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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

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

Plaintiffs and Petitioners,

v.

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

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: October 28, 2010
Time: 3:30 p.m.
Dept: 97A
Judge: The Honorable Jeff Hamilton
Trial Date: None
Action Filed: June 17, 2010

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INTRODUCTION

Plaintiffs seek a preliminary injunction prohibiting enforcement of three statutes that will, when they go into effect next year, regulate the purchase and sale of handgun ammunition. An injunction, particularly a mandatory injunction like the one sought here, is an extraordinary remedy, one requiring a significant showing of irreparable injury and a reasonable probability of success on the merits. Plaintiffs cannot meet their burden to establish either of these elements.

First, plaintiffs make no showing that they are likely to suffer harm, much less the "significant irreparable injury" required when a plaintiff seeks to restrain a public entity in the performance of its duties. Their only alleged harm – a vague and generalized fear of prosecution – is unsubstantiated because there have been no threats of enforcement, much less prosecution, and the statutes at issue are largely dormant until February 2011. Even if plaintiffs could demonstrate some remote possibility of harm, they cannot establish the requisite likelihood of success on the merits of their claims.

Plaintiffs first cause of action is a facial constitutional challenge to the definition of "handgun ammunition" used in section 12060, 12061, and 12318 of the Penal Code. Plaintiffs allege in the complaint that this definition is fatally vague in all of its applications, but remarkably admit in their moving papers that the definition they challenge *has* a valid application, thus defeating their claim of facial invalidity. And even if the Court were to consider the merits of plaintiffs' definitional challenge, the definition is not facially vague. A statutory scheme need not identify and anticipate every precise activity that is intended to be prohibited. Reasonable certainty is all that is required to satisfy due process.

Plaintiffs' second cause of action – an as-applied vagueness challenge –is not justiciable because it is unripe and seeks an improper advisory opinion from the Court. Finally, the third purported cause of action for mandamus relief is defective because plaintiffs cannot identify a ministerial duty that defendants have failed to discharge.

For all these reasons, and as more fully explained below, the State respectfully requests that the Court deny plaintiffs' motion for preliminary injunctive relief.

STATEMENT OF FACTS

Plaintiffs[1] 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.[2]) 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 Penal Code section 12323(a) – 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 also assert that this alleged vagueness gives law enforcement officials "essentially unbridled discretion to interpret and apply the Challenged Provisions." (¶ 9.)

Plaintiffs admit that 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 will be) and introduce no such evidence on this motion.

On these facts, Plaintiffs allege three causes of action for (1) Due Process Vagueness – Facial, (2) Due Process Vagueness – As Applied, and (3) a Petition for Writ of Mandate. (¶¶ 88-109.) Defendants State of California, the California Department of Justice, and Attorney General Edmund G. Brown Jr. (collectively, the "State") answered Plaintiffs' complaint and verified petition for on August 4, 2010.

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[1] Plaintiffs include Sheriff Clay Parker of Tehama County, Herb Bauer Sporting Goods, Inc., California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Collectibles, LLC, and Steven Stonecipher (collectively, "Plaintiffs").

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

ARGUMENT

I. APPLICABLE LEGAL STANDARD.

Injunction is an extraordinary remedy; one that cannot issue unless the moving party meets its burden to establish that: (a) it is reasonably probable that they will prevail on the merits (*San Francisco Newspaper Printing Co., Inc. v. Superior Court* (1985) 170 Cal.App.3d 438, 442; Code Civ. Proc., § 526(a)(1)); (b) there is some impending threatened great or irreparable injury (Code Civ. Proc. § 526(a)(2)); and (c) the balance of equities weighs in the moving party's favor. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) The decision to issue or deny a preliminary injunction rests in the sound discretion of the trial court and the exercise of that discretion will not be disturbed on appeal absent abuse. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286; *Graf v. San Diego Unified Port Dist.* (1988) 205 Cal.App.3d at 1189, 1194.)

In general, a preliminary injunction may not be issued "[t]o prevent the execution of a public statute by officers of the law for the public benefit" or "[t]o prevent the exercise of a public or private office, in a lawful manner, by the person in possession." (Civ. Code, § 3423(d),(f); Code Civ. Proc., § 526(b)(4).) Although these general rules do not preclude the issuance of preliminary injunctive relief when the constitutionality of a statute is challenged, "trial courts should be extremely cautious, and even hesitant and reluctant, when asked to enjoin law enforcement officials from enforcing an ordinance obviously approved and adopted by duly elected representatives of the people for the purpose of promoting and protecting public morality *prior to a trial on the merits*." (*City of Santa Monica v. Superior Court* (1964) 231 Cal.App.2d 223, 226 [italics in original]; *Cohen v. Board of Supervisors* (1986) 178 Cal.App.3d 447, 453.)

Finally, because mandatory injunctions like the one Plaintiffs seek here require the enjoined party to take affirmative action before a trial on the merits,[3] they are rarely granted.

[3] Although Plaintiffs might argue that the injunction requested here is prohibitory in nature, injunctions are classified as prohibitory or mandatory by their *effect*, not its form or language. (*Davenport v. Blue Cross of Cal.* (1997) 52 Cal.App.4th 435, 446.) Thus, an injunction may be mandatory in effect even though its language is prohibitory. Here, while (continued...)

(*Teachers Inc. & Annuity Ass'n v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493 ["The granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established"] [internal quotations and citations omitted].)

II. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE INJURY.

In considering a motion for preliminary injunction, courts first evaluate the harm that the plaintiff is likely to suffer if an injunction is denied compared to harm defendant is likely to suffer if interim relief is denied pending a trial on the merits. Because the defendants here are public entities, Plaintiffs must make a significant showing of injury:

> Where . . . the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. [Citations.] This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a *significant showing* of irreparable injury.

(*Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 [italics added].)

In their moving papers, Plaintiffs have not established significant irreparable injury, or even any legitimate need for the extraordinary remedy of a mandatory injunction preventing state law enforcement officers from enforcing sections 12060, 12061 or 12318 pending a trial on the merits. That is because two of the three statutes they challenge do not go into effect until February 2011, and, as the State plainly admits in its Answer, it has not enforced, or even threatened to enforce sections 12060(a)(1) or (a)(2) against anyone, including Plaintiffs. (State's Answer, ¶ 21 ["the State denies that it is presently enforcing subparagraphs (1) or (2) of section 12061(a) of the Penal Code against any individual or business"].) Plaintiffs essentially are asking the Court to stop the State from taking actions

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(...continued)
Plaintiffs ostensibly seek to *prohibit* the State from enforcing the Challenged Provisions, the requested injunction would change the relative positions of the parties by *compelling* the State to surrender its ability to enforce the laws at issue when they go into effect, making it mandatory. Where an order enjoins a defendant from exercising authority, it is mandatory in effect. (See, e.g., *Johnston v. Superior Court* (1957) 148 Cal.App.2d 966, 967-971 [injunction restraining city from enforcing zoning ordinance mandatory in nature]; see also *Kolender v. Lawson* (1983) 461 U.S. 352, 353 ["a mandatory injunction seeking to restrain enforcement of the statute"].)

that it is already legally barred from taking until February 2011. Thus, Plaintiffs cannot show any likelihood of harm to their respective interests before this matter can be heard on the merits. (See *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 751 ["There is a presumption that state officers will obey and follow the law. . . . Without a threat of present or future injury, no injunction can lie"].)

The chief harm that Plaintiffs identify is their alleged fear of prosecution. (Motion, p. 13:8.) But this fear appears more manufactured than real. Plaintiffs have not provided the Court with any evidence establishing that any law enforcement officer, much less a state officer, has so much as discussed AB 962 with them, much less threatened them with prosecution for violating sections 12061(a)(1) or (a)(2) (the only two provisions currently in effect). A generalized and unfounded fear of prosecution is insufficient to justify a mandatory injunction.

Plaintiffs rely on Ninth Circuit authority for the proposition that "'constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.'" (Motion, p. 13:4-5.) Even if federal authority were binding on this Court, the case cited by Plaintiffs is inapplicable. In *Nelson v. National Aeronautics and Space Administration* (9th Cir. 2007) 530 F.3d 865, the plaintiff employees were required to either submit to an invasive background investigation or lose their jobs. (*Id.* at p. 872.) The court held that plaintiffs were likely to succeed on their claim that the investigation would violate their constitutional right to privacy. (*Id.* at p. 881.) Thus, the court found that plaintiffs "face[d] a stark choice – either violation of their constitutional rights or loss of their jobs" and granted an injunction. (*Id.*) Unlike the plaintiffs in *Nelson*, Plaintiffs here are unlikely to succeed on the merits and therefore are not likely to have their constitutional rights violated if a preliminary injunction is denied.[4]

[4] Plaintiffs also misplace reliance on *McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal.2d 595 for the proposition that they will suffer irreparable injury because they will be forced to "*contemplate* whether to discontinue certain business practices and to begin preparations for the Challenged Provisions to take effect." (Motion, p. 13:16-17 [italics added].) This assertion is insufficient to establish the requisite harm. Further, the case is factually distinguishable. The issue in *McKay* was the constitutionality of an ordinance prohibiting solicitation from any (continued...)

The relative balance of harms weighs heavily against issuing a premature mandatory injunction. On this basis alone, the motion for preliminary injunction should be denied.

III. PLAINTIFFS ALSO CANNOT ESTABLISH A REASONABLE PROBABILITY THAT THEY WILL SUCCEED ON THE MERITS OF THE THREE CAUSES OF ACTION ALLEGED IN THEIR COMPLAINT.

To obtain an injunction, the moving party must carry its burden to establish a reasonable probability that it will prevail on the merits of its claims. Although Plaintiffs address why they think the definition of "handgun ammunition" is vague, this discussion is not tethered to the merits of their three causes of action, each of which is defective.

A. Plaintiffs Are Unlikely to Prevail on Their First Cause of Action, Which Alleges that the Challenged Provisions are Facially Vague.

1. Plaintiffs Tacitly Concede in the Moving Papers that the Definition of Handgun Ammunition Is *Not* Facially Vague.

In their first cause of action, Plaintiffs allege that sections 12060, 12061, and 12318 of the California Penal Code are "invalid and unenforceable on their face because they violate the Fourteenth Amendment's Due Process requirement that laws not be vague." (Complaint, ¶ 89.) Specifically, they assert that these three statutes are facially void for vagueness "because they fail to provide notice to persons of ordinary intelligence regarding which calibers of ammunition are 'handgun ammunition.'" (*Id.*, ¶ 91.)

"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

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(...continued)
doorway opening onto a public sidewalk. Plaintiffs alleged that they never stepped off their premises to engage in such conversations. On those facts, the Supreme Court held merely that that complaint stated a cause of action for an injunction prohibiting the city from interfering with the alleged conduct. (*Id.* at p. 603.)

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.) The "total and fatal conflict" element 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: "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. Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 138.)

Plaintiffs allege 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. Regardless, Plaintiffs all but admit in their moving papers that *the definition of handgun ammunition is not facially vague* when they attempt to explain why they are not challenging 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 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."

(Motion, p. 9, fn. 10.) Plaintiffs' effort to distinguish the use of "handgun ammunition" in section 12316 from the references in the Challenged Provisions is unpersuasive. First, 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 enacted as part of the *same Assembly Bill* as sections 12060, 12061, and 12318. (See A. B. 962, 2009-2010 Sess. (Cal. 2009).) 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), they concede that it is *not* facially vague.

Plaintiffs cannot meet their burden to demonstrate that the Challenged Provisions "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions" and tacitly admit that there *is* a circumstance in which the definition of handgun ammunition is validly applied. Plaintiffs also cannot establish a likelihood of success on the merits of their first purported cause of action for the reasons explained in subsection D, below.

2. The Definition of "Handgun Ammunition" Is Not Vague, Facially or Otherwise.

Plaintiffs' contention that sections 12060, 12061, and 12318 are unconstitutionally vague rests upon the supposed difficulty of determining which calibers of ammunition are "principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person." (Penal Code, § 12323(a).) Contrary to Plaintiffs' assertions, an expert's opinion is not required to determine whether ammunition is principally for use in a handgun.[5] Even if there were certain calibers of ammunition that presented borderline cases, meaning that they could be used as often in a handgun as in a rifle, the mere fact that Plaintiffs might not be able to classify every caliber of ammunition as handgun versus rifle ammunition would not render the definition unconstitutionally vague.

To be enforceable, a law must be sufficiently precise as to give a person of ordinary intelligence a reasonable opportunity to know what is required and to provide a sufficient standard for enforcement so that arbitrary and discriminatory enforcement may be avoided. (*Bamboo Brothers v. Carpenter* (1982) 133 Cal.App.3d 116, 126.) But reasonable certainty

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[5] In fact, opinion evidence about the meaning of a statute, whether from a lay person or a purported 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 laypeople or experts on these matters 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].) Accordingly, the State objects to the numerous boilerplate declarations submitted by Plaintiffs and their experts in connection with the preliminary injunction motion as irrelevant and as inadmissible opinion testimony.

is all that is required. (*Rutherford v. State of California* (1987) 188 Cal.App.3d 1267, 1276.) A statute "is presumed to be valid and must be upheld unless its unconstitutionality 'clearly, positively and unmistakably appears.'" (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404.) Even when criminal penalties apply, a statute will be upheld against a vagueness challenge "if any reasonable and practical construction can be given its language." (*State Bd. of Equalization v. Wirick* (2001) 93 Cal.App.4th 411, 420 [internal quotations omitted].)[6]

A statutory scheme also is not required to isolate and specify, or provide detailed plans and specifications concerning, every precise activity or conduct that is intended to be required or prohibited. (*Sunset Amusement Co. v. Board of Police Comm'rs* (1972) 7 Cal.3d 64, 73.) As the Court of Appeal said in *Bone v. State Board of Cosmetology* (1969) 275 Cal.App.2d 851 in examining whether the use of the word "primarily" in a statute rendered it vague:

> The "fact that borderline cases will arise is not enough to make a statute unconstitutionally vague. Courts have found themselves capable of interpreting and applying the word 'primarily' as used in other statutes. (See *Malat v. Riddell* (1966) 383 U.S. 569, 572, 86 S.Ct. 1030, 16 L.Ed.2d 102, construing a federal revenue act; *People ex rel. Breuning v. Berry* (1956) 147 Cal.App.2d 33, 304 P.2d 818, construing a building safety law. See also *United States v. Harriss* (1954) 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989, **rejecting the contention that the word 'principally' made a penal statute unconstitutionally vague**.)

(*Id.* at pp. 857-858 [emphasis added].) Furthermore, numerous provisions in the California Penal Code, along with hundreds of other California statutes, use words like 'principally,' 'chiefly,' 'primarily,' or 'mainly' to define conduct, all without giving rise to vagueness concerns of the sort alleged by Plaintiffs here. (See, e.g., Penal Code, § 453(b)(2) ["no device commercially manufactured primarily for the purpose of illumination shall be deemed to be an incendiary device"]; Penal Code, § 635 [criminalizing manufacture of "any

[6] As the Supreme Court of California has acknowledged, there also is a subjective component to vagueness determinations. "A number of California cases have 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 members of the particular vocation or profession to which the statute applies." (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 765.) Applied here, that suggests that at least the vendor plaintiffs should be held to a slightly higher standard of knowledge regarding the definition of handgun ammunition.

device which is primarily or exclusively designed or intended for eavesdropping"]; Penal Code, § 12022.2 [criminalizing possession of ammunition "designed primarily to penetrate metal or armor"].)

Finally, Plaintiffs make much of the fact that the sponsor of AB 962 introduced legislation that would have replaced the "principally for use" language in section 12323(a) with a list of ammunition calibers. (Motion, pp. 9:8 – 10:19.) They also attempt to introduce a hearsay summary of the sponsor's alleged testimony on the bill. Even if Plaintiffs' summary of the sponsor'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; see also *County of Santa Cruz v. City of Watsonville* (1985) 177 Cal.App.3d 831, 842 ["It is well settled that the testimony or opinions of individual members of a legislative body are inadmissible for purposes of interpreting a statute"].) Moreover, even if a legislator opined that a statute was vague, 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"].)

Applying the standards above that require only reasonable certainty and the upholding of a statute if any reasonable and practical construction can be given its language, the Challenged Provisions' "principally for use" language is not unconstitutionally vague, and Plaintiffs cannot meet their burden to establish a probability of success on the merits.

B. Plaintiffs Also are Unlikely to Prevail on their Second Cause of Action Because Plaintiff Herb Bauer Sporting Goods, Inc.'s "As-Applied" Challenge is Unripe.

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

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.) Courts should not entertain a lawsuit that does not present a justiciable controversy. (See 3 Witkin, Cal. Proc. (4th ed. 1996) *Actions*, § 73, p. 132.) "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.) 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 [courts will not consider "questions as to the constitutionality of a statute unless such consideration is necessary to the determination of a *real and vital controversy between the litigants in the particular case before it*"] [italics in original] [citations omitted].) Mere dissatisfaction with legislative policy does not present a justiciable controversy. (See, e.g., *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1449 [county lacked standing to challenge constitutionality of statute governing formulas for determining state disbursement of funds to school districts]; *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].)

The ripeness requirement prevents courts from issuing purely advisory opinions. (See generally *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 911-912.) "'A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.'" (*Pacific Legal Found. v. California Coastal Comm'n* (1982) 33 Cal.3d 158, 171 [citation omitted].) And 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 events. (*Id.* at pp. 170-173.) As the Supreme Court of California said in *Pacific Legal Foundation*, "judicial decisionmaking is

best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Id.* at p. 170.)

Here, the Court cannot know (and should avoid speculating about) how the statutes at issue might be applied, what kinds of controversies may arise, or what parties might be involved. Plaintiff Herb Bauer Sporting Goods, Inc. describes only the following injury:

> Because I do not know what my obligations are under California Penal Code sections 12060, 12061, and 12318, I fear that I will be prosecuted for unknowingly violating them. For example I fear that I may be prosecuted if I display, in a manner accessible to a transferee, any ammunition that law enforcement deems "handgun ammunition" even though I do not know what types of ammunition are "handgun ammunition" or which types of ammunition law enforcement will consider "handgun ammunition."

(Declaration of Barry Bauer, ¶ 7.) Although this plaintiff claims to harbor a vague fear of prosecution, it can identify *no concrete controversy* or threat of enforcement or prosecution by the State or any other law enforcement authority.[7] The mere belief that state law is unconstitutional does not give rise to a ripe controversy. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 64.) In *City of Santa Monica*, the city sought declaratory relief regarding the constitutionality of an initiative prohibiting city officials from receiving campaign contributions after the end of their term of office. (*Id.* at pp. 52-53.) The Court of Appeal affirmed dismissal of the city's action as nonjusticiable, finding that the city lacked standing because it had not suffered "any actual or threatened action which would injure the city." (*Id.* at p. 60.) It also held that the dispute was not ripe because "'courts will not intervene merely to settle a difference of opinion; there must be an imminent and significant hardship inherent in further delay.'" (*Id.* at p. 64.)

At most, the second cause of action present a difference of opinion predicated on conclusory allegations, not a justiciable controversy. The only allegation evincing a

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[7] Plaintiffs insinuate in their complaint that law enforcement officials will abuse their "essentially unbridled discretion to interpret and apply the Challenged Provisions" (¶ 9), but introduce no evidence of such abuse. Until Plaintiffs can at least allege an abuse of discretion, Evidence Code section 664 creates a presumption assume that law enforcement officers will obey the law will not act arbitrarily or illegally.

concrete controversy is plaintiff Herb Bauer Sporting Goods, Inc.'s alleged "fear" that the law *might* be enforced against it at some point in the future. By failing to identify any actual or threatened action by the State, however, it concedes that none exists. There also is no reason to believe that Herb Bauer Sporting Goods is not in compliance with the law.[8] Hence, there are no facts before the Court to suggest that plaintiff Herb Bauer Sporting Goods, Inc.'s claims are in any respect ripe for adjudication.

The second cause of action for as-applied due process violations "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, plaintiff Herb Bauer Sporting Goods, Inc. is unlikely to prevail on its merits of his claim.

C. The Third Purported Cause of Action for a Writ of Mandate is Defective Because Plaintiffs Cannot Identify a Ministerial Duty as Required for Mandamus Relief.

Plaintiffs' third cause of action purports to state a cause of action for a writ of mandamus. The remedy of mandamus, however, issues only "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" (Code Civ. Proc., § 1085) upon the petition "of the party beneficially interested" (*Id.*, § 1086) and will not lie to control discretion conferred upon a public officer or agency. (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 315; *Faulkner v. California Toll Bridge Auth.* (1953) 40 Cal.2d 317, 326.) Two basic requirements are essential to the issuance of a writ: (1) A clear, present and ministerial duty upon the part of the respondent (*Sherman v. Quinn* (1948) 31 Cal.2d 661, 664; *Browning v. Dow* (1923) 60 Cal.App. 680, 682); and (2) a clear, present and beneficial right in the petitioner to the performance of that duty. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351.)

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[8] Plaintiff Herb Bauer Sporting Goods, Inc. challenges Penal Code § 12061(a)(1), which states that a "vendor shall not permit any employee who the vendor knows or reasonably should know is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code to handle, sell, or deliver handgun ammunition in the course and scope of his or her employment." Putting aside the ripeness of its definitional challenge, this plaintiff does not allege that it knows or reasonably should know that any of its employees fall into one of the defined categories, which adds another layer of unripeness to the inquiry.

Plaintiffs bear the burden of demonstrating that defendants owe them a ministerial duty to perform the acts sought to be compelled. (*MacLeod v. Long* (1930) 110 Cal.App. 334, 338 [a peremptory writ of mandate "must be predicated upon the existence of a duty on the part of defendants to perform an act concerning which they have no right to refuse. The burden is, therefore, upon the plaintiff to prove the existence of such right rather than upon the defendants to disprove the same"]; *Eistrat v. Board of Civil Service Comm'n of the City of Los Angeles* (1961) 190 Cal.App.2d 29, 34.)

None of the defendants named in the complaint has any "ministerial duties" under the Challenged Provisions that might be compelled under section 1085 or 1086. This is not a case in which a state officer is refusing to perform a non-discretionary statutory duty. Penal Code sections 12060, 12061 and 12318 are penal statutes of general application. Perhaps recognizing this, Plaintiffs can identify only a *negative* ministerial duty or, as expressed in the complaint, "a clear, present, and ministerial duty *not* to enforce the Challenged Provisions against Plaintiffs, or anyone." (Complaint, ¶105 [italics in original].) There is no case authority to support the issuance of a "negative writ."

To the extent that Plaintiffs are seeking issuance of an injunction in connection with the third cause of action,[9] they plainly cannot identify a basic requirement for mandamus relief – a ministerial duty – and thus they cannot meet their burden to establish a likelihood of success on the merits on the third cause of action for purposes of obtaining provisional relief.

CONCLUSION

For all the foregoing reasons, the Court should deny Plaintiffs' request for a preliminary injunction enjoining defendants from taking actions that they are already legally barred from taking until next year. The day may come when an actual criminal prosecution, or threat thereof, will present a court with a justiciable vagueness question. This, however,

[9] Plaintiffs do not pray for injunctive relief under their mandamus "cause of action," and do not discuss this claim in their preliminary injunction motion. The State addresses it here out of an abundance of caution and to show that none of Plaintiffs' causes of action has merit.

is not that case. If circumstances change, or a threat of enforcement is made by the State, Plaintiffs can renew their motion. Until then, however, there simply is no harm justifying interim relief and little likelihood that Plaintiffs' claims will succeed on the merits.

Dated: September 30, 2010

Respectfully Submitted,

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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 September 30, 2010, I served the attached

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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

C.D. Michel
Michel & Associates, P.C.
180 East Ocean Blvd., 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 September 30, 2010 at Sacramento, California.

Brenda Apodaca
Declarant

Brenda Apodaca
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