting that constitutional conduct is not at issue because the Challenged Provisions were "intended to prevent felons from purchasing ammunition" and because the Supreme Court stated the right to keep and bear arms does not cast doubt on "prohibitions on the possession of firearms by felons." But this argument misses the point twofold. First, the Challenged Provisions do not merely restrict felons and other prohibited persons. The Challenged Provisions

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[1] As California code pleading has moved toward federal notice pleading, the important thing is that the proponent be informed of the contestant's standing. (*Estate of Lind* (1989) 209 Cal.App.3d 1424, 1434.)

[2] A principle founded in common sense and supported by a case recently cited with approval by the Supreme Court in *Heller v. District of Columbia.* (*Andrews v. State* (1871) 50 Tenn.165, 178.)

impose *a blanket prohibition* on *all internet and mail order sales* of "handgun ammunition" by anyone, and require thumb prints be taken for *every* purchase of "handgun ammunition" by *all citizens*. (Pen. Code, §§ 12061, 12318.) Such prohibitions and regulations at the very least "relate to" or "implicate" the right to keep and bear arms. And that is all it takes to trigger a heightened standard.

Defendants would have a heightened standard invoked only when the Second Amendment is actually *violated*. But that approach would defeat the purpose of a higher standard, as challengers would simply bring suit under that violated right. Regardless of whether they directly violate any Second Amendment rights, the Challenged Provisions at least "relate to" or "implicate" those rights.

Finally, Defendants summarily conclude that heightened vagueness standards are limited to the First Amendment and "there is no authority for applying" it in a Second Amendment context. (Defs.' Oppn. at p. 3, fn. 2 [citing *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679].) But the very case Defendants' cite recognizes the standard's application outside of the First Amendment. (*Sanchez v. City of Modesto*, *supra*, 145 Cal. App.4th at p. 679.) And the United States and California Supreme Courts have applied the heightened standard in multiple cases involving the rights to life, to choose whether to bear children, to travel, and to equal protection under the law.[3] At the time *Sanchez* was decided, fundamental rights were *not yet guaranteed* by the Second Amendment. So it is hardly surprising that examples of successful facial challenges implicating Second Amendment rights and triggering a heightened standard are hard to find. Nonetheless, the United States Supreme Court's rulings in *District of Columbia v. Heller* (2008) 128 S.Ct. 2783 and *McDonald v. Chicago* (2010) 130 S.Ct. 3020 now confirm that Second Amendment rights are indeed fundamental to our system of ordered liberty, and should be afforded similar protections as First Amendment rights. This notion is no different in the vagueness context. No constitutional right is "less 'fundamental' than" others, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.* (1982) 454 U.S. 464, 484, and the Supreme Court has emphatically rejected attempts to deprive the Second Amendment of the dignity afforded other fundamental rights. (*District of Columbia v. Heller*, *supra*,

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[3] See e.g., *Kolender v. Lawson* (1983) 461 U.S. 352 [right to "freedom of movement"]; *Colautti v. Franklin* (1979) 439 U.S. 379 [right to abortion]; *Roe v. Wade* (1973) 410 U.S. 113, 164 [right to abortion]; *People v. Barksdale* (1972) 8 Cal.3d 320, [rights to life and to choose whether to bear children]; *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 543-545 [right to equal protection of the law].

128 S.Ct. at p. 2821.) *Heller* explained the "Second Amendment is no different" from the First Amendment in that it was the product of interest-balancing by the People themselves, *id.* at p. 2816, implying the structure of First Amendment doctrine should inform Second Amendment analyses. Several post-*Heller* decisions expressly apply First Amendment analysis to Second Amendment rights;[4] thus, the heightened vagueness standard should apply equally to First and Second Amendment rights.

In light of the confusion over what ammunition is "handgun ammunition" and the likelihood of arbitrary enforcement, the Challenged Provisions fail to satisfy *any* constitutional vagueness standard, let alone the heightened standard required of statutes that relate to fundamental rights.

II. THE CHALLENGED PROVISIONS ARE VAGUE UNDER *ANY* STANDARD

The Challenged Provisions are vague in all applications, because *no one* can determine whether any given ammunition is actually chambered more often in a handgun than a rifle. And this, Defendants acknowledge, is the controlling "standard."

The confusion surrounding the Challenged Provisions is demonstrated by Defendants' own "expert's" opinion of what constitutes "handgun ammunition,"[5] which has continuously changed and defensively adapted as this case progressed. (Pls.' Evid. Supp. Reply, Ex. B.) Defendants' own "expert's" inability to uniformly apply the standard proves that lay individuals, retailers, and law enforcement cannot – and should not – be expected to. Rather than acknowledge this, Defendants mislead the Court by suggesting that, among them, Plaintiffs' witnesses identify fifteen cartridges used more often in handguns than rifles. (Defs.' Oppn. at p. 6:19-23.) But actually, deponent witnesses' answers varied widely. And several deponents *were not even familiar* with some of the ammunition Defendants once claimed were "commonly understood" to be "handgun ammunition" by all those the

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[4] *United States v. Marzzarella* (3d Cir. Pa. 2010) 614 F.3d 85, 89 n.4, 96-97; *United States v. Huet* (W.D. Pa., Nov. 22, 2010, No. 08-0215) 2010 U.S. Dist. LEXIS 123597, *27-28; *United States v. Chester* (4th Cir. W.Va., Dec. 30, 2010, No. 09-4084) 2010 U.S. App. LEXIS 26508, *24-26.

[5] Attached as "Exhibit B" is a chart prepared by Plaintiffs to assist the Court in viewing the relevant deposition testimony. It illustrates the varied answers provided when asked about various cartridges.

law applied to.[6] In fact, a comparative analysis of Plaintiffs witnesses' answers reveals that only *one cartridge* was *estimated* by all deponents as likely being chambered more often in a handgun based on *their experience*.[7] (Pls.' Stip. Suppl. Sep. State. Mat. Facts [hereafter "Pls.' SUMF"] Nos. 1,3,4; Pls.' Evid. Supp. Reply, Ex. C.)

In any case, this line of inquiry is irrelevant. It relies on the *subjective experience and knowledge* of each deponent polled, and requires them to opine as to which cartridges *they themselves* consider "principally for use in handgun" rather than determining, objectively, which ammunition is actually chambered more often in a handgun, which is what the statute requires. Accordingly, Defendants' attempt to point to one or two cartridges (out of thousands) that three or four people might agree on is not persuasive. Where a statute is vague as to as applied to everyone, as opposed to a particularly situated individual, they lack the constitutionally required clarity.

Defendants rely on *Village of Hoffman Estates v. Flipside* to argue that Plaintiffs must establish the Challenged Provisions are "void in all [their] applications." Aside from not touching upon constitutional rights, as the Challenged Provisions do, the regulation at issue in *Hoffman Estates*, and the appropriate application of the vagueness doctrine, was manifestly different there than it is here. There, the Court applied the "vague in all applications" standard and found that a plaintiff whose conduct clearly falls under that *civil* statute cannot complain of vagueness in the law's application to *someone else*. (*Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495.) There, plaintiffs were required to *obtain a license* if they sold *any* one product falling within the definition at issue. (*Id.* at p.500.) Once they were required to obtain a license, no further vagueness issues arose. Under those circumstances, the Court could find the statute sufficiently certain as to plaintiff if *any* items it sold were regulated.

Such is not the case here. Under the Challenged Provisions, Plaintiffs must determine whether *every single* cartridge they ever purchase or sell is covered. For Plaintiff Herb Bauer Sporting Goods, that is over 150 cartridges. Plaintiffs RTG and Ables Ammo each sell hundreds of cartridges. Because

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[6] Defendants appear to abandon their "common understanding" defense, acknowledging they had to conduct extensive research to determine which ammunition is "handgun ammunition" under the Challenged Provisions. And Defendants cite to no case law that suggests "common understanding" can be based on such research.

[7] For the Court's convenience, attached as "Exhibit C" to the Declaration of Clinton B. Monfort is a chart illustrating the varied answers provided by Plaintiffs when asked about various cartridges.

every transfer exposes them to criminal liability, Plaintiffs must be able to understand the law as it applies to *every cartridge*, not just a select few that Defendants somewhat arbitrarily proclaim to be "handgun ammunition." The best anyone can do is venture a guess according to their own subjective knowledge of what the Challenged Provisions cover. Without knowing objectively which ammunition is actually covered, Plaintiffs can never know if they are conforming their behavior to the law.

Ultimately, a list should have been provided. And the Legislature, at least belatedly, knew it. Just as the Supreme Court noted in voiding the law in *Kolender v. Lawson* (1983) 461 U.S. 352, 361, this "is not a case where further precision in the statutory language is either impossible or impractical." An official list would cure the vagueness issues, and creating one is neither "impossible or impractical" – as evidenced by AB 2358 and DOJ's current cartridge list.[8]

III. GENUINE CONFUSION EXISTS AS TO WHAT AMMUNITION IS REGULATED

Since AB 962 passed, Plaintiffs' counsel turned to the DOJ for clarification. DOJ was as unable as everyone else to provide clarity. (Pls.' SUMF No. 18.) Nonetheless, Defendants now argue the only confusion that exists is by Plaintiffs' doing. (Defs.' Oppn. at pp. 15-17.) Defendants baldly assert ammunition vendors have "superior knowledge" as to what ammunition is chambered more often in a handgun (which they acknowledge is their interpretation of the controlling standard) – and claim that therefore the Challenged Provisions should be upheld. (*Id.* at p. 9.) Defendants then claim that because some online ammunition vendors market some ammunition as "handgun ammunition," they must therefore know what ammunition is fired more often in a handgun. (*Id.* at p. 11, fn.9.)

Defendants' argument is a red herring supported by neither fact or law.

A. Retailers Have *No* "Superior Knowledge" of Whether Ammunition Is *Used* More Often in a Handgun; Regardless, the Challenged Provisions Are *Not Limited* to Firearm Retailers and any Special "Knowledge" They May Have is Irrelevant

Defendants provide *no* evidence to support their assertion that ammunition vendors have "superior knowledge" of what "handgun ammunition" is under the Challenged Provisions. Even if Defendants could somehow prove such knowledge, their attempt to invoke the heightened knowledge standard discussed in *Cranston v. City of Richmond* (1985) 40 Cal.3d 755 is misplaced. First, *Cranston*, and all cases it relies on, involved *civil* statutes. *Id.* at 765-770. Second, the statute in

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[8] Defendants go to great lengths to distinguish *Harrott v. County of Kings* (2001) 25 Cal.4th 1138. But Plaintiffs refer to *Harrott* for the notion the California Supreme Court demands ordinary citizens be provided clear guidelines on how to comply with law. An official list is the way to provide such guidelines.

Cranston applied *exclusively* to police officers, whereas Section 12318 applies equally to *all* non-exempt persons, not solely "members of [a] particular vocation or profession." And many ammunition vendors subject to section 12061, such as Wal-Marts and sporting good retailers, do not possess *any* special knowledge about ammunition. Defendants cite to *no* authority which invokes a knowledge standard commensurate with members of a particular vocation when the statute applies beyond them.

B. Marketing Printouts from Ammunition Vendor Websites Do Not Indicate Whether the Ammunition is Chambered More Often in a Handgun than a Rifle.

Online vendors (like everyone) are unable to determine what ammunition is regulated. This is supported by testimony not only from Plaintiffs, but also from multiple non-party shippers who, unbeknownst to Plaintiffs and their counsel at the time, unilaterally made the costly decision to cease shipping all or most ammunition to individuals in California because they are unable to determine which ammunition is actually regulated. (See Pls.' SUMF Nos. 71-82, 190-201). Defendants dispute this in a conclusory footnote that assumes these statements are false because some vendors market ammunition as "handgun ammunition." (Defs.' Oppn. at p. 11, fn.9). But Defendants fail to explain how the marketing classifications of some vendors are relevant to a *legal* determination of what ammunition is chambered more often in a handgun, or how it equates such knowledge to vendors.

Defendants make much of Plaintiff Abel's Ammo's reference to "handgun ammunition" on its website. (See State's Compend. Evid., Ex. D.) But they slyly omit that the list in Defendants' Exhibit D was only produced because Defendants entered the term "handgun ammunition" in the website's search engine. In fact, Abel's home page lists "rifle and pistol ammunition" together without further distinction. (And while 17 of the cartridges appearing in Defendants' Exhibit D *are not* on Defendants' final list, only 16 are.) (See Pls.' Evid. Supp. Reply, Ex. J.) This proves Plaintiffs' point, as do the other websites referenced by Defendants. All these sites display multiple cartridges as "handgun ammunition" that do not appear on Defendants' list. None display identical lists. In fact, they all vary quite significantly from one another. (State's Compend. Evid., Exs. D-J; see also Decl. of B. Graham Supp. Defs.' Oppn.).

In any event, that a website markets or brands some ammunition as "handgun ammunition" is not determinative of whether that ammunition is used more often in a handgun. Nor does it disprove

there is any confusion as to what ammunition is regulated.[9] Defendants made *no inquiry whatsoever* of internet vendors, and offer no evidence suggesting website labeling has any bearing.

C. Confusion Is Widespread / AB 2358 Was Amended to *Clarify*, Not Expand AB 962

Retailers, individuals, law enforcement, and legislators alike acknowledge the difficulty in determining what ammunition the Challenged Provisions regulate. Defendants suggest Plaintiffs are the only ones confused by these laws, completely overlooking the fact that: (1) Plaintiffs' counsel received numerous inquiries from non-plaintiffs about what ammunition is covered (Decl. of C. Monfort Supp. Pls.' Mot. Summ. J. at ¶ 2); (2) a non-party law enforcement officer testified he is confused (Pls.' SUMF No.2); (3) Defendants have provided multiple, conflicting lists of what ammunition they believe is regulated (see Pls.' SUMF No. 37; Graham Depo. vol. 1, at pp. 103:18-104:3; Decl. of B. Graham Supp. Defs.' Oppn. at ¶ 12; Graham Depo. Vol. 1, at pp. 132:23-133:1, 133:17-21, 136:6-8, 137:3-5, 153:13-23, 172:22-173:1-2; see Pls.' Evid. Supp. Reply, Ex. B); (4) multiple non-party online vendors have foregone untold profits by ceasing shipments to California (see Pls.' SUMF Nos. 80-82); (5) a previous legislature acknowledged section 12323(a) provides a problematic standard for a prior version of AB 962 (Pls.' SUMF Nos. 13, 15,16); and (16) the author of the law himself acknowledged he received vagueness complaints from the public (*Ammunition: Hearing on A.B. 2358 Before the S. Pub. Safety Comm.*, 2010 Leg., 2009-2010 Sess. (Cal. 2010) at 00:23:55 (statement of Assem. Kevin de Leon, Sponsor) [hereafter *AB 2358 Hearing*].)

Defendants ignore these supported facts and muddle Plaintiffs' reference to the legislative history of AB 962 and related bills. To reiterate, the evidence is not offered to *interpret* the law, and it counters Defendants' assertion that "the only confusion has been fomented by Plaintiffs." Oppn. at p. 1

Defendants patently mislead this court by claiming AB 2358 was amended to include a list of handgun ammunition to "expand the scope of the law"– *tellingly* failing to provide *any supporting legislative history*. (See Defs.' Oppn. at pp. 17-18.) But as Plaintiffs' moving papers note, the reason AB 2358 was amended just weeks after Defendants filed an Answer in this case was "*to bring some clarity to the law*"– a statement made on the record, during a committee hearing, by the author of AB

[9] Defendants arbitrarily researched sales over five years and limited their interpretation of the law to civilian use of firearms in CA. (Pls. SUMF Nos. 44,49,88, 89.) While Plaintiffs are unsure what the true test requires, Defendants' interpretation suggests a cartridge's status may change among states. So shippers in states where hunting with a certain cartridge in rifles is be more prevalent, would be required to know *usage trends in CA.*

962 and AB 2358 himself. (*AB 2358 Hearing, supra*, at 00:23:55.) It is far from "sinister" as Defendants suggest, to assume AB 2358 was amended in response to this suit – it is plainly obvious. Moreover, contrary to Defendants' falsehood about the reason AB 2358 was amended, Assemblyman de Leon specifically stated the purpose was to make AB 962 much *less broad* in application, and to *limit it* to only "19 'types' of ammunition" out of "5 pages" of ammunition. (*Id.* at 00:14:20, 00:25:19.)

In light of the Defendants' willingness to misrepresent such basic facts, statements made by Defendants and its expert should be viewed with incredulity.[10]

IV. DEFENDANTS CANNOT SAVE THE CHALLENGED PROVISIONS FROM VAGUENESS BY MISDIRECTING THE COURT'S FOCUS TO WHETHER § 12323 OR OTHER STATUTES REFERENCING IT ARE VAGUE IN ALL APPLICATIONS

Plaintiffs contend that Penal Code sections 12060, 12061, and 12318 are unconstitutionally vague; and they are. Plaintiffs need not establish that any provision of law that might reference section 12323(a), or that might use words included in that statute, are vague in all applications of *those statutes*. Nonetheless, Defendants' Opposition makes the reaching argument that the Challenged Provisions are not unconstitutionally vague because Plaintiffs have not challenged Penal Code section 12323(a). (Defs.' Oppn. at pp.11-12.) This is apparently because section 12323(a) is referenced by section 12060 to define what "handgun ammunition" is under section 12060, and thus subject to the remainder of the Challenged Provisions. Defendants' argument conveniently misses the point. They attempt to twist Plaintiffs' claims into a challenge to section 12323(a), which is solely a "definitional" statute. They assert the definition provided in that section cannot fail for vagueness because it is employed in Penal Code section 12316(a)(1)(B) that *may* have a non-vague application. But Plaintiffs agree the 12323(a) definition of "handgun ammunition," taken by itself, is unconstitutionally vague. Though it is employed in both sections 12060 and 12316(a)(1)(B), the difference is that section 12316 appears to save itself from the inherent vagueness of section 12323(a) because it allows the retailer to determine whether a particular type of ammunition is "handgun ammunition" based on the retailer's understanding of the purchaser's subjective intended use. Conversely, the Challenged Provisions do not consider intended usage and provide no such guidance. Rather, they rely exclusively on whether

[10] Assemblyman de Leon states (Defendant) *DOJ* assured him those 19 types of ammunition, which included .223, 5.56x45, 7.62x39, .22 rimfire, .41, 5.7X28, 7.63. 7.65, and .50, were *"handgun ammunition that is commonly used in CA"* which *do not* appear on the DOJ's current list. (*AB 2358 Hearing, supra*, at 00:12:25.)

the ammunition is *actually* used more often in a handgun. Ultimately, the Challenged Provisions are vague in all of their applications, regardless of whether Penal Code section 12316 is too.

The same is true for the use of the 12323(a) definition in "armor piercing ammunition" laws. Plaintiffs have not conducted an analysis (nor need they) as to whether these statutes might be unconstitutionally vague under whatever standard might be applied to those statutes. Armor piercing ammunition is not being sold by the tens of thousands everyday in California, and is not a concern of Plaintiffs. Plaintiffs' challenge should not cast doubt on the validity of different statutes that reference part of the definition found in the Challenged Provisions. Of course, should this Court deem it necessary to find section 12323(a) unconstitutional in order for Plaintiffs to prevail on their current challenge, Plaintiffs respectfully request such alternative relief as prayed for in their Complaint.

V. ARBITRARY ENFORCEMENT IS LIKELY, AS EVIDENCED BY DOJ'S CHANGING TESTIMONY ABOUT WHAT AMMUNITION IS "HANDGUN AMMUNITION"

Plaintiffs' moving papers point out the arbitrary enforcement likely to result as law enforcement officers and agencies apply their subjective understanding of what ammunition is principally for use in a handgun. (Pls.' SUMF No. 3; Pls.' Mot. Summ. J. at pp.12-15.) The concerns expressed by various parties, and the contradicting statements of Defendants own "expert" witness evince its likelihood.[11]

Plaintiffs' concern is further realized by examining the *research process* used by Defendants to determine their "lists." Nonetheless, Defendants assure the research they undertook establishes a "careful and measured approach" to make sure they are positive as to what ammunition is "principally for use in a handgun" and regulated by the Challenged Provisions. (Defs.' Oppn. at p.14). In the process, Defendants dismiss the declarations submitted by sworn peace officers because they did not undertake a "research process" to determine what ammunition is chambered more often in a handgun. (*Id.* at pp. 12-13.) Defendants apparently believe it is okay to require that everyone the law applies to, and all those who enforce it, undertake a *research process* to attempt to determine what is covered by the law. It seems Defendants also contend that, should law enforcement officers conduct their own research, they would somehow determine that, out of thousands of cartridges, the Challenged Provisions apply only to those *same 16 cartridges* that DOJ now claims are covered.

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[11] *Cartridges of the World* identifies numerous cartridges in its section on handgun cartridges not included in DOJ's list, and explains the popularity of many cartridges in rifles that the state identified as handgun ammunition. (Pls.' SUMF Nos. 94-95). No evidence is provided that listings are based on actual use.

As noted, Plaintiff Herb Bauer Sporting Goods, sells over 150 cartridges. Similarly, Plaintiffs Able's Ammo and RTG Collectible sell hundreds of cartridges. To suggest law enforcement will apply the Challenged Provisions uniformly borders on the absurd. Just as DOJ's "expert" reached his subjective opinion as to what ammunition is regulated, so too will other law enforcement officers be left to apply the law based on their *subjective* experience. Neither Plaintiffs nor law enforcement can rely on, or be bound by, any of Defendants' "lists" of ammunition.[12]

Finally, Defendants assert the "principally for use in" standard is a sufficient guideline to avoid arbitrary enforcement. But there are no guidelines *for determining* whether any cartridge is "principally for use in a handgun" – if it were even possible to do so. There certainly are none explaining that one must review DROS statistics, reflect on their experience, consult authoritative books, and review ammunition websites to determine a given cartridge's use. *That is an invention of Defendants.*

The likelihood of arbitrary enforcement is particularly troublesome given the state's expert changed his testimony over what "handgun ammunition" is *significantly* in just the past *two weeks.*

VI. DEFENDANTS FAIL TO ADDRESS AMMUNITION USED IN ANTIQUE FIREARMS

Despite being fully briefed in Plaintiffs' moving papers, Defendants completely ignore the vagueness problems over what ammunition will be excluded as ammunition "designed and intended" to be used in a firearm that was manufactured prior to 1898. Defendants apparently concede the further aggravation of the likelihood of arbitrary and discriminatory enforcement as all those the laws apply to, and those charged with enforcing it, attempt to determine what ammunition is exempted.

VII. DEFENDANTS' CHARACTERIZATION OF STEPHEN HELSLEY'S TESTIMONY AS BIASED AND UNRELIABLE IS NEAR LIBELOUS

Plaintiffs' expert's knowledge of firearms and ammunition is unparalleled, becoming knowledgeable about firearms and ammunition over his experiences spanning the last fifty years as a student, an author, and in law enforcement. (See Decl. of S. Helsley Supp. Pls.' Mot. Summ. J. at ¶¶ 2-19.) A true hero, Mr. Helsley was awarded the Valor Medal as Special Agent Supervisor for Defendant DOJ. (*Id.* at ¶8.) Nonetheless, Defendants condemn him as biased and unreliable.

Despite Defendants' negative portrayal, Defendants acknowledge Mr. Helsley is not even paid for his testimony. Defendants make much over his prior employment by the National Rifle

[12] Try as they might to portray their experts' research as taking a "measured approach" to enforcement, the obvious reality is that Defendants did so only in response to this litigation.

Association, but ignore the fact that Mr. Helsley was also employed by Defendants – for more years than he was employed by the NRA. (Decl. of S. Helsley Supp. Pls.' Mot. Summ. J. at ¶ 4-13.) They give no credence to the fact that Mr. Helsley was *shot in the line of duty while serving Defendants*, and disregard that fact that Mr. Helsley was *acknowledged so highly* while serving Defendants that he was promoted to head the Firearms Division. (*Id.* at ¶¶8-13.) Unlike the state's expert, Mr. Helsley's testimony has *never waivered*, and Defendants offer no evidence his testimony about ammunition and the Challenged Provisions was altered in any way by any bias. Plaintiffs' expert offers testimony about the nature of firearm ammunition (see generally *id.* at ¶20-73), the flawed nature of the state's research process to determine what ammunition is used more often in a handgun (S. Helsley Depo. at 130:2-25, 131:1-25; 132:1-15), and explains why he is unable to determine whether a particular cartridge is fired more often out of a handgun. Although Defendants admit his expertise, they attempt to discredit his testimony as improper opinion on the legal question whether the Challenged Provisions provide sufficient notice to persons of ordinary intelligence and law enforcement. But Mr. Helsley never provides testimony on this subject matter. Nor does he attempt to opine on what ammunition the Challenged Provisions regulate.

In fact Mr. Helsley acknowledges, as do Plaintiffs, that no one can be an expert on that subject matter, because no one is able to determine what the law requires them to determine: whether any given cartridges have actually been fired more often out of a handgun. (Decl. of S. Helsley Supp. Pls.' Mot. Summ. J. at ¶72-73.) Rather, Mr. Helsley explains *why* he is unable to determine what ammunition is fired more often through a handgun; something he is *well* qualified to testify about.[13]

VIII. IT IS DEFENDANTS' "EXPERT" WHOSE TESTIMONY IS OF LITTLE VALUE

Disregarding his obvious bias as Defendants' full-time employee, it is revealing that Mr. Graham has changed his opinion *multiple* times, under oath, as to what "handgun ammunition" is. (Pls.' Evid. Supp. Reply, Ex. C). He first provided Plaintiffs a list of eleven *calibers*. (Pls.' SUMF No. 37.) Later, in his deposition, he said he considered specific cartridges within those calibers to be included in that list. (Pls.' SUMF No. 96). Now, he submits a declaration in support of Defendants' opposition listing

[13] Defendants also mis-characterize Mr. Helsley's testimony, asserting he concedes 7 cartridges are "handgun ammunition" under the Challenged Provisions; Mr. Helsley was merely responding to questioning, explaining what cartridges in his experience are likely chambered more often in a handgun.

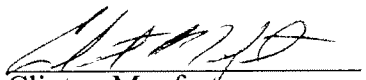
sixteen cartridges he believes to be "handgun ammunition." (Decl. of B. Graham Supp. Defs.' Oppn. at ¶ 12.) Yet, without explanation, he omitted six cartridges from his declaration – .45 Long Colt, 9mm Mauser, .256 Winchester Magnum, .25 NAA, .32 Smith & Wesson, and .32 Short Colt – that he identified as "handgun ammunition" at deposition.[14] Though Defendants attribute Mr. Graham's inconsistency in articulating what "handgun ammunition" is to Plaintiffs' interrogatory, Defendants were clearly aware Plaintiffs were inquiring what ammunition Defendants consider "handgun ammunition" under the Challenged Provisions.[15] In reality, Mr. Graham believed he effectively communicated a list of a dozen or so cartridges when he listed the eleven "calibers"– apparently unaware the list he provided included countless cartridges absent from his current list. Such discrepancies reveal *even Defendants* are confused as to Challenged Provisions' meaning.

CONCLUSION

Ultimately, the root of the vagueness doctrine is a rough idea of fairness. (*Colton v. Kentucky* (1972) 407 U.S. 104, 110.) With that notion in mind, it is unfair to conclude a complete prohibition on a major means by which an essential component of a firearm is commonly purchased does not *relate to* the to the right to keep and bear arms. Nor is it fair to conclude that *of thousands of cartridges* that are either used more often in a handgun or a rifle, that the Challenged Provisions *only apply to sixteen cartridges*, and that the Challenged Provisions *provide sufficient notice that they apply to these sixteen cartridges* so as to preclude arbitrary enforcement. Finally, fairness precludes a conclusion that criminal statutes are not vague in all applications (versus as applied to an individual) because four deponents agreed in their *experience* that one cartridge of the sixteen was chambered more often in a handgun. For each of the foregoing reasons, the Court should enter judgment in favor of Plaintiffs.

Dated: January 7, 2011

Respectfully submitted,
MICHEL & ASSOCIATES, P. C.



Clinton Monfort
Attorney for Plaintiffs

[14] Graham Depo. Vol. 1, at pp. 132:23-133:1, 133:17-21, 136:6-8, 137:3-5, 153:13-23, 172:22-173:1-2.

[15] Defendants suggest Plaintiffs "muddled" the issue over "caliber" and "cartridge," noting that Plaintiffs used the term "caliber" in their complaint. Though Plaintiffs used the descriptor "caliber," they listed specific *cartridges*. (Compl. at 2:15-23.) For clarity, it is not so important that one use the term "caliber"or "cartridge" when referencing ammunition as long as the ammunition is ultimately identified by cartridge name. (AB 2358's list read: "all variations of ammunition in the following calibers" to attempt to avoid that problem.)

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Claudia Ayala, 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 January 7, 2011, I served the foregoing document(s) described as

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL

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
Sacramento, CA 94244-2550

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Executed on January 7, 2011, at Long Beach, California.

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

CLAUDIA AYALA