IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

# 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 Respondents,

## v.

THE STATE OF CALIFORNIA; KAMALA
D. HARRIS, in her official capacity as

Attorney General for the State of California; AND THE CALIFORNIA DEPARTMENT OF JUSTICE,

Defendants and Appellants.

Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeff Hamilton, Judge

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Kamala D. Harris
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
Peter A. Krause
Supervising Deputy Attorney General
Ross C. Moody
Deputy Attorney General
State Bar No. 142541
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1376
Fax: (415) 703-1234
E-mail: Ross.Moody@doj.ca.gov
Attorneys for Appellants State of California,
Kamala Harris, and the California Departme
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Edmund G. Brown Jr.
Attomey General of Califormia
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General


State Bar No, 185098
13001 Street, Suite 125
P.O. Box 944255

Sacramento, CA 94244-2550
Telephone: (916) 324-5328
Fax: (916) 324-8835
E-mail: PeterKrause@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
COLNTY 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
RESPONSES TO SPECIALLY PREPARED INTERROGATORIES, SET ONE

Action Filed: June 17, 2010

PROPOUNDING PARTIES:

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

RESPONDING PARTIES:
THE STATE OF CALIFORNIA, JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, AND THE CALIFORNIA DEPARTMENT OF JUSTICE

SET NO.: ONE

## GENERAL OBJECTIONS

The following General Objections are incorporated into each of defendant and respondent State of California, Edmund G. Brown, Jr, and California Department of Justice's (collectively, the "State") responses to plaintiffs and petitioners' 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") Special Interrogatories:
A. The State objects to the form of Plaintiffs' special interrogatories in that they are propounded by all plaintiffs to all defendants in a single document. The State defendants will respond in good faith with a single response without waiving any objections or defenses that each individual responding party would otherwise be entitled to assert in this litigation.
B. The State objects to the "Instructions and Definitions" that appear on pages 2 through 4 of Plaintiffs' Special Interrogatories, Set One to the extent they constitute an improper preface and instruction and purport to impose obligations on the State that are not contained in the Code of Civil Procedure. (Code Civ. Proc., $\$ 2030.060$ (d) ["No preface or instruction shall be included with a set of interrogatories"].)
C. The State has not completed its investigation of the facts or discovery relating to this case. The following responses are based upon information known at this time and are given without prejudice to the State's right to supplement these responses, and introduce into evidence or otherwise use any subsequently discovered evidence and facts. Each response is given subject to all appropriate objections (including but not limited to objections concerning competency,
relevancy, propriety, authenticity, and admissibility) that would require exclusion at trial. All such objections and grounds therefore are reserved and may be made at trial.
D. The State objects to each special interrogatory in Plaintiffs' Special Interrogatories, Set One to the extent it calls for information protected from disclosure by the attorney-client privilege, attomey work product doctrine, or any other statutory or common law privilege. The State will produce only non-privileged information in response to these interrogatories, and nothing contained herein shall be construed as a waiver of any such privilege. In the event any privileged information is disclosed in this response, such disclosure is inadvertent and does not constitute a waiver of any privilege.

## SPECLAL INTERROGATORY NO. 1

Do YOU contend that there is a generally accepted definition of "handgun ammunition?"

## RESPONSE TO SPECLAL INTERROGATORY NO. 1:

The State further objects to this Interrogatory on the following grounds:

1. The definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities; and
2. The phrase "generally accepted" is vague and ambiguous and fails to specify by whom the detinition is meant to be generally accepted.

Without waiving the foregoing general or specific objections, the State responds as follows: Yes.

## SPECIAL INTERROGATORY NO. 2

If YOU contend that there is a generally accepted definition of "handgun ammunition," please state that definition.

## RESPONSE TO SPECIAL LNTERROGATORY NO. 2:

The State further objects to this Interrogatory on the ground that the definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and

[^0]have no connection to this case, including "any and all . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities.

Without waiving any of the foregoing general or specific objections, the State responds as follows: "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, notwithstanding that the ammunition may also be used in some rifles." (Cal. Penal Code \& 12323 (a).)

## SPECLAL INTERROGATORY NO. 3

IDENTIFY any and all PERSONS who have knowledge of the facts upon which YOU base YOUR response to Special [nterrogatory No. 2.

RESPONSETO SPECIAL INTERROGATORY NO. 3:
The State further objects to this Interrogatory on the ground that the definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities.

Without waiving any of the foregoing general or specific objections, the State responds as follows: The definition is one known by anyone who has read or otherwise become familiar with the language of section 12323, subdivision (a) of the California Penal Code.

## SPECIAL INTERROGATORY NO. 4

IDENTIFY any and all DOCUMENTS upon which YOU rely to support YOUR response to Special Interrogatory No. 2.

## RESPONSE TO SPECLAL INTERROGATORY NO. 4:

The State further objects to this Interrogatory on the ground that the definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all . . agents, representatives, employees,

[^1]servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities.

Without waiving any of the foregoing general or specific objections, the State responds as follows: The text of California Penal Code section 12323.

## SPECIAL INTERROGATORY NO. 5

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

## RESPONSE TO SPECLAL INTERROGATORY NO. 5:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the term "DEFENDANTS" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all ... agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities;
2. It is compound and conjunctive insofar as it calls for a response based upon three separate statutes. (Code Civ. Proc., $\S 2030.060(f)$ ); and
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: $.45,9 \mathrm{~mm}, 10 \mathrm{~mm}, .40, .357, .38, .44, .380, .454, .25, .32$.

## SPECIAL INTERROGATORY NO. 6

For each type of ammunition YOU list as "handgun ammunition" in response to Special Interrogatory No. 5, please IDENTIFY any and all PERSONS who have knowledge of the facts upon which YOU base YOUR response to Special Interrogatory No. 5.

## RESPONSE TO SPECLAL INTERROGATORY NO. 6:

The State further objects to this Interrogatory on the following grounds:

1. The definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities;
2. The definition of the term "PERSONS," is overbroad insofar as it includes individuals and entities other than the named defendants, including "any natural person, together with all federal, state, county, municipal and other govemment units, agencies or public bodies, as well as firms, companies, corporations, partnerships, proprietorships, joint ventures, organizations, groups of natural persons or other associations or entities separately identifiable whether or not such associations or entities have a separate legal existence in their own right." The State defendants cannot speculate about what knowledge these entities might possess.
3. It is not full and complete in and of itself. (Code Civ. Proc., § 2030.060(d)); and
4. It is compound and conjunctive. (Code Civ. Proc., $\$ 2030.060(\mathrm{f})$ ),

Without waiving any of the foregoing general or specific objections, the State responds as follows: There is a common understanding among those individuals and businesses who might be subject to sections 12060,12061 , and 12318 of the Penal Code, as well as among those who might enforce them, that the calibers identified in the State's response to Interrogatory No. 5 are used principally in pistols and revolvers. Persons with knowledge of the facts underlying the State's response include Special Agent Supervisor Blake Graham, who may be contacted through counsel for the State.

## SPECLAL INTERROGATORY NO. 7

For each type of ammunition YOU list as "handgun ammunition" in response to Special Interrogatory No. 5, please IDENTIFY any and all DOCUMENTS upon which YOU rely to support YOUR response to Special Interrogatory No. 5.

## RESPONSE TO SPECLAL INTERROGATORY NO. 7:

The State further objects to this Interrogatory on the following grounds:

1. The definition of the term "YOU" is overbroad and vague insofar as it includes
third parties who are not defendants and have no connection to this case, including "any and all. . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities;
2. It is not full and complete in and of itself. (Code Civ. Proc., $\$ 2030.060(\mathrm{~d})$ ); and
3. It is compound and conjunctive. (Code Civ. Proc., §2030.060(f)).

Without waiving any of the foregoing general or specific objections, the State responds as follows: There is a common understanding among those individuals and businesses who might be subject to sections 12060, 12061, and 12318 of the Penal Code, as well as among those who might enforce them, that the calibers identified in the State's response to Interrogatory No. 5 are used principally in pistols and revolvers. Accordingly, the State does not believe that documentary support (or expert testimony) is necessary to a finding that the listed calibers are "handgun ammunition." Nevertheless, the State's list is supported by the following documents. The Department of Justice is required by statute to maintain a record of handgun sales in the state. The listed calibers are consistently among the highest in terms of handgun sales volume based upon the number of handguns sold over each of the past five years. The sales data is contained on a Dealer Record of Sales spreadsheet that the State will produce in response to Plaintiffs' requests for production. The listed calibers are also identified in "Cartridges of the World," which Plaintiffs' expert relies upon, on ammunition vendor websites, and online encyclopedias as handgun ammunition calibers. Discovery is continuing. The State reserves the right to supplement this response.

## SPECIAL INTERROGATORY NO. 8

For each type of ammunition listed as "handgun ammunition" in response to Special Interrogatory No. 5 , please state all facts that support your contention that each particular type of ammunition you list is "handgun ammunition" for purposes of California Penal Code sections 12060,12061 , and 12318.

## RESPONSE TO SPECIAL INTERROGATORY NO. 8:

The State further objects to this Interrogatory on the following grounds:

1. Specially defined terms carried over from question to question are not capitalized. (Code Civ. Proc., § 2030.060(e));
2. It is not full and complete in and of itself. (Code Civ. Proc., $\S 2030.060$ (d)); and
3. It is compound and conjunctive. (Code Civ. Proc., § $2030.060(\mathrm{f})$ ).

Without waiving any of the foregoing general or specific objections, the State responds as follows: There is a common understanding among those individuals and businesses who might be subject to sections 12060,12061 , and 12318 of the Penal Code, as well as among those who might enforce them, that the calibers identified in the State's response to Interrogatory No. 5 are used principally in pistols and revolvers. Numerous documents support this understanding. The Department of Justice is required by statute to maintain a record of handgun sales in the state. The listed calibers are consistently among the highest in terms of handgun sales volume based upon the number of handguns sold over each of the past tive years. The sales data is contained on a Dealer Record of Sales spreadsheet that the State will produce in response to Plaintiffs' requests for production. The listed calibers are also identified in "Cartridges of the World," which Plaintiffs' expert relies upon, on ammunition vendor websites, and online encyclopedias as handgun ammunition calibers. Discovery is continuing. The State reserves the right to supplement this response.

## SPECIAL INTERROGATORY NO. 9

Do YOU contend that "ammunition principally for use in a HANDGUN" means ammunition that is used more often in a HANDGUN than in a LONG GUN?

## RESPONSE TO SPECIAL INTERROGATORY NO. 9:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities; and
2. The plain language of sections 12323 and 12060 (b) of the Penal Code speak for 8
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themselves. Statutory interpretation, including the meaning of statutory terms and phrases, lies in the sole province of the Court. (County of Yolo v. Los Rios Community Coll. Dist. (1992) 5 Cal.App.4th 1242, 1257.).

Without waiving any of the foregoing general or specific objections, the State responds as follows: Yes, one interpretation of the statutory language, "ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person," is ammunition that is used more often in a pistol or revolver than in a rifle.

## SPECIAL INTERROGATORY NO. 10

If YOU do not contend that "ammunition principally for use in a handgun" means ammunition that is used more often in a HANDGUN than in a LONG GUN, please state YOUR understanding of the meaning of "ammunition principally for use in a HANDGUN."

RESPONSE TO SPECIAL INTERROGATORY NO. 10:
Inapplicable.

## SPECIAL INTERROGATORY NO. 11

IDENTIFY any and all DOCUMENTS upon which YOU rely to support YOUR response to Special Interrogatory No. 10.

## RESPONSE TO SPECIAL INTERROGATORY NO, 11:

Inapplicable:

## SPECIAL INTERROGATORY NO. 12

Please state all facts that assist YOU in determining whether a given type of ammunition is used more often in a HANDGUN than in a LONG GUN.

## RESPONSE TO SPECIAL NTTERROGATORY NO. 12:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all. agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities; and 9
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2. This interrogatory appears to require the State to accept Plaintiffs' definition of the phrase "principally for use in a handgun." Statutory interpretation, including the meaning of statutory terms and phrases, is the Court's responsibility, and the Court has not yet construed the challenged provisions. (County of Yolo v. Los Rios Community Coll. Dist. (1992) 5 Cal.App. 4th $1242,1257$. )

Without waiving any of the foregoing general or specific objections, the State responds as follows: There is a common understanding among those individuals and businesses who might be subject to sections 12060,12061, and 12318 of the Penal Code, as well as among those who might enforce them, that the calibers identified in the State's response to Interrogatory No. 5 are used principally in pistols and revolvers. Numerous documents support this understanding. The Department of Justice is required by statute to maintain a record of handgun sales in the state. The listed calibers are consistently among the highest in terms of handgun sales volume based upon the number of handguns sold over each of the past five years. The sales data is contained on a Dealer Record of Sales spreadsheet that the State will produce in response to Plaintiffs' requests for production. The listed calibers are also identified in "Cartridges of the World," which Plaintiffs' expert relies upon, on ammunition vendor websites, and online encyclopedias as handgun ammunition calibers. Discovery is continuing. The State reserves the right to supplement this response.

## SPECIAL INTERROGATORY NO. 13

IDENTIFY any and all DOCUMENTS upon which YOU rely to support YOUR response to Special Interrogatory No, 12.

## RESPONSE TOSPECIAL INTERROGATORY NO. 13:

The State further objects to this Interrogatory on the grounds that the definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities.

Without waiving any of the foregoing general or specific objections, the State responds as follows: There is a common understanding among those individuals and businesses who might be subject to sections 12060,12061 , and 12318 of the Penal Code, as well as among those who might enforce them, that the calibers identified in the State's response to Interrogatory No. 5 are used principally in pistols and revolvers. Numerous documents support this understanding. The Department of Justice is required by statute to maintain a record of handgun sales in the state. The listed calibers are consistently among the highest in terms of handgun sales volume based upon the number of handguns sold over each of the past five years. The sales data is contained on a Dealer Record of Sales spreadsheet that the State will produce in response to Plaintiffs' requests for production. The listed calibers are also identified in "Cartridges of the World," which Plaintiffs' expert relies upon, on ammunition vendor websites, and online encyclopedias as handgun ammunition calibers. Discovery is continuing. The State reserves the right to supplement this response.

## SPECIAL INTERROGATORY NO. 14

Please state all facts that assist you in determining whether the types of ammunition YOU list in your response to Interrogatory No. 5 are used more often in a HANDGUN than in a LONG GUN.

## RESPONSE TO SPECIAL INTERROGATORY NO. 14:

The State further objects to this Interrogatory on the following grounds:

1. The definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities;
2. It is not full and complete in and of itself. (Code Civ. Proc., $\$ 2030.060(\mathrm{~d})$ );
3. It is compound and conjunctive. (Code Civ. Proc., § $2030.060(\mathrm{t})$ ); and
4. The State objects to the extent that giving a response to this Interrogatory would require the State to accept as final Plaintiffs' definition of the phrase "principally for use in a 11
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handgun." Statutory interpretation, including the meaning of statutory terms, is the Court's responsibility, and the Court has not yet construed the challenged provisions. (County of Yolo v. Los Rios Community Coll. Dist. (1992) 5 Cal.App.4th 1242, 1257.)

Without waiving any of the foregoing general or specific objections, the State responds as follows: There is a common understanding among those individuals and businesses who might be subject to sections 12060,12061 , and 12318 of the Penal Code, as well as among those who might enforce them, that the calibers identified in the State's response to Interrogatory No. 5 are used principally in pistols and revolvers. Numerous facts and documents support this understanding. The Department of Justice is required by statute to maintain a record of handgun sales in the state. The listed calibers are consistently among the highest in terms of handgun sales volume based upon the number of handguns sold over each of the past five years. The sales data is contained on a Dealer Record of Sales spreadsheet that the State will produce in response to Plaintiffs' requests for production. The listed calibers are also identified in "Cartridges of the World," which Plaintiffs' expert relies upon, on ammunition vendor websites, and online encyclopedias as handgun ammunition calibers. Discovery is continuing. The State reserves the right to supplement this response.

## SPECIAL INTERROGATORY NO. 15

IDENTIFY any and all DOCUMENTS upon which YOU rely to support YOUR response to Special Interrogatory No. 14.

## RESPONSE TO SPECIAL INTERROGATORY NO. 15:

The State further objects to this Interrogatory on the grounds that the definition of the term "YOU" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities.

Without waiving any of the foregoing general or specific objections, the State responds as follows: There is a common understanding among those individuals and businesses who might 12
be subject to sections 12060, 12061, and 12318 of the Penal Code, as well as among those who might enforce them, that the calibers identified in the State's response to Interrogatory No. 5 are used principally in pistols and revolvers. Numerous documents support this understanding. The Department of Justice is required by statute to maintain a record of handgun sales in the state. The listed calibers are consistently among the highest in terms of handgun sales volume based upon the number of handguns sold over each of the past five years. The sales data is contained on a Dealer Record of Sales spreadshect that the State will produce in response to Plaintiffs' requests for production. The listed calibers are also identified in "Cartridges of the World," which Plaintiffs' expert relies upon, on ammunition vendor websites, and online encyclopedias as handgun ammunition calibers. Discovery is continuing. The State reserves the right to supplement this response.

## SPECLAL INTERROGATORY NO. 16

Do YOU contend that DEFENDANTS are not currently enforcing California Penal Code section 12061(a)(1)-(2)?

## RESPONSE TO SPECIAL INTERROGATORY NO. 16:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employces, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities;
2. The term "enforcing" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests.

Without waiving the foregoing general or specific objections, the State responds as 13
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follows: The Department of Justice has not enforced subparagraphs (1) or (2) of section 12061(a) of the Penal Code, the only provisions currently in force, against any individual or business.

## SPECIAL INTERROGATORY NO. 17

If YOU contend that DEFENDANTS are not currently enforcing Califormia Penal Code section $12061(a)(1)-(2)$, IDENTIFY any and all DOCUMENTS supporting this claim.

## RESPONSE TO SPECIAL INTERROGATORY NO. 17:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities;
2. The term "enforcing" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests.

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice does not contend that it is "not currently enforcing Califomia Penal Code section 12061(a)(1)-(2)," only that it has not done so against any individual or business. To the extent that Plaintiffs are asking the State to identify documents to establish a negative, the State has no such documents in its possession, custody, or control.

## SPECIAL INTERROGATORY NO. 18

Do YOU contend that DEFENDANTS have instructed law enforcement officers not to enforce California Penal Code section 12061(a)(1)-(2)?

## RESPONSE TO SPECIAL INTERROGATORY NO. 18:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case. including "any and all . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities;
2. The phrase "law enforcement officers" is vague, ambiguous, and overbroad insofar as it fails to differentiate between federal, state, or local law enforcement officers. The State will construe this request to mean officers employed by the California Department of Justice.
3. The term "enforce" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests.

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice makes no such contention.

## SPECIAL INTERROGATORY NO. 19

If YOU contend that DEFENDANTS have instructed law enforcement officers not to enforce Califormia Penal Code section 12061 (a)(1)-(2), IDENTIFY any and all DOCUMENTS supporting this claim.

RESPONSE TO SPECIAL INTERROGATORY NO. 19:
Inapplicable.

## SPECIAL INTERROGATOR Y NO. 20

Do YOU contend that DEFENDANTS have informed firearm retailers that DEFENDANTS are not enforcing California Penal Code section $12061(a)(1)-(2)$ ?

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## RESPONSE TO SPECIAL INTERROGATORY NO. 20:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities;
2. The term "enforcing" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests.
3. The phrase "firearms retailers" as used in this Interrogatory is vague, ambiguous, and overbroad.

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice does not contend that it has informed firearm retailers that it is not enforcing Califomia Penal Code section 12061 (a)(1)-(a)(2).

## SPECIAL INTERROGATORY NO. 21

If YOU contend that DEFENDANTS have informed firearm retailers that DEFENDANTS are not enforcing Califormia Penal Code section 12061(a)(1)-(2), IDENTIFY any and all DOCUMENTS supporting this claim.

## RESPONSE TO SPECIAL INTERROGATORY NO. 21:

Inapplicable.

## SPECIAL INTERROGATORY NO. 22

Do YOU contend that DEFENDANTS will never enforce Catifomia Penal Code section 12061(a)(1)-(2)?

## RESPONSE TÓ SPECIAL INTERROGATORY NO. 22:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, including "any and all . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities;
2. The term "enforce" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests.

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice does not contend that it will never enforce Califomia Penal Code section $12061(a)(1)-(a)(2)$.

## SPECIAL INTERROGATORY NO. 23

If YOU contend that DEFENDANTS will never enforce Califormia Penal Code section $12061(\mathrm{a})(1)-(2)$, IDENTIFY any and all DOCUMENTS supporting this claim.

RESPONSE TO SPECIAL INTERROGATORY NO. 23:
Inapplicable.

## SPECIAL INTERROGATORY NO. 24

Do YOU contend that DEFENDANTS will never enforce Califormia Penal Code section 12061(a)(3)-(7), once that section takes effect on February 1, 2011?

## RESPONSE TO SPECIAL INTERROGATORY NO. 24:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, 17
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including "any and all . . agents, representatives, employees, servants, consultants, contractors,
2 subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting

to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities;
2. The term "enforce" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests.

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice does not contend that it has instructed law enforcement officers not to enforce Califormia Penal Code section 12061(a)(3)-(7) once that section takes effect on February 1, 2011,

## SPECIAL INTERROGATORY NO. 27

If YOU contend that DEFENDANTS have instructed law enforcement officers not to enforce California Penal Code section 12061(a)(3)-(7), once that section takes effect on February 1, 2011, IDENTIFY any and all DOCUMENTS supporting this claim.

## RESPONSE TO SPECIAL INTERROGATORY NO. 27:

Inapplicable.

## SPECIAL INTERROGATORY NO. 28

Do YOU contend that DEFENDANTS have informed firearm retailers that DEFENDANTS will not enforce California Penal Code section 12061 (a)(3)-(7) once that section takes effect on February 1, 2011?

## RESPONSE TO SPECIAL INTERROGATORY NO. 28:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting 19
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to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities;
2. The term "enforcing" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests; and
3. The phrase "firearms retailers" as used in this Interrogatory is vague, ambiguous, and overbroad. The State will construe this request to mean federal firearms licensees and those engaged in the retail sale of ammunition.

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice does not contend that it has informed firearm retailers that it will not enforce Califormia Penal Code section 12061(a)(3)-(7) once that section takes effect on February 1, 2011.

## SPECIAL INTERROGATORY NO. 29

If YOU contend that DEFENDANTS have informed firearm retailers that DEFENDANTS will not enforce Califomia Penal Code section 12061(a)(3)-(7), once that section takes effect on February 1, 2011, IDENTIFY any and all DOCUMENTS supporting this claim.

RESPONSE TO SPECLAL INTERROGATORY NO. 29:
Inapplicable.

## SPECLAL INTERROGATORY NO. 30

Do YOU contend that DEFENDANTS will never enforce California Penal Code section 12318, once that section takes effect on February 1, 2011?

## RESPONSE TO SPECIAL INTERROGATORY NO, 30:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employees, servants, consultants, contractors, Responses To Plantiffs' Specially Prepared Interrogatories, Set One (10CECG02116)
subcontractors, investigators, attorneys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities; and
2. The term "enforce" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests.

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice does not contend that it will never enforce Califomia Penal Code section 12318 once that section takes effect on February 1, 2011.

## SPECLAL INTERROGATORY NO. 31

If YOU contend that DEFENDANTS will not enforce California Penal Code section 12318, once that section takes effect on February 1,2011, IDENTIFY any and all DOCUMENTS supporting this claim.

## RESPONSE TO SPECLAL INTERROGATORY NO. 31:

Inapplicable.

## SPECIAL INTERROGATORY NO. 32

Do YOU contend that DEFENDANTS have instructed law enforcement officers not to enforce California Penal Code section 12318 once that section takes effect on February 1, 2011?

## RESPONSE TO SPECIAL INTERROGATORY NO. 32:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the 21
Responses To Plamiffs' Specially Prepared Interrogatories, Set One (10CECG02116)
overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities;
2. The phrase "law enforcement officers" is vague, ambiguous, and overbroad insofar as it fails to differentiate between federal, state, or local law enforcement officers. The State will construe this request to mean officers employed by the Califormia Department of Justice.
3. The term "enforce" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice does not contend that it has instructed law enforcement officers not to enforce California Penal Code section 12318 once that section takes effect on February 1, 2011.

## SPECLAL INTERROGATORY NO. 33

If YOU contend that DEFENDANTS have instructed law enforcement officers not to enforce Califormia Penal .Code section 12318, once that section takes effect on February 1, 2011, IDENTIFY any and all DOCUMENTS supporting this claim.

## RESPONSE TO SPECIAL INTERROGATORY NO. 33:

Inapplicable.

## SPECIAL INTERROGATORY NO. 34

Do YOU contend that DEFENDANTS have informed the general public that DEFENDANTS will not enforce California Penal Code section 12318 once that section takes effect on February 1, 2011?

## RESPONSE TO SPECIAL INTERROGATORY NO. 34:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the terms "YOU" and "DEFENDANT" are overbroad and vague insofar as they includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting 22
Responses To Plaintiffs' Specially Prepared Interrogatories, Set One (10CECG02116)
to act on behalf of DEFENDANTS." This vagueness is compounded by the fact that it incorporates the term "PERSONS," which is also vague and overbroad, thus amplifying the overbreadth in the context of this interrogatory. The State cannot respond on behalf of all these individuals and entities; and
2. The term "enforce" is vague and ambiguous insofar as it fails to distinguish between citation, arrest, prosecution, or some lesser enforcement activity such as informal discussions or requests

Without waiving the foregoing general or specific objections, the State responds as follows: The Department of Justice does not contend that it has informed the general public that it will not enforce California Penal Code section 12318 once that section takes effect on February 1, 2011.

## SPECIAL INTERROGATORY NO. 35

If YOU contend that DEFENDANTS have informed the general public that DEFENDANTS will not enforce Califormia Penal Code section 12318, once that section takes effect on February 1,2011, IDENTIFY any and all DOCUMENTS supporting this claim.

## RESPONSE TO SPECIAL INTERROGATORYNO. 35:

Inapplicable.

Respectfully Submitted,
Edmund G. Brown Jr. Attomey General of Califormia Zackery P. MORAZZIN Supervising Deputy Attomey 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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## DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

I am employed in the Office of the Attomey 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 13001 Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On November 23,2010, I served the attached
RESPONSES TO PLAINTIFFS' FORM INTERROGATORIES, SET ONE;
RESPONSES TO SPECIALLY PREPARED INTERROGATORIES, SET ONE;

## RESPONSES TO PLAINTIFFS' DEMAND FOR PRODUCTION AND INSPECTION OF DOCUMENTS, SET ONE; and <br> RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSIONS, SET ONE

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, 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 November 23, 2010, at Sacramento, California
$\frac{\text { Brenda Apodaca }}{\text { Declarant }}$


## EXHIBIT " 55 "

Edmund G. Brown Jr.
Attomey General of Califomia
Zackery P. Morazzini
Supervising Deputy Attomey General
Peter A. Krause
Deputy Attomey General
State Bar No. 185098
13001 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, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION; <br> ABLE'S SPORTING, INC.; RTG <br> 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
AMENDED RESPONSE TO SPECIALLY PREPARED INTERROGATORY NO. 5

Action Filed: June 17, 2010

PROPOUNDING PARTIES: SHERIFF CLAY PARKER, HERB BAUER SPORTING GOODS, CALIFORNIA RIFLE AND PISTOL ASSOCIATION, ABLE'S SPORTING, INC., RTG SPORTING COLLECTIBLES, LLC, AND STEVEN STONECIPHER

RESPONDING PARTIES:
THE STATE OF CALIFORNIA, JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, AND THE CALIFORNIA DEPARTMENT OF JUSTICE

SET NO.:
ONE

## SPECIAL INTERROGATORY NO. 5

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

## AMENDED RESPONSE TO SPECLAL INTERROGATORY NO. 5:

The State further objects to this Interrogatory on the grounds that:

1. The definition of the term "DEFENDANTS" is overbroad and vague insofar as it includes third parties who are not defendants and have no connection to this case, including "any and all . . . agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other PERSONS or entities acting or purporting to act on behalf of DEFENDANTS." The State cannot respond on behalf of all these individuals and entities;
2. It is compound and conjunctive insofar as it calls for a response based upon three separate statutes. (Code Civ. Proc., § $2030.060(\mathrm{f})$ ); and
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 Califormia Penal Code sections 12060, 12061, and 12318: .45,9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, .32. The California Department of Justice may identify additional
calibers of ammunition that fall within the statutory definition of "handgun ammunition" in regulations to be promulgated at a later date.

Dated: November 29, 2010
Respectfully Submitted,
Edmund G. Brown Jr.
Attorney General of Califormia
Zackery P. Morazzinl
Supervising 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

## VERIFICATION

I, Blake Graham, have read the foregoing AMENDED RESPONSE TO SPECIALLY PREPARED INTERROGATORY NO. 5 and know its contents:

I am a Special Agent Supervisor at the Department of Justice, Bureau of Firearms, a party to this action, and ann authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing document and know its contents, which are true of my own knowledge, except as to those matters stated on my information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on November 29, 2010, at Sacramento, California.


BLAKE GRAHAM

## DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

1 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 November 29, 2010, I served the attached

## AMENDED RESPONSE TO SPECIALLY PREPARED INTERROGATORY NO. 5

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, 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 Califorma the foregoing is true and correct and that this declaration was executed on November 29, 2010, at Sacramento, California.

Brenda Apodaca
Declarant


## EXHIBIT "56"

EdMund G. Brown Jr.
Attomey General of Califormia
Zackery P. MORAZZINI
Supervising Deputy Attomey 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, 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
RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSIONS, SET ONE

Action Filed: June 17, 2010

[^2]
3. The term "YOU," defined by Plaintiffs as "the State of Califomia, Jerry Brown, in his official capacity as Attorney General of the State of Califormia, the Department of Justice, and any and all of DEFENDANTS' agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other persons or entities acting or purporting to act on behalf of DEFENDANTS" is overbroad as to scope. The State lacks knowledge sufficient to respond on behalf of all these individuals.

Subject to these objections, the State responds as follows: Deny.

## REQUEST FOR ADMISSION NO. 2

Admit that there are thousands of types of ammunition suitable for use in both HANDGUNS and LONG GUNS.

## RESPONSE TO REOUEST FOR ADMISSION NO. 2 :

The State objects to this Request on the grounds that:

1. It is vague and ambiguous; and
2. 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;" and
3. It seeks an admission on a matter that is neither relevant to the subject matter of the action, nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to these objections, the State responds as follows: Despite a reasonable inquiry into the matter, the State lacks facts sufficient to enable it to admit or deny "that there are thousands of types of ammunition suitable for use in both HANDGUNS and LONG GUNS."

## REQUEST FOR ADMISSION NO. 3

Admit that YOU do not know what types of ammunition are "principally for use in a HANDGUN."

## RESPONSE TO REQUEST FOR ADMISSION NO. 3:

The State objects to this Request on the grounds that:

1. 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;" and
2. The term "YOU," defined by Plaintiffs as "the State of Califormia, Jerry Brown, in his official capacity as Attomey General of the State of Califormia, the Department of Justice, and any and all of DEFENDANTS' agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other persons or entities acting or purporting to act on behalf of DEFENDANTS" is overbroad as to scope. The State lacks knowledge sufficient to respond on behalf of all these individuals.

Subject to these objections, the State responds as follows: Deny.

## REQUEST FOR ADMISSION NO. 4

Admit that YOU do not know what types of ammunition are used more often in HANDGUNS than in LONG GUNS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 4:

The State objects to this Request on the grounds that:

1. 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."
2. The term "YOU," defined by Plaintiffs as "the State of California, Jerry Brown, in his official capacity as Attorney General of the State of Califormia, the Department of Justice, and any and all of DEFENDANTS' agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other persons or entities acting or purporting to act on behalf of DEFENDANTS" is overbroad as to scope. The State lacks knowledge sufficient to respond on behalf of all these individuals; and
3. The State objects to the extent that this Request requires the State to accept Plaintiffs' definition of the phrase "principally for use in a handgun." Statutory interpretation, including the meaning of statutory tenns, is the Court's responsibility, and the Court has not yet construed the

[^3] (10CECG02116)
challenged provisions. (County of Yolo v. Los Rios Community Coll. Dist. (1992) 5 Cal.App.4th $1242,1257$.

Without waiving the foregoing general or specific objections, the State responds as follows: Deny.

## REQUEST FOR ADMISSION NO. 5

Admit that YOU are unable to determine whether each type ammunition [sic] suitable for use in both HANDGUNS and LONG GUNS are actually used more often in HANDGUNS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 5:

The State objects to this Request on the grounds that:

1. 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;"
2. It is compound and conjunctive (Code Civ. Proc., § 2033.060(f));
3. The term "YOU," defined by Plaintiffs as "the State of Califomia, Jerry Brown, in his official capacity as Attorney General of the State of California, the Department of Justice, and any and all of DEFENDANTS' agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attomeys, and any other persons or entities acting or purporting to act on behalf of DEFENDANTS" is overbroad as to scope. The State lacks knowledge sufficient to respond on behalf of all these individuals; and
4. The State objects to the extent that this Request requires the State to accept Plaintiffs' definition of the phrase "principally for use in a handgun." Statutory interpretation, including the meaning of statutory terms, is the Court's responsibility, and the Court has not yet construed the challenged provisions. (County of Yolo v. Los Rios Community Coll. Dist. (1992) 5 Cal.App.4th $1242,1257$.

Without waiving the foregoing general or specific objections, the State responds as follows: Deny.

## REQUEST FOR ADMISSION NO. 6

Admit that there is no way for anyone to determine whether each type of ammunition suitable for use in both HANDGUNS and LONG GUNS is used more often in HANDGUNS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 6:

The State objects to this Request on the grounds that:

1. 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."
2. It is compound and conjunctive (Code Civ. Proc., § 2033.060(f));
3. It calls for speculation; and
4. The State objects to the extent that this Request requires the State to accept Plaintiffs' definition of the phrase "principally for use in a handgun." Statutory interpretation, including the meaning of statutory terms, is the Court's responsibility, and the Court has not yet construed the challenged provisions. (County of Yolo v. Los Rios Community Coll. Dist. (1992) 5 Cal.App.4th $1242,1257$.

## REQUEST FOR ADMISSION NO. 7

Admit that the CHALLENGED PROVISIONS fail to provide reasonable notice as to what types of ammunition are "handgun ammunition" for purposes of the CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 7:

The State objects to this Request on the grounds that:

1. It is compound and conjunctive because the definition of "Challenged Provisions" includes three separate statutes. (Code Civ. Proc., § 2033.060(f));
2. 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."
3. The phrase "reasonable notice" is vague and ambiguous.

Subject to these objections, the State responds as follows: Deny.
Response To Plaintiff' Request For Admissions, Set One
(10CECG02116)

## REQUEST FOR ADMISSION NO. 8

Admit that Defendant Department of Justice worked with Assemblyman Kevin De Leon's office in an attempt to address the vagueness issues presented by the CHALLENGED PROVISIONS by amending Assembly Bill 2358 to include a "list of ammunition calibers" that would be considered "handgun ammunition" for purposes of the CHALLENGED PROVISIONS

## RESPONSE TO REQUEST FOR ADMISSION NO. 8:

The State objects to this Request on the grounds that:

1. It is compound and conjunctive. (Code Civ. Proc., $\S 2033.060(f)$ );
2. It calls for a legal conclusion about unspecified "vagueness issues;"
3. It is vague and ambiguous; and
4. It seeks an admission on a matter that is neither relevant to the subject matter of the action, nor reasonably calculated to lead to the discovery of admissible evidence.

## REQUEST FOR ADMISSION NO. 9

Admit that Defendant Department of Justice has not issued any guidelines that identify what types of ammunition are "handgun ammunition" under the CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 9:

The State objects to this Request on the grounds that:

1. It is compound and conjunctive. (Code Civ. Proc., § $2033.060(\mathrm{f})$ ); and
2. 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."

Subject to these objections, the Department of Justice admits that it has not issued guidelines listing calibers of ammunition that are commonly understood to be handgun ammunition within the meaning of sections 12060, 12061, or 12318 of the Penal Code.

## REQUEST FOR ADMISSION NO. 10

Admit that YOU are not aware of any guidelines that identify what types of ammunition are "handgun ammunition" under the CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 10:

The State objects to this Request on the grounds that:

1. It is compound and conjunctive. (Code Civ. Proc., § 2033.060(f));
2. The term "YOU," defined by Plaintiffs as "the State of Califormia, Jerry Brown, in his official capacity as Attorney General of the State of California, the Department of Justice, and any and all of DEFENDANTS' agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other persons or entities acting or purporting to act on behalf of DEFENDANTS" is overbroad as to scope. The State lacks knowledge sufficient to respond on behalf of all these individuals;
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;" and
4. The term "guidelines" is vague and ambiguous.

Subject to these objections, the Department of Justice admits that it is unaware of any formal guidelines that identify the calibers of ammunition that are commonly understood to be handgun ammunition for purposes of sections 12060, 12061, or 12318 of the Penal Code.

## REQUEST FOR ADMISSION NO. 11

Admit that YOU are not currently enforcing any of the CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 11:

The State objects to this Request on the grounds that:

1. It is compound and conjunctive. (Code Civ. Proc., § $2033.060(\mathrm{f})$ ); and
2. The term "YOU," defined by Plaintiffs as "the State of Califormia, Jerry Brown, in his official capacity as Attorney General of the State of California, the Department of Justice, and any and all of DEFENDANTS' agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other persons or entities acting or purporting to act on behalf of DEFENDANTS" is overbroad as to scope. The State lacks knowledge sufficient to respond on behalf of all these individuals.

## 8

Response To Plantiffs' Request For Admissions, Set One

Subject to these objections, the Department of Justice admits that it has not enforced Penal Code sections $12061(\mathrm{a})(1)$ or (a)(2), the only subdivisions of the Challenged Provisions currently in force, against any individual or business.

## REQUEST FOR ADMISSION NO. 12

Admit that YOU will never enforce any of the CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 12:

The State objects to this Request on the grounds that:
2. It is compound and conjunctive. (Code Civ. Proc., § 2033.060(f));
2. The term "YOU," defined by Plaintiffs as "the State of California, Jerry Brown, in his official capacity as Attorney General of the State of Califormia, the Department of Justice, and any and all of DEFENDANTS' agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other persons or entities acting or purporting to act on behalf of DEFENDANTS" is overbroad as to scope. The State lacks knowledge sufficient to respond on behalf of all these individuals; and
3. It calls for speculation about future events and is therefore an improper hypothetical.

## REQUEST FOR ADMISSION NO. 13

Admit that YOU have not instructed local and state law enforcement officers not to enforce the CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 13:

The State objects to this Request on the grounds that:

1. It is compound and conjunctive. (Code Civ. Proc., § 2033.060(f)); and
2. The term "YOU," defined by Plaintiffs as "the State of California, Jerry Brown, in his official capacity as Attomey General of the State of California, the Department of Justice, and any and all of DEFENDANTS' agents, representatives, employees, servants, consultants, contractors, subcontractors, investigators, attorneys, and any other persons or entities acting or purporting to act on behalf of DEFENDANTS" is overbroad as to scope. The State lacks knowledge sufficient to respond on behalf of all these individuals

Subject to these objections, the Department of Justice admits that it has not instructed local and state law enforcement officers not to enforce sections 12060,12061 , or 12318 of the Penal Code.

## REQUEST FOR ADMISSION NO. 14

Admit that you have not informed firearm retailers that you will not enforce the CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 14:

The State further objects to this Request on the grounds that:

1. Specially defined terms carried over from question to question are not capitalized.
(Code Civ. Proc., § $2033.060(\mathrm{e})$ );
2. The phrase "firearm retailers" as used in this Request is vague and ambiguous; and
3. It is compound and conjunctive.

Subject to these objections, the Department of Justice admits that it has not instructed firearm retailers that it will not enforce sections 12060, 12061, or 12318 of the Penal Code.

## REQUEST FOR ADMISSION NO. 15

Admit that you have not informed firearm retailers that you will never enforce the CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 15:

The State further objects to this Request on the grounds that:

1. Specially defined terms carried over from question to question are not capitalized.
(Code Civ. Proc., § $2033.060(\mathrm{e})$ );
2. The phrase "firearm retailers" as used in this Request is vague and ambiguous; and
3. It is compound and conjunctive.

Subject to these objections, the Department of Justice admits that it has not instructed firearm retailers that it will never enforce sections 12060, 12061, or 12318 of the Penal Code. REQUEST FOR ADMISSION NO. 16

Admit that you have not publicly announced that you will not enforce the CHALLENGED PROVISIONS.

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Response To Plaintiffs' Request For Admissions, Set One
(10CECG02116)

## RESPONSE TO REQUEST FOR ADMISSION NO. 16:

The State further objects to this Request on the grounds that:

1. Specially defined terms carried over from question to question are not capitalized (Code Civ. Proc., $\$ 2033.060(\mathrm{e})$ );
2. The phrase "publicly announced" is vague and ambiguous; and
3. It is compound and conjunctive.

Subject to these objections, the Department of Justice admits that it has not publicly announced that it will not enforce sections 12060,12061, or 12318 of the Penal Code.

## REQUEST FOR ADMISSION NO. 17

Admit that you have not publicly announced that you will never enforce the

## CHALLENGED PROVISIONS.

## RESPONSE TO REQUEST FOR ADMISSION NO. 17:

The State further objects to this Request on the grounds that:

1. Specially defined terms carried over from question to question are not capitalized.
(Code Civ. Proc., § $2033.060(\mathrm{e})$ ); and
2. It is compound and conjunctive.

Subject to these objections, the Department of Justice admits that it has not publicly announced that it will never enforce sections 12060,12061 , or 12318 of the Penal Code.

Dated: November 23, 2010
Respectfully Submitted,
Edmund G. Brown Jr.
Attorney General of California
ZaCKERY P. MORAZZINI Supervising Deputy Attomey General


Deputy Attomey General Altorneys for Defendants and Respondents State of California, Edmund G. Brown Jr., and the California Department of Justice

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11
Response To Plantuff' Request For Admissions, Set One
(10CECG02116)

## VERIFICATION

## I. Blake Graham, have read the foregoing RESPONSES TO PLAINTIFFS' REQUEST

 FOR ADMISSIONS, SET ONE and know its contentsI am a Special Agent Supervisor at the Department of Justice, Bureau of Firearms, a party to this action, and am authorized to make this venfication for and on its behalf, and I make this verification for that reason. I have read the foregoing document and know its contents, which are true of my own knowledge, except as to those matters stated on my information and belief, and as to those matters, I believe them to be true

1 declare under penalty of perjury under the laws of the State of California that the forcgoing is true and correct and that this verification was executed on November 23, 2010, at Sacramento, Califormia.


## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: Sheriff Clay Parker, et al. v. The State of Califormia
No.: 10CECG02116
I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the Califormia State Bar, at which member's direction this service is made. 1 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 November 23,2010, I served the attached
RESPONSES TO PLAINTIFFS' FORM INTERROGATORIES, SET ONE;
RESPONSES TO SPECLALLY PREPARED INTERROGATORIES, SET ONE;

## RESPONSES TO PLAINTIFFS' DEMAND FOR PRODUCTION AND INSPECTION OF DOCUMENTS, SET ONE; and <br> RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSIONS, SET ONE

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, Califomia, 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 Califormia the foregoing is true and correct and that this declaration was executed on November 23, 2010, at Sacramento, Califormia.

Brenda Apodaca
Declarant


## EXHIBIT "57"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO
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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, )
V.

No. 10CECG02116

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.

VOLUME I
DEPOSITION OF

BLAKE GRAHAM

WEDNESDAY, DECEMBER 1, 2010

REPORTER: LINDSEY R. PERRY, CSR \#12806, RPR, CRR

## APPEARANCES

For the Plaintiffs and Petitioners:
(Appeared telephonically)
MICHEL \& ASSOCIATES
By: CLINTON B. MONFORT, Attorney at Law
SEAN A. BRADY, Attorney at Law JOSHUA DALE, Attorney at Law
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802
cmontfort@michellawyers.com

For the Defendants and Respondents:
STATE OF CALIFORNIA DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL By: PETER A. KRAUSE, Attorney at Law 1300 I Street, Suite 125
Sacramento, CA 94244
peter.krause@doj.ca.gov

For the Bureau of Firearms:
STATE OF CALIFORNIA DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL By: KIMBERLY GRAHAM, Attorney at Law 1300 I Street, Suite 1101 Sacramento, CA 94244 kimberly.graham@doj.ca.gov

Also present:
Ed Worley, National Rifle Association of America Stephen Helsley (Appeared telephonically)
disassembling the weapons, per se, but $I$ do note what caliber the weapons are to make sure it matches the paperwork that's been submitted by the manufacturer to make sure we don't have a typo error that would cause the gun dealers problems down the road or something like that.

Okay. So in your training -- I mean, in these experiences, is it fair to say that you deal with what types of ammunition or what caliber ammunition might be used in those firearms and that's about it? A I don't think I understand that question, sir. Q Okay. Does your training deal with whether or not any ammunition, you know, suitable for use in the firearms you're dealing with are principally for use in a handgun?

MR. KRAUSE: I'm going to object there. Vague and ambiguous as to "your training." Which training are you referring to?

MR. MONFORT: I'm sorry. I say "training" because this is listed under his training section in his CV. It seems like he's learned on the job in conducting reviews, so that's what I'm referring to, everything that he did under his entry in his $C V$ he just described. And the entry on the CV I'm referring to is the April 2008 entry. And I'll go ahead and repeat the question.
$Q$
Did the activities you conducted in your job
allow you to determine whether or not ammunition suitable for use in the firearms you dealt with were principally used in a handgun?

MR. KRAUSE: I'1l object again that it's vague and ambiguous, but if you understand, go ahead and answer.

THE WITNESS: I think I understand where you're going, Mr. Monfort.

MR. KRAUSE: Don't guess, though.
THE WITNESS: No, I'll attempt to answer the question as I understand it.

The weapons that $I$ review as part of this function of my job, I have to identify specific calibers that match the paperwork submitted by the manufacturers, and as such, I gain an understanding of calibers common to handguns in California and $I$ gain an understanding of the calibers that are being -- calibers and weapons that are being submitted for the DOJ roster.

Q BY MR. MONFORT: Okay. When you say you "gain an understanding" as to types of ammunition that are common to handguns, I understand that you're learning that certain calibers are frequently used in handguns, but do you acquire a knowledge as to whether a particular caliber was used more often in a handgun than in a rifle? A As part of my, you know, training and experience over the last 16 or so years, when added to this
experience with the handgun -- rostered guns and other factors, I can say that I -- I have a feeling that there are certain calibers that are more often than not handgun calibers.

Does that answer your question?

Q Yes, it does. Thank you.
okay. In regard to your expert testimony on your CV, I believe I asked you if you'd testified as an expert in a deposition.

Have you ever testified as an expert in any setting, whether that be at a hearing, at trial or declaration?

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A I've testified as an expert in preliminary
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hearing and jury trial settings, I believe, sir, if that answers your question.

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Yes, it does.
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Your expert testimony that your CV identifies you provided on February 15th, 2007? And this is, again, on page three of Exhibit $A$ ?

A Correct.
Q It states, "Qualified as an expert witness on assault weapons identification, assault weapons registration and the DOJ automated firearms system"; is that correct?

A Yes, sir.

Did any of your testimony in that case deal with ammunition generally?

A You were cut off again, sir. I want to make sure I have the full question.

Q Sure. Did any of your testimony in that case, the testimony that you identify as being on February 15 th, 2007, have to do with ammunition?

A I think there - because some of the weapons in this case were -- you know, they were assault weapons and, specifically all the weapons under Penal Code Section 12276.1, one of the issues there is it has -- you know, center fire versus rim fire is the determining factor. In that sense, ammunition would have been an issue because I would have mentioned center fire and that's, again, an ammunition type term.

Q Okay. So your testimony in that case, is it accurate to say, didn't deal with whether or not any particular caliber of ammunition was handgun ammunition? A I don't know that that question was asked of me by the prosecution or the defense, and I don't know that $I$ offered that opinion, sir. Q Thank you.

In regard to the testimony you identified being on April 12th, 2007, in your CV, your CV states that you qualified as an expert witness on an assault weapons
be asking about is have you ever been a witness -- apart from maybe -- maybe not qualifying as an expert witness, but have you ever acted as a witness as a special agent in any other court hearings or trials or preliminary hearings?

THE WITNESS: Yeah, I've had several, obviously, nonexpert testimony types of cases where $I$ was the case agent or the arresting officer where $I$ had to talk about a particular weapon and those types of things, but I don't -- if $I$ had been deemed an expert by a court, then $I$ would have mentioned it here in my expert testimony section.

Q BY MR. MONFORT: Okay. Thank you. I think that's sufficient on that matter.

Okay. Just to summarize, we've discussed all the training that you've - the training that you've had, basically.

Did any of your training cover what types of ammunition the public uses more often in a handgun?

MR. KRAUSE: Objection. Vague and ambiguous.
MR. MONFORT: I'm curious whether or not any of his training instructed him as to whether a particular caliber of ammunition is used more often in a handgun.

THE WITNESS: Mr. Monfort, I'll try to answer your question here.

I do know, based on my cumulative training and experience, that certain calibers, for example, are pistol cartridge calibers as opposed to a rifle type of cartridge.

One of the ways that you would break that down a little bit is if something, for example, is a machine gun, if it's in a pistol cartridge caliber, then you're going to call it a submachine gun as opposed to a--if it's a rifle caliber, like a Bushmaster M4 rifle that I talked about earlier. If that weapon is capable of full automatic fire, it's going to be deemed a machine gun versus an H\&K MP5 in 9 mm . So that would be one way to -I'm trying to answer your question. Q BY MR. MONFORT: Okay. Thank you.

Other than the training we've discussed as identified in your $C V$, have you had any other training that you would -- that would allow you to determine or that would assist you in determining whether or not a specific type of ammunition is handgun ammunition?

MR. KRAUSE: Objection as to training. Formal? Informal?

MR. MONFORT: Well, let's go with formal first.

THE WITNESS: Formal training --
BY MR. MONFORT: As identified in your CV.

I'm sorry. Say again.

Q I'm sorry. I didn't mean to cut you off. Formal training other than what you've identified in your CV?

A I think my CV's fairly accurate with regards to my formal training I've received. I don't know the -anything I've left off there.

Q Okay. Have you received any informal training that is not identified in your CV that instructed you as to whether or not a particular type of ammunition is principally used in a handgun?

A And what do you mean by "informal training"? Q Have you ever been -- have you ever been taught whether or not a particular caliber of handgun -- a particular caliber of ammunition is principally used in a handgun outside of formal training?

A Okay. Well, I think you've answered my question with another question.

Can you define what informal training is? Is that just non-classroom? Is that something self-directed I can learn on my own or what do you mean specifically there so I can answer your question?
Q All of the above, other than the formal classroom training you've identified in your CV.

A Okay. As far as informal training, things that I would consider, it might be books that I read, you know,
reference manuals, articles on the Internet from, you know, reputable sources.

Q Okay. Can I - I'm sorry. Can I stop you real quick?

Can you identify for me whether or not these books and materials that you've relied on -- or that you said that you learn from inform you as to whether a particular caliber of ammunition is principally used in a handgun?

MR. KRAUSE: Objection. Vague and ambiguous.
MR. MONFORT: Okay. I'll withdraw the question. Q Can you identify for me the materials that you referred to in your previous answer?

A Sure. Cartridges of the World. It's a reference guide. I think you've been provided excerpts of that document. Another manual is called Rifles of the World; Gun Traders Guide; there are various web sites that $I$, you know, peruse because they're firearms related off and on through the course of my, you know, years here just to gain knowledge in the field. Some of the Web sites are firearms manufacturers, you know, Winchester, Ruger, Glock, those types of Web sites; the Small Arms Ammunition Manufacturers Institute Web site; Cheaper Than Dirt. It's a -- you know, they sell lots of firearms accessories and ammunition; Cabela's Web site; Midway USA is another Web
site. I think there -- you know, there's a few others as well, but those types of Web sites, manuals, references, the firearms training that I got through -- well, I'm trying to stick to the informal here for you, but by reading the manufacturer -- or the manufacturers' Web sites of both the ammunition makers, the gun makers and these other companies that -- I'll call them wholesalers that sell ammo, for example, they kind of self-police themselves, if you will, as to what they consider -- what ammunition types they consider handgun versus, you know, rifle ammunition. Whether that be for customer use or some other fashion, I don't know. Maybe it's a -- there's some other reason, but most of the Web sites that I went to and still go to to this day, they break it down by handgun versus rifle -- I'm sorry. Yeah, handgun versus rifle cartridges, shotgun, and then sometimes rim fire is also broken down to further separate it for the person on the Web site.

Q Okay. Thank you.
I think we've covered your experience, education and training pretty well. Just to confirm, you are testifying as an expert in this case; correct?
A Yes, sir.

Okay. Is there anything that we haven't covered or that you haven't at least mentioned that you feel
qualifies you to testify as an expert in this case?
A I don't think we've -- I think you've covered
everything that is relevant.
Q I'm sorry?
A I said I think you've covered everything that's
relevant.
Q Okay. Thank you.
Are you being paid for your testimony in this
case?
A My normal, you know, salary, just like any other
day, if I was here or if I was, you know, at the range or
some other normal function of my day.
Q Okay. Thank you.
Can you describe for me, please, the nature of
your testimony as an expert in this case? And by that I
mean what do you think you're testifying as an expert in
regard to?

MR. KRAUSE: Objection. Vague and ambiguous.
If you understand, you can answer.
THE WITNESS: Yeah, I guess I -- I need you to either rephrase or re-ask the question again. Q BY MR. MONFORT: Okay. You're testifying as an expert in this case.

What are you an expert in?
Well, as my CV states, I have testified
previously as an assault weapons identification expert, assault weapons registration expert, the assault -- or automated firearms system within, you know, the DOJ database, and those are the things I've previously qualified as. Q Okay. I understand the things you've previously qualified as.

I mean, are you testifying as an expert about ammunition in this case, in your opinion?

A Yeah. That's basically the subject of this lawsuit. Q Okay. Does that pretty well -- I mean, is there anything that I've left off that you believe you're testifying as an expert to in this case -A You're going to have to repeat that. You were fading in and out there.

Q I'm sorry. I had to stand up to stretch my legs.
I apologize.
A Okay.
Q I. just want to be clear that we've covered everything that you're testifying as an expert to in this case in our discussion right now.

You're not testifying as an expert with regard to anything else other than firearms and ammunition; is that right?
sections challenged in this lawsuit?
MR. KRAUSE: Objection, again, that it lacks foundation. There's no evidence that he's been asked to necessarily opine on $A B 962$ or -- or the challenged provisions that you defined at the beginning.

MR. MONFORT: Okay. Okay.
Are you aware whether the Bureau of Firearms ever produced an analysis of $A B$ 962? And when I say "AB 962," I mean Assembly Bill 962 which was passed in 2009 and which is the subject of this litigation.

A If the Bureau of Firearms did, I don't recall having a major or minor part in it. If I was asked about it, I don't have any recollection at this time about it. Q If analysis was conducted or produced, if analysis of $A B 962$ was produced, do you know who in the Bureau of Firearms produced it?

MR. KRAUSE: Objection. Calls for speculation.
THE WITNESS: The only person $I$ can think of might be Jeff Amador. And then if -- maybe if he was out, there might be some alternate person. If he was sick or, you know, vacation or something, there might be someone else designated to perform that job function, but I don't know who that would be. I'm not part of that chain of command, if you will.

Q BY MR. MONFORT: Is it correct that you did not


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ammunition calibers would have been included in that list
in Assembly Bill 2358?
    MR. KRAUSE: Objection. Relevance.
    You can answer.
    MR. MONFORT: That's -- are you going to allow
    him to answer?
    MR. KRAUSE: Yeah.
    THE WITNESS: I was waiting for the court
        reporter and the delay on the phone and everything else.
    Yes, I was asked to, you know, look into the
        calibers for that.
        Q BY MR. MONFORT: Okay. When you say you were
        asked to look into the calibers for that, were you asked
        to identify what calibers of ammunition were handgun
        ammunition?
        A Yeah. I mean, that's - that's the -- I think
        that was the whole point of that, I guess, amendment.
        Q Okay. Can you identify for me the calibers of
        ammunition that you identified as handgun ammunition, as
        you were asked to do so with regard to Assembly Bill 2358?
        A I -- I might be able to give you some, but I
        probably can't give you all of the calibers that I
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A I'll try. I believe . 45 caliber, 9 mm , 10 mm , .380, .25, . 40 caliber, .38, .357, possibly . 454 and possibly 7.62 and maybe .223 .

Q Okay. Can you recall any other ammunition calibers other than those that you identified as handgun ammunition for purposes of Assembly Bill 2358?

A Not off the top of my head. And again, those -the calibers I just gave you are my best recollection. There may be additions or deletions to the ones that I gave you.

Q Okay. Can you recall if anyone else was involved in determining ammunition calibers to include in Assembly Bill 2358?

MR. KRAUSE: Objection to the extent it requires the disclosure of communications you may have had with attorneys. Attorney-client privilege. Apart from discussions with lawyers. You can identify nonlawyers that you --

THE WITNESS: Yeah, I would probably say the acting chief, Stephen Lindley. And beyond that, I can't think of anybody -- I work for him, so that's -- that's who I would report to.

Q BY MR. MONFORT: Did Stephen Lindley identify other calibers of handgun ammunition other than the ones that you've already identified for me?

Did he -- I don't know -- I can't say that he identified other calibers. I mean, I may have myself, but I - I don't know if he specifically did.

MR. KRAUSE: And we don't want you to guess. Q BY MR. MONFORT: I'm sorry. Are you still thinking? I just .- I don't want to be sitting here. A No. I'm done with my answer there. Sorry. Q Okay. Thank you.

Okay. Just to be clear, can you think of anyone, other than the lawyer, who you communicated with in determining what calibers to list in Assembly Bill 2358? A Besides Stephen Lindley, I don't recall any other nonlawyers off the top of my head right now.

Q Did you consult with Assemblyman De Leon -Assemblyman Kevin De Leon or his staff at any point in that process?

A I personally haven't had any contact with anybody at the legislature regarding the matter that you're discussing, at least to my knowledge. If somebody was -you know, got ahold of something $I$ wrote or said or something, I -- I have no control over that. Q Okay. Thank you.

Are you aware of anyone at the Department of Justice, other than yourself, who had contact with Assemblyman De Leon or his staff about the ammunition

Q So can you flip to special interrogatory number five?

A Okay. So page five. What line on the side of the pleading paper, sir?

Q Line seven. The interrogatory inquires -- asks you to list all types of ammunition Defendants consider handgun ammunition for purposes of California Penal Code Sections 12060, 12061 and 12318.

A Okay. Got you. I understand where you're coming from right now.

Q And then the state provides -- objects to the interrogatory. And then at the bottom of the objections beginning at line 21 , the response states, "Without waiving any of the foregoing general or specific objections, the state responds as follows: .45, $9 \mathrm{~mm}, 10 \mathrm{~mm}$, . $40, .357, .38, .44, .380, .454, .25$ and $.32 . "$
A Okay. I see.

Q Is it your position today that the ammunition you consider handgun ammunition for purposes of the challenged provisions are those same calibers?

A Yes.
Q Okay. Now, turning to special interrogatory number six.

MR. KRAUSE: If you could provide a page and line citation, please.

MR. MONFORT: I will. I'm sorry. Give me one moment. Okay. I am now on page six, line 16.

In your response to Plaintiffs' special interrogatory number six, you stated that, "There is a common understanding among those individuals and businesses who might be subject to Sections 12060,12061 and 12318 of the Penal Code, as well as among those who might enforce them, that the calibers identified in the state's response to interrogatory number five are used principally in pistols and revolvers"; is that correct? A Yes. Q Is that your position today? A Yes. Q Okay. Moving forward, I'm going to now make reference to the list of ammunition calibers provided in response to interrogatory number five and described in special interrogatory number six. For simplicity sake, I'm going to refer to the list of ammunition calibers provided in your responses to special interrogatory number five as the "DOJ's common understanding list," if that is okay with you.

MR. KRAUSE: Can't we just call it "the list"?
MR. MONFORT: Well --
MR. KRAUSE: "Caliber list"? How about just "caliber list"?

MR. MONFORT: Okay, yes, that will work. I just want to make sure there was no confusion with regard to previous lists with regard to AB 2358. Okay. Caliber list? Okay. I have that -- if I use the wrong terminology, I apologize. Feel free to jump in and correct me as I prepared my notes using the "common understanding" language.

THE WITNESS: Okay.
Q BY MR. MONFORT: Okay. Mr. Graham, did you provide --

THE REPORTER: I'm sorry. What was the question?

Q BY MR. MONFORT: Did You provide input in developing the DOJ's common understanding list?

MR. KRAUSE: Caliber list. The response - -
MR. MONFORT: I'm sorry. I just did it.
Did you provide input in developing the DOJ's caliber list?

A Yes.
Q Can you describe the input you provided to me? A Yes. Again, as I said earlier, through the dealer record of sale system, which is, again, linked to the automated firearms system, the -- basically the most popular handgun calibers were, I guess, documented through a search showing how many of each -- how much of each -how many handguns of each particular caliber were sold
five minutes?

MR. KRAUSE: If we have to, yeah. It's --
MR. MONFORT: I apologize. I have to use the restroom.

THE WITNESS: Okay. We'll be here.
MR. KRAUSE: 3:05.
MR. MONFORT: Okay. Thank you.
(Recess taken.)
MR. MONFORT: Okay. I'm here with Mr. Dale. Mr. Brady has not joined me, but I'll go ahead and proceed without him.

THE WITNESS: Okay.
Q BY MR. MONFORT: Okay. Mr. Graham, referring again to the caliber list --

A Right.
Q -- one of the calibers you identified is 32 ; is
that correct?

A Did you say . 32?
Q Yes.

A Yes, . 32 is on the list.

Q
Okay. Is it accurate to say your inclusion of .32 on this list describes ammunition which can be of varying dimensions?

MR. KRAUSE: Objection. Vague and ambiguous.

THE WITNESS: It could -- it could be used to,

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yeah, define variants of the . 32 that have a different
``` case length, rim thickness, et cetera.

Q BY MR. MONFORT: Okay. So when you say ". 32 caliber," are you describing multiple cartridges of ammunition?

A Yes.
Q So it's your understanding that the DOJ's listing of .32 caliber includes multiple types of cartridges for that caliber; correct?

A Correct.
Q Okay. And I'd like to make clear, when you testified that a particular cartridge is included within your definition of .32 caliber, your understanding is the same as the DOJ's understanding; is that correct? A Yes.

Q Can you identify for me whether the following cartridges are .32 caliber ammunition included in your caliber list:

The first one, .32-40 Remington?
A No.
Q Is that .32 caliber ammunition?
A Yes.
Q \(\quad .32-44 ?\)
A I'm - I don't believe that's a handgun round. Q When you say ". 32" in your list, did you mean, 135
then, to exclude .32-44?
A I don't know that I gave it much thought because
it's a rifle round.
Q Okay. And is that .32-44 . 32 caliber?
A Yeah, it's a variant for the rifle.
Q Is . 32 Smith \& Wesson included in your caliber
list?
A Yes.
Q Is that also . 32 caliber?
A Yes.
Q How about . 32 Ideal? Is that included in your
list?
A I couldn't hear the last part.
Q The . 32 Ideal, is that included in your caliber
list?
A I'm not familiar with that caliber, sir.
Q Okay. How about the .32 long rim fire?
A I'm not familiar with that one either.
Q Okay. How about the .32 short rim fire?
A Are these . 32 short Colts that you're speaking of
right now?
Q The ammunition I'm referring to is commonly
referred to as .32 short rim fire.

A
Well, a .32 short Colt \(I\) would include in that, but I don't know that you're -- I -- I want to make sure
\begin{tabular}{|c|c|}
\hline 1 & that our language is the same in case we're talking about \\
\hline 2 & the same thing. \\
\hline 3 & Q Okay. I actually have . 32 Short Colt on my list, \\
\hline 4 & so that is included in your caliber list? \\
\hline 5 & A Yeah. Correct \\
\hline 6 & Q Okay. And I asked you about the .32-40 \\
\hline 7 & Remington. \\
\hline 8 & What about the .32-40? \\
\hline 9 & A That's -- again, that's not going to be a handgun \\
\hline 0 & round. \\
\hline 1 & Q Is that . 32 caliber ammunition? \\
\hline 2 & A Yes. \\
\hline 3 & Q What about -- does the caliber list encompass \\
\hline 4 & the .32-40 Bullard? \\
\hline 5 & A I'm not familiar with that round, sir. \\
\hline 6 & Q Okay. Does the caliber list encompass the . 32 \\
\hline 7 & Winchester Special? \\
\hline 8 & A It's not going to be a handgun round that I'm \\
\hline 9 & aware of. \\
\hline 0 & Q Is that .32 caliber ammunition? \\
\hline 1 & A Based on your description alone, I -- it probably \\
\hline 2 & is. \\
\hline 3 & Q So you're not -- you're not aware of that \\
\hline 4 & particular cartridge -- you don't have knowledge as to \\
\hline 5 & that one as to whether or not it's 32 caliber? \\
\hline & 137 \\
\hline
\end{tabular}
that our language is the same in case we're talking about the same thing.

Q Okay. I actually have .32 short colt on my list, so that is included in your caliber list?

A Yeah. Correct.
Q Okay. And I asked you about the . 32-40 Remington.

What about the \(.32-40\) ?
A That's - - again, that's not going to be a handgun round.

Q Is that .32 caliber ammunition?
A Yes.
Q What about -- does the caliber list encompass the .32-40 Bullard?

A I'm not familiar with that round, sir.
Q Okay. Does the caliber list encompass the .32 Winchester Special?

A It's not going to be a handgun round that I'm aware of.

Q Is that .32 caliber ammunition?
A Based on your description alone, I -- it probably
is.
Q So you're not - you're not aware of that particular cartridge -- you don't have knowledge as to that one as to whether or not it's . 32 caliber?

A Yeah, I -- could you spell the last part? . 32 what?

Q It's the . 32 Winchester Special.

A Oh, Winchester Special. Okay.
Yeah, that -- again, that's not one I'm familiar with and it's not something \(I\) was able to find information on in my research.

Q Okay. What about . 32-20 WCF? Is that encompassed by your inclusion of .32 caliber on the caliber list?

A Not to my knowledge, sir.
Q Okay. Is that, then, not . 32 caliber ammunition?
A Could you rephrase the question, sir?
Q You testified that the \(.32-20\) WCF is not encompassed on your identification of .32 caliber list you provided.

So my question, then, is your testimony that .32-20 WCF is not . 32 caliber ammunition?

A I didn't say that. It's -- it's not an identified handgun round that I'm aware of, is a better characterization of what I've said.

Q Is it .32 caliber ammunition?
A Again, I have no particular information on that round. There's approximately 1,500 rounds or cartridges out there, and \(I\) can't know all of them.
cartridge?
A That's a fair representation. I'm not familiar with the caliber, so \(I\) can't make an opinion on it.

Q Okay. What about the . 400 Colt Magnum? Is that
a handgun round?
A I've never heard of it before today, sir.
Q Okay. What about the . 400 Carbon? That's .400 space \(C-a-r-b-o-n\).

A I'm not familiar with that one, sir.
Q So you don't know whether that's handgun ammunition or rifle ammunition; is that correct?

A That's right, sir.
Q Okay. What about the . 401 Special?
A Never heard of it.
Q Okay. Okay. What about the .40-50 Sharps?
A As far as I know, that's a -- no. I was actually going to say that's a rifle round, but it -- I think I'm mistaken, so I'll -- I don't really have an opinion on that and I don't want to guess. Q Do you have an opinion whether that's . 40 caliber ammunition?

A Could you repeat the cartridge as you stated it previously?

Q It's -- reads .40-50 Sharps.
A You know, it -- it probably is a . 40, but again,

I don't want to guess, so I don't - I don't have a formal opinion on that round.

Q Okay. Okay. What about the . 40-65 WCF?
A It's not one that I'm familiar with and I
wouldn't consider it a handgun round that I'm -- you know, for purposes of this lawsuit.

MR. KRAUSE: Hey, Clint, this is Peter. Are you referring to a book or something that we need to mark as an exhibit or is this just --

MR. MONFORT: NO, I'm not.
MR. KRAUSE: Okay.
THE WITNESS: This is your own personal knowledge of these cartridges, then, Clint?

MR. MONFORT: These are notes that \(I\)-- I also have learned about ammunition in the process of this lawsuit and I have notes for my deposition and I have certain ones identified to ask you about. I cannot recall where I got those from.

THE WITNESS: Okay. It sounds like I need to buy some more books.

MR. KRAUSE: Clint, is there a way to shortcut this? I mean, I think he's testified as to what he considers the list to be and from where it's derived and that it's -- you know, commonly understood handgun rounds and not all of these - these obscure variants. I mean --

MR. MONFORT: You know, I'm sorry. All of our -all of our - all of my clients - all of the plaintiffs in this lawsuit sell multiple cartridges of each of the calibers \(I\) both identified as the commonly understood caliber list and they're not identified in the commonly understood caliber list, so I apologize for the tediousness of this and the time it takes, but it's absolutely crucial that we ask your expert about these. So I apologize for the delay.

Mr. Graham, you're - honestly, you've been a great witness so far, and \(I\) hope to wrap this up as quickly as possible, but, you know, I'm not making it any more, you know, lengthy than \(I\) absolutely feel is necessary to protect the interests of my client.

THE WITNESS: Okay. If we can continue, then. Q BY MR. MONFORT: Okay. How about . 40-72?

A Not familiar with.
Q Okay. Then would you consider that to be . 40 caliber ammunition or you don't know?

A I don't know and I -- I wouldn't have included that as - you know, in terms of this list.

Q Okay. What about .40-90 Sharps?
A Again, same answer.
Q So you don't know whether that is handgun ammunition or rifle ammunition; is that correct?

Q Yes, that would be great. A Okay. For reference, I'll be going from the Cartridges of the World, page 330. Q No, no, I'm sorry. I would like to just ask you in your opinion. So I'm not interested in how the book classifies it. I'm asking, in your opinion, what you consider to be . 44 ammunition as handgun ammunition from your personal knowledge.

A Okay. . 44 Magnum, . 44 Special, . 44 Auto Mag. Those would be the ones off the top of my head. And then likely there are others that are handgun -- principally for use in handguns as well.

Q Okay. Can you try to remember what those might be?

A
Without referring to the Cartridges of the World, I'm afraid \(I\) can't. Q So is it your testimony you would need to refer to the book in order to determine whether or not particular cartridges of ammunition are handgun ammunition?

MR. KRAUSE: Objection. Mischaracterizes his testimony.

MR. MONFORT: I'm not -- I don't think my question is assuming testimony. I'll try and rephrase it for you.

Are you able to identify other calibers of ammunition -- other cartridges of ammunition that are handgun ammunition other than the three that you identified without referring to Cartridges of the World? A Not at this time. Q Okay. And so my question, then, was in order to determine whether a cartridge of ammunition is handgun ammunition, other than the ones that you named are handgun ammunition, do you have to refer to Cartridges of the World?

A No, there are other resources that I would check if I had to make some kind of an opinion, given more time than put on the spot with a random caliber question. Q Okay. Other than Cartridges of the world, what resource would you turn to to identify other cartridges of .44 caliber ammunition as handgun ammunition, since you wouldn't be able to make that determination?

A Right. I might look at the Rifles of the World book to see if there are rifles listed in particular caliber, you know, in this instance, .44 , to see how many of those were -- rifles were chambered in that particular caliber or cartridge. I might check the SAAMI Web site. I might check some of the ammunition wholesaler Web sites that I previously mentioned: Midway USA, Cabela's, those types of things. And potentially even the firearm
manufacturer Web sites out there to see if they make guns in a particular caliber more commonly than -- than -- in a rifle manner or if it was in a handgun more often than not.

Q Okay. Are you aware if there are any cartridges of ammunition that are listed in both the handgun caliber section of Cartridges of the world and the rifle caliber section of Cartridges of the World?

A I looked for that, and I didn't see any exact matches that were, I guess, a dual listing, if you will. Q Okay. And then what if it wasn't listed in one of those sections as a rifle cartridge or handgun cartridge? How would you make that determination? A Again, I would refer to the same resources that I just mentioned. You know, maybe the -- the Gun Trader Guide. Again, you've been provided with a copy of that. There might be other, you know, resources out there as well.

\section*{Q Okay. Thank you.}

Now, for .44, I'm going to do the same thing. I'm going to go through various cartridges of ammunition. I know that you were trying to name them off the top of your head, so I'm going to identify some for you and I would like you to tell me whether or not, in your opinion, these cartridges of ammunition are -- were included in
        your listing of .44 caliber in the DOJ's caliber list,
        okay?
        A Okay.
        Q . 44 Magnum?
        A Yes.
        Q Is that . 44 caliber ammunition?
        A Yes.
        Q .44 Remington?
        A . 44 Remington Magnum or --
        Q Just . 44 Remington.
        A That one I -- it would take more research than
        just what \(I\) have time for right now, obviously.
        Q Okay. In your opinion, is that . 44 caliber
        ammunition?
        A It sounds as if it was.
        Q Okay. What about .44-90?
        A .44-90 is not something I researched for purposes
        of this lawsuit, so I'm not aware of that caliber, sir.
        Q You're not aware of the caliber or you're aware
        of it and you just don't know whether it's handgun
        ammunition or rifle ammunition? I just want to be clear.
        A I'm not aware of that specific caliber. As I
        said, there's --
        Q Never heard of it?
        A Yeah. There are many, many calibers out there
so...
Q Okay. okay. Would you consider that one to be . 44 caliber ammunition, though?

A It sounds --
MR. KRAUSE: Calls for speculation.
MR. MONFORT: Okay. No problem.
Q What about the . 444 Marlin?
A . 444 Marlin, again, it's not a handgun caliber
I'm familiar with. It's likely a rifle round, but I'm -again, I've got no opinion as to if it applies to this lawsuit.

Q Okay. Okay. But your - and to the best of your knowledge, it's likely a rifle round?

MR. KRAUSE: Objection. Calls for speculation.
THE WITNESS: Yeah, I'm not familiar with it as far as a handgun round goes, sir, so...

Q BY MR. MONFORT: Okay. In your opinion, would that be a . 44 caliber round?

MR. KRAUSE: Objection. Calls for speculation.
Don't guess.
THE WITNESS: Yeah, it's -- it's beyond the scope of my knowledge, sir.

Q BY MR. MONFORT: You don't know whether the . 44 Marlin is a . 44 caliber; is that correct?

A You said the . 444 Marlin; correct?
Q

A
Okay. Yeah, I'm not - I'm not familiar with the round, so \(I\) don't want to guess.

Q Okay. Thank you.
Let's see. In your responses to Plaintiffs' special interrogatories, you identify .45 caliber ammunition as handgun ammunition; is that correct? A Yes, sir. Q Okay. You state ammunition which can be of varying dimensions --

MR. KRAUSE: You broke up there. Could you repeat that, please? Q BY MR. MONFORT: Is it accurate to say that .45 caliber ammunition in your caliber list describes ammunition which can be of varying dimensions?

MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: Yes, I would probably limit the . 45 to the \(.45 \mathrm{ACP}, .45\) Long Colt and the .45 GAP . Q BY MR. MONFORT: I'm sorry. Just for the - can you repeat those one more time for me, please? My pen ran out of ink.

A Yeah, . \(45 \mathrm{ACP}, .45\) Long Colt --
Q Uh-huh.
A -- and . 45 GAP, gap.
Q Okay. Do you have any idea how many cartridges
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there are in . 45 caliber?

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A It's kind of an open-ended question.
    What do you mean, exactly?
Q If you had to provide a best estimate of how many
types of .45 caliber cartridges there are, how many would
you estimate there are?

MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: Are you speaking in terms of rifles and handguns?

Q BY MR. MONFORT: All cartridges of .45 caliber ammunition.

MR. KRAUSE: Calls for speculation.
THE WITNESS: Yeah, I couldn't give you a number, sir. It's -- there's probably quite a few. Q BY MR. MONFORT: Quite a few?

A Yep.
Q I mean, more than 20?
A I don't know. I don't know. There's probably more than -- more than ten, but I -- I couldn't give you a specific number.

Q Okay. Thank you.
So . 45 ACP is identified as handgun ammunition in your caliber list; is that correct?

A Yes.
Does your caliber list include .45-70 Government?

A No, that's typically a rifle round.
Q Is that .45 caliber ammunition?
A It's . 45 caliber rifle ammunition.
Q Is it sometimes used as handgun ammunition?
A Yeah. Sometimes, though, is not principally for use, so --

Q I'm just curious whether or not it's sometimes used in a handgun.

A Yeah, it probably is. I've never seen one of those in a handgun, but there's probably some out there. Q Okay. And . 45 --

A You went under water there, Mr. Monfort.
Q .45 -- is that within your caliber list that --
A Yeah, you'll have to -- we're not able to -yeah, we're not able to copy that.

Q Okay. Let me move. I don't know what's going on.

Let's see. Okay. Can you hear me better now? Is that better?

A Yeah, that's pretty good.
Q Okay. In your listing of .45 caliber ammunitions in the caliber list you provided, does that include \(.45-75 ?\)

A No, that's -- that's not going to be a handgun round.

Q
A
Q
A the . 45 GAP , the .45 ACP and the .45 Long Colt. Those were the three that I meant to include. Q Okay. I understand that you identified those. I am going to state the names and ask you just in case it jogs your recollection or triggers your memory as to a specific cartridge that you might consider to be handgun ammunition that you didn't identify.

A I understand, sir. And again, just so we're on the same page, I assume you're saying handgun ammunition, you're assuming that -- we're on the same page meaning that principally for use in a particular handgun as opposed to can be used in a handgun, right? Q I'm referring to your caliber list that you provided in response to Plaintiffs' special interrogatories where we asked you to identify all ammunition that was handgun ammunition --

MR. KRAUSE: For purposes of the challenged provisions.

THE WITNESS: Right, right. Q BY MR. MONFORT: And you identified . 45 caliber ammunition, so I'm asking you, in your definition of .45
caliber ammunition on that list, does that include .450 Marlin? A No.

Q Is that . 45 caliber ammunition?
A I can't honestly tell you if it is or isn't, sir.
I'm not familiar with the cartridge.
Q Okay. So -- okay. What about the . 450 Alaskan?
A The . 450 Alaskan, I've heard of that, but I

of the Webley cartridge that you're asking me about in a minute or are we talking about the same cartridge right now?

Q The one I'm aware of - okay. My understanding is that there's two cartridges and the one I'm referring to is the .45 Webley. The .455 Webley is a different cartridge.

A Okay. I'm sure it's -- you know, it's a pistol cartridge. There may also be rifle rounds chambered in that, but that particular round \(I\) can't say is principally for use in handguns only. Q Okay. But would you consider that to be . 45 caliber ammunition?

MR. KRAUSE: Calls for speculation.
THE WITNESS: Based on the markings of .45, it's -- it's . 45 caliber.

Q BY MR. MONFORT: Okay. I believe it was in response to the .450 Marlin that you said you had to conduct research in order to determine whether or not it was ammunition that's principally for use in a handgun.

Can you describe that research for me, please? A Well, I would - again, I would try to refer to books available to me, ammunition vendor web sites. Q

I would like to know what specific research you did with regard to this specific caliber.

I understood your testimony to be that you conducted research on this one and you couldn't come to a conclusion. I would like you to describe to me the particular research that you conducted in regard to this round.
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A Which round?

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Q The . 450 Marlin.
A The . 450 Marlin. I don't recall doing specific
research on that -- that round. There's -- the Alaskan, as \(I\) just talked about a second ago, I remember reading about that --

Q I apologize. I meant to refer to the . 450 Alaskan. I'm sorry. I'm getting a little confused here as well.

A Okay.
Q The . 450 Alaskan, can you describe for me the research you conducted in order to determine whether or not the . 450 Alaskan is handgun ammunition?

A Yeah, I was checking Web sites; just, you know, researching it as much as I could just to see if it's going to be something to include or not include, and I just didn't feel that there was enough information out there to, you know, include it there.

Hello?
Okay. So is it your testimony that you didn't
know off the top of your head whether this .45 caliber round was handgun ammunition?

MR. KRAUSE: Objection. Mischaracterizes his testimony.

Q BY MR. MONFORT: Is that your testimony?
A Are you jumping calibers again? Because we were just on the . 450 Alaskan and now you're saying the . 45 . I want to make sure we're talking about the same thing. Q Well-- okay. Is the . 450 Alaskan .45 caliber ammunition?

MR. KRAUSE: Objection. Calls for speculation.
THE WITNESS: Again, sir, it could be a variant, but I don't have an opinion on whether it's a true .45 or some derivative of that.

Q BY MR. MONFORT: When you say "true . 45," what do you mean?

A Something, you know, based on the actual -like . 45 ACP cartridge that's been around for about a hundred years.

Q Okay. Is that what you meant in your response when you identified .45 caliber ammunition? Did you mean it to include ammunition cartridges that are based on the . 45 ACP?

MR. KRAUSE: Objection. Mischaracterizes the witness's testimony.
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A
To the best of my knowledge -- I'm sorry.
Did
you say "handgun" or did you say it's ". 32 caliber"?
Q I just asked if it was . }32\mathrm{ caliber.
A .32-40, I believe, makes reference to . 32 caliber
and then 40 grains of propellant in the cartridge.
Q Okay. Okay. All right. .45-85?
A I'm not familiar with that cartridge, sir.
Q Would you classify that as . 45 caliber ammunition
based on its definition of .45-85, so the caliber would be
.45, and I believe the grains you alluded to was 85?
MR. KRAUSE: Objection. Calls for speculation.
MR. MONFORT: I probably worded that wrong,
but --
THE WITNESS: Yeah, I'm -- again, based on what you've said, the same logic would follow, but I'm not familiar with that cartridge, so $I$ don't want to guess. Q BY MR. MONFORT: Okay. So is it your testimony that you don't know whether . 45-85 is .45 caliber ammunition? A Well, .45--.45-85, again, if it's the same -it would be 85 grains of propellant in the .45 cartridge. Q Okay. And then is it your testimony that you don't know whether the .45-85 is handgun ammunition? A I don't know that I've ever seen one, but it's very possible that it is.

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\(Q\)

A

Q of .45 caliber ammunitions in your response - in your caliber list?

A I believe I said the .45 Long Colt was.
Are you saying -- are you breaking that down further?

Q Okay. I'll leave that cartridge aside for now.
How about the four -- I believe -- I'm sorry. Did you already say that you weren't sure about the .458 Winchester Magnum?

A You're breaking up there. Four what?
Q The . 458 Winchester Magnum, is that included within your listing of .45 caliber ammunition?

A No, sir.
Q Can you tell me why not?
A It's not one that \(I\) was able to identify as being linked to principally for use in handgun ammunition -yeah, principally for use in handguns. Q Okay. What did you do to try to link it to try to determine whether or not it was linked to handguns .or being principally for use in handguns?

A Well, the -- again, the dealer record of sale queries brings up certain calibers. That gave us the
initial listing, and then researching from that point online with the Cartridges of the World, the Rifles of the World, Gun Trader's Guide, the online Web pages with the dealers breaking down what they considered handgun ammunition versus rifle ammunition. That's the general procedure when I came across certain calibers. Q Okay. So you needed to do that in order to conclude that . 458 Winchester Magnum is not handgun ammunition; is that correct?

MR. KRAUSE: Objection. Mischaracterizes the witness's testimony. Q BY MR. MONFORT: Did you need to conduct the research I described in order to determine whether a .458 Winchester Magnum (inaudible) handgun ammunition?
A Basically, the calibers that I list- -- you know, that are -- the 11 calibers listed, those were the ones that were deemed to be principally for use. The other ones that are not specifically listed there, you know, there wasn't enough information out there to -Q I'm sorry. When you say "calibers," you're saying that those calibers are principally used in a handgun? You're not referring to whether the cartridges in those calibers were principally used in a handgun? I'm a little confused. Can you explain what you mean? A Yes. In response to your special interrogatory
number five, you said list all types of ammunition. The assumption here was that you referred to calibers. The simplest way to respond to your question here was by listing calibers.

Q Okay. So that -- that -- does that list encompass the calibers of ammunition that are handgun ammunition? Is that correct? Or are there other calibers that are handgun ammunition?

A There are other calibers that are not relevant to this specific interrogatory that are handgun ammunition.

MR. KRAUSE: I think part of the problem stems from, you know, the word "types." I mean, maybe if Plaintiffs could explain what they meant by "types" instead of having us struggle with what you meant by "types." We tried to provide a good faith answer based on a common understanding among people who --

MR. MONFORT: I actually don't know what -- our problem is that we don't know what is meant by "ammunition principally used for handguns," so all I was asking the defendants to do is to identify the ammunition that is principally for use in a handgun. And I don't know.

MR. KRAUSE: Well, we -- and just as we don't know what you meant by "types" and we didn't want to simply object and we provided a good faith answer.

If you want to further clarify what you mean by
whether 9 mm Winchester Magnum is 9 mm caliber? A It's my testimony I'm not familiar with it. Q Okay. Again, whether or not I'm making it up or it's an actual caliber or not, you don't know whether or not that cartridge of ammunition is 9 mm caliber; is that correct?

MR. KRAUSE: Objection. Asked and answered.
THE WITNESS: Yes, that's -- same answer, sir.

Q BY MR. MONFORT: Yes or no? I understand the objection has been put in place.

A Okay. And I think your question was -- I don't know --

Q Whether or not - is it your testimony that you don't know whether or not that cartridge is 9 mm caliber? A Correct.

Q Thank you.
Sorry. Bear with me one moment here, please.
I'm trying to get to the point where we can begin wrap-up.
MR. KRAUSE: So you think you're going to finish today?

MR. MONFORT: I'm imagining it will be about within another hour, so, yes, as long as -- I understand you might have to leave. Or are you now staying?

MR. KRAUSE: Yeah, I'm hoping to get out of here by \(5: 30\), so an hour would be great.

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MR. MONFORT: Okay. I'm going to do my best to make that happen. Q Okay. Mr. Graham, I've asked you about the discovery responses. I'd now like to ask you some questions about the documents you identified in your responses to Plaintiffs' specially-prepared interrogatories.

A Okay.
Q In your response to special interrogatory number seven, you identify some documents that support the statement of the common understanding list and by that list is the caliber list you identified; is that correct?
A Correct.

Okay. Among these documents you identify records of handgun sales in the state that are required to be maintained by the Department of Justice; is that correct? A Yes. Q Are you aware the Department of Justice had provided plaintiffs with a spreadsheet that -A You were kind of in and out on that question, sir.
Q I was asking whether or not you're aware that the Department of Justice has provided Plaintiffs with a spreadsheet containing the sales data contained in the records you refer to.
\begin{tabular}{|c|c|}
\hline 1 & A I'm being shown a document by Mr. Krause right \\
\hline 2 & now. \\
\hline 3 & Q Okay. \\
\hline 4 & A Is this something we should mark, Mr. Monfort? \\
\hline 5 & MR. MONFORT: Yes. We can mark that as Exhibit \\
\hline 5 & D. \\
\hline 7 & MR. KRAUSE: I think it's referred to as the \\
\hline 8 & Dealer Record of Sales List. \\
\hline 9 & (Whereupon Plaintiffs' Exhibit D was \\
\hline 10 & marked for identification.) \\
\hline 11 & Q BY MR. MONFORT: Yes, I can refer to it from here \\
\hline 12 & on out as "DROS records," if you'd like \\
\hline 13 & A Okay. \\
\hline 14 & (Off-the-record discussion.) \\
\hline 15 & Q BY MR. MONFORT: So just to be clear, the records \\
\hline 16 & that you identified in response to your interrogatory that \\
\hline 17 & supported the caliber list are the records we've \\
\hline 18 & identified as the DROS records; correct? \\
\hline 19 & A Yes. This is one - the -- kind of the starting \\
\hline 20 & point for, I guess, the consideration on what calibers to \\
\hline 21 & list out. \\
\hline 22 & Q Okay. I'm sorry. You said it was the starting \\
\hline 23 & point; is that right? \\
\hline 24 & A Yes. \\
\hline 25 & Q Okay. Am I correct that the DROS system has been \\
\hline & 177 \\
\hline
\end{tabular}
operational since the 1930s?
A I don't know about the '30s. I'm familiar with it going back into the '70s. I know it goes beyond that, but I can't give you a specific year beyond the -- you know, generally the '70s sometime.

Okay. Is it also correct that a system -- and I'm unsure if you had this or not -- that the system has been operated for -- automated for at least 30 years?

MR. KRAUSE: Objection. Mischaracterizes the witness's testimony.

BY MR. MONFORT: Has the DROS system been automated for at least 30 years?

A
I'm not sure the exact date of the automation of the dealer record of sale system.

MR. KRAUSE: And objection as to "automated."
What do you mean by "automated"?
MR. MONFORT: Computerized.
MR. KRAUSE: Okay.
THE WITNESS: I don't know what, you know, specific year, you know, the -- they had computers start doing this. I know it used to be paper documents and then it -- it eventually merged into an online system, but I -I don't know the year.

Q BY MR. MONFORT: Can you confirm whether or not it's been computerized for at least over the last ten
thing that's out there.
Q Okay. Does the DROS system record -- the statistics you provided us with, are those including transfers or just sales? Because they're referred to as sales in the document, but my understanding is the dealer record of sales system records all transfers, not just sales.

A Yeah, it would be sales, private party transfers. I think that's what -- I mean, that's what this list looks like it would be. It's not -Q Okay.

A Let me just look -- flip through here. Q Is it your opinion that the DROS records identify whether a particular caliber of ammunition is used principally in a handgun?

A Say that again.
Q
Is it your opinion that the DROS records identify whether a particular caliber of ammunition is used principally in a handgun?

A No. It's basically a starting point for us to understand what calibers are common in handgun sales. Q Okay. Thank you.

Is it your opinion that these sales records identify whether a particular cartridge of ammunition is used more than - is used more in a handgun than in a long
gun?
MR. KRAUSE: Objection. Calls for speculation. THE WITNESS: Yeah, I -- I don't know that I can say that the - the caliber here gives a breakdown as to the actual -- one caliber versus another is being used more in rifles than in handguns.

Q BY MR. MONFORT: Okay. Thank you.
So is it your testimony -- am I correct that you rely on the handgun sales data in the DROS records in determining what calibers of ammunition to include in the DOJ's caliber list?

MR. KRAUSE: Objection. Mischaracterizes the witness's prior testimony.
Q BY MR. MONFORT: Did you rely on the DROS records we're talking about in determining what calibers of ammunition to include in the DOJ's caliber list?

MR. KRAUSE: Objection. Asked and answered.
THE WITNESS: Yeah, I think I've already said I did use it as a starting point to see what the popular -Q BY MR. MONFORT: Okay.

MR. KRAUSE: He wasn't finished answering.
MR. MONFORT: I'm sorry.
THE WITNESS: I was just going to say that the -it was a tool, basically, to determine what were the popular calibers in California in handguns. That was the
gist of this particular data search.
Q BY MR. MONFORT: Are these DROS records available to the public?

A I think as long as you make a purchase, you can request a copy of your own DROS records. I don't know that it's releasable to the general public. That's probably a question better posed to our legal staff.

Q
I'm sorry. Do you know whether -- I'm not referring to a particular record. The records you reviewed, the totality of the record sales over the last five years, is that information, that sales data, is that information available to the public, in your opinion? A I don't know, sir. I'm not sure if it's - if there's any privileged information captured in this. I don't believe there is. There's nothing identifying a purchase or anything.

MR. KRAUSE: Are you asking whether a person could make a public records act request for it?

MR. MONFORT: Yes.
MR. KRAUSE: Do you know?
THE WITNESS: I don't know. It's possible. Again, our legal staff would be able to handle that question better than \(I\).
Q BY MR. MONFORT: Okay. Aside from whether the public can access them, the general public, are the DROS
sales records available to local law enforcement?
A It's probably the same type of question that
would go to our legal staff.
Q Okay. And again, I -- you're probably going to
give the same answer, but I'm going to ask it.
    Are the DROS records available to ammunition
vendors?
A I imagine -- yeah, like you said, it's going to
be the same answer. DOJ BOF legal staff could probably
answer that question better than I. I don't have an
answer for you.
Q Okay.
A Sorry.
Q How about licensed firearm retailers, dealers
licensed pursuant to Penal Code Section 12071, do they
have access to the DROS records?
A I don't know, sir. It would be, again, a
question for our legal staff.
Q Okay. Mr. Graham, for each caliber of ammunition
you identified as handgun ammunition in the DOJ's caliber
list, did you perform a comparative analysis of handgun
sales versus rifle sales in that --
    A You're kind of in and out, sir. Could you repeat
        the question?
        Q Sure. No problem.

For each caliber of ammunition you identified as handgun ammunition in the DOJ's caliber list, did you perform a comparative analysis of handgun sales versus rifle sales in that caliber?
Q
    Can you please explain to me why not?
A Yeah, the Department of Justice is prohibited
from tracking long gun sales beyond the fact of a-- maybe
a prohibited person trying to buy a long gun. If - - after about five days in the background process, assuming it's going to be a pass, meaning someone's going to be able to buy the weapon, meaning a long gun, we're not able to retain that information in this -- in the computer system. So there's no similar search, you know, similar to Exhibit D that \(I\) can ask for for long guns.

Q Okay. In your discovery responses, you state that the listed -- the calibers identified in the DOJ's caliber list are consistently among the highest in terms of handgun volume sales over the last five years; is that correct?

A Yeah, to the best of my recollection, yes. Q Okay. Can you tell me what you mean by "among the highest" sold? And what I mean by that, was there a cutoff point -- did a caliber of firearm, for example, have to be in the top ten or 15 each year in order to meet
your qualification? A No. It was basically which ones were, you know, clearly principally for use in handguns that didn't have, I guess, more of a dual-use issue that would kind of cloud the issue, if that would make sense. Q

And you're referring to information not contained in the sales data to make that determination; is that correct?

MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: Could you rephrase that, sir? Q BY MR. MONFORT: I'll probably just move on to another question.

I'm just trying to come up with what you meant in terms of among the highest sold. You know, for example, are there any calibers not listed in the DOJ's caliber list that were among the highest sold?

A Yeah, the .22 , the \(5.7 \times 28 \mathrm{~mm}\). Those were, you know, among the highest, but, you know, they were basically left out at this time.

Q Can you tell me why?
A The .22 , for example, it's -- it's got a heavy following in handguns and a heavy following in rifles and it's, frankly, a little too difficult to pinpoint or -Q When you say it has a "heavy following" in both handguns and rifles, how do you know this?

A It's one of the more popular weapons -- handguns weapons sold. When I go to gun shows, I see lots of .22 rifles. I see lots of .22 handguns. It's a popular and cheap cartridge to shoot. It's been around for a long, long time.

Q Okay.
A That - that --

Q
Do you have any data regarding the sales of .22 caliber information in rifles other than seeing it sold at gun shows?

MR. KRAUSE: Clint, just let me -- I think you cut him off again. If you could please wait for him to finish his answers.

MR. MONFORT: Yeah, I'm sorry. I can't tell since I'm on the other end here.

THE WITNESS: That's okay.
Yeah, with regards to the .22 s , you know, I -attending gun shows, going to gun stores, reading gun magazines, you know, research on the Internet, reviewing different, you know, reference manuals, Rifles of the World, Cartridges of the World, the Gun Trader's Guide and just my own personal experience as a gun owner, talking with other gun owners about what they find to be popular and, you know, what they typically buy and shoot. Q BY MR. MONFORT: Okay. So for purposes of the
challenged provision, is .22 caliber ammunition handgun ammunition?

A Not at this time.
Q Not at this time? Was it at any former point in time?

MR. KRAUSE: Objection. Vague and ambiguous.
BY MR. MONFORT: Well, you said "not at this time." That seems to me to indicate that the status of handgun ammunition or rifle ammunition might have changed.

MR. KRAUSE: Or might change in the future after further research and field study, maybe.

THE WITNESS: Yeah, I mean --
Q BY MR. MONFORT: Okay. But at this time, it's rifle ammunition; is that correct?

A Not necessarily. It may not meet the current "principally for use" language of the aforementioned sections in the Penal Code, so it was basically left off. Q Okay. What does "principally" mean, in your understanding? A Probably --

MR. KRAUSE: Objection. I'm going to object. Calls for a legal conclusion and vague and ambiguous, but -Q BY MR. MONFORT: In determining whether or not a caliber of ammunition is handgun ammunition, did you
consider it to be handgun ammunition if that caliber of ammunition is used more than 50 percent of the time in a handgun?

MR. KRAUSE: Again, objection. Calls for a legal conclusion, but please answer.

THE WITNESS: Okay. Yeah, basically, the majority of the time is -- is the general rule \(I\) follow when considering the different calibers that were floating around out there.

BY MR. MONFORT: Is 22 caliber ammunition used more than 50 percent of the time in handguns?

MR. KRAUSE: Objection. Calls for speculation.
THE WITNESS: I really couldn't form a strong opinion on that and that's why I didn't include it on the list here, sir.
Q BY MR. MONFORT: I'm sorry. You said you haven't formed a strong opinion.

Have you formed some opinion that might not be characterized as a strong opinion? A I think the .22 is used quite a bit in both rifles and handguns, but \(I\) was unable to determine if it met the "principally for use" language as defined in the Penal Code sections.
Q Okay. In your understanding, does the "principally for use" standard mean ammunition that is
used more than 50 percent of the time in a handgun?
MR. KRAUSE: Objection. Asked and answered and calls for a legal conclusion.

THE WITNESS: Yeah, my interpretation is if it was more often than not or 50 percent or a majority of the time, and that's the best way \(I\) can say it.

BY MR. MONFORT: Okay. And then so -- I just want to ask you this question as well just so that we're clear.

Is . 22 caliber ammunition, in your opinion, used more than 50 percent of the time in a rifle?

MR. KRAUSE: Objection. Asked and answered. Objection. Calls for speculation.

THE WITNESS: I was unable to tell if it was, you know, more likely to be shot out of a rifle or handgun on that specific caliber.
```

Q
BY MR. MONFORT: And can you just -- just to be

``` clear, can you explain to me why not? A Just because of the long history of the round, the huge numbers of rifles and handguns chambered in this particular caliber and the commonness and availability of this cartridge.

Q
Were you unable to determine it because you didn't have any data to compare it to between handgun usage and rifle usage of .22 ammunition?

Objection. Calls for speculation.
THE WITNESS: The .22, you know, obviously I said earlier that there are no rifle stats from the DROS system, you know, and/or the AFS system that's linked to the DROS system. That would have made things a lot easier, to have that information available.

BY MR. MONFORT: Okay. I also note that the .22 is listed in the DROS sales.

Does that include . 225?
A The dealers basically -- the way these numbers appear here, if you can look at page one of Exhibit D, this is a 2006 date. About four columns down, there's a number 17,297.

Do you see that number, sir? Q Yes. A Okay. So that number there is generated because dealers in California in 2006 told the Department of Justice, using a drop-down screen on their computer screens that they transmit the DROS data from, that they made that many sales and transfers of .22 caliber handguns.

If, for some reason, the dealer thought that they had a -- I believe you called it . 225 s --

Yes.
- then one or more of those guns in that number might be that -- you know, represented there.

Does that help you?
I'm sorry. So one or more of those guns might be represented there.

So you don't know whether that list includes all sales of \(.225, .223, .222, .221, .556\) and .57 ; is that correct?

MR. KRAUSE: Objection. Mischaracterizes the witness's testimony and he's -- he's not here offered as an expert on the DROS system, so it's calling for speculation.

MR. MONFORT: I'm sorry. He's relying on it and that's why I'm curious about it because I'm a little bit unfamiliar with it, with the record.

THE WITNESS: Farther down on the same page, sir, about two-thirds of the way down, .222 , .221 , those are Iisted there. They have -- they have, you know, different sales numbers. You know, 16 sales of .222 .
```

Q BY MR. MONFORT: Okay.

``` A Eifteen sales of .221. And then you said, I think, .223 as well. There were 117 sales of those handguns, at least as identified by a gun dealer to the Department of Justice at the time of sale. Q Okay. And what about . 556? Is that included
within the .22 s ?
A No. That's got its own designation almost at the very bottom of the list. There were five identified in 2006.

Q Okay. Okay. Now, don't those firearms all shoot .22 caliber ammunition? Is that correct?

MR. KRAUSE: Objection. Vague and ambiguous. Calls for speculation.

THE WITNESS: To the -- yeah. The way this is broke down -- broken down, excuse me, is in this -- you know, in this fashion for the dealers to accurately document the sale of the weapons. The cartridges that each fire is going to be, you know, depending on the weapon itself -- dependent upon the weapon itself. The .22, the \(.223, .221, .222\), I'm surprised, actually, to see a lot of those other calibers, the .222 . 221, the .223 listed as handgun sales because those are common rifle caliber rounds.
```

BY MR. MONFORT: Okay. Thank you.

```

If a rifle was transferred or sold that used the . 45 Long colt cartridge or if a handgun was transferred that used the . 45 Long colt cartridge, would it be in the .45 or .454 data?

MR. KRAUSE: Objection. Calls for speculation. Incomplete hypothetical.

THE WITNESS: Again, depending upon what the dealer put in there, assuming they put .45, then it would be listed in the -- the total next to the . 45 . If they used .454, then it's going to be listed next to the figure in there.

Q BY MR. MONFORT: So am I correct in understanding that you're relying on the dealers to actively report the sales of a particular caliber firearm and identify that in the correct caliber?
A Yes

Q
One of the calibers listed in the DROS records is . 32-20.

Do you consider that to be a distinct caliber of ammunition?

MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: Could you refer me to the page you're discussing the cartridge? Oh, I see. Okay. Halfway -- about halfway down page one?

BY MR. MONFORT: Yes, .32-20. It's identified in the column at the top of the left is identified calibers. It lists .32-20 separately from .20. Do you consider this -- or .32-20 separately from . 32 .

Do you consider this to be a distinct caliber of ammunition, .33-20?

193

1
a -- you know, a lower receiver, for example, that's, for some reason, been DROS'd as a handgun.

Q BY MR. MONFORT: Okay. Do you know that that's a code?

A Yeah, there -- that one, I'm sure is -- it is an actual code. It's not a caliber. There is no . 8888 caliber.

Q Okay. What about the 375 .
A .375. Can you tell me which page you're on?
Q I'm at the last page right below the 8888 entry. A Oh, okay. Yeah, I believe that's a caliber code. It's not going to be a -- it's a caliber indication. It's not a -- like a code or something like that for the dealers.

Q Okay. That's a caliber?
A Yeah, it's a caliber reference for the dealers so that they can have a - you know, a code to -. to make a DROS entry into the automated firearms and DROS systems. Q Okay. So are there firearms that shoot ammunition of a .375 caliber?

A
Off the top of my head, I can't tell you or name one, but, you know, it's -- it's in there for -- for a reason. I don't know what \(I\) can do to further answer that question.
your list of ammunition calibers?
MR. KRAUSE: Objection. Assumes facts not in evidence.

Q
BY MR. MONFORT: Did you consider the .375 caliber when determining the caliber list?

A I think it - you know, I looked at the - - the list as a whole and the most popular and, I guess, the largest calibers that were being purchased and transferred in the state over the last five years or so were the ones that were put forth in this list. And this, obviously, is not -- it's got a low number of transactions involving this particular identifier.

Is it your opinion that a caliber of ammunition is only handgun ammunition if it's popular?

MR. KRAUSE: Objection. Vague and ambiguous. Mischaracterizes the witness's testimony.

THE WITNESS: The question, I think --
BY MR. MONFORT: Is it possible?
A Is what possible?
Q I'm sorry. I'm sorry.
Is it your testimony that you left calibers off the list if they were not popular, even if they might be principally used in a handgun?

MR. KRAUSE: Objection. Mischaracterizes the witness's prior testimony.

THE WITNESS: Given -- given the short time frame available due to the perceived, I don't know, compressed court schedule on this matter, you know, the calibers that were chosen is what was - the ones that were researchable given the short amount of time. So there's probably calibers left off that, given more time and research, you know, might actually fit the definition, but at this time, they were left off.

Q BY MR. MONFORT: Okay. I guess just to be clear, I know that you gave me some reason how you came to a determination or how you came in -- how you formulated this list, but just to be clear, my question is whether or not unpopular calibers of ammunition were left off the list even though they might be principally used in a handgun?

MR. KRAUSE: Objection. Asked and answered and mischaracterizes the witness's prior testimony.

If you have anything to add --
THE WITNESS: I -- yeah, I have nothing to add, sir.

Q
BY MR. MONFORT: I'm sorry. I just need an answer to this question. I -- I'm not sure if I've gotten a yes or a no.

Were unpopular calibers of ammunition excluded from your list of ammunition calibers even though they
might be principally used in a handgun?
MR. KRAUSE: Objection. Vague. Ambiguous. Mischaracterizes the witness's testimony. Argumentative.

If you understand what he's asking you -- I think you've given an answer, but --

THE WITNESS: Yeah. I don't know that I have a different answer than I've already given, Mr. Monfort.

MR. MONFORT: Are you instructing the witness not to answer? I haven't gotten a yes or no answer yet.

MR. KRAUSE: No, I'm not instructing him not to answer. I'm telling him to answer if he can answer it. Q BY MR. MONFORT: Yes or no? Were unpopular calibers left off the list even though they were principally used in a handgun?

MR. KRAUSE: Same objections as before.
THE WITNESS: I think I've already answered this. Given the compressed time to -Q BY MR. MONFORT: Yes or no?

MR. KRAUSE: He --
THE WITNESS: I'm trying to answer your question, but you're cutting me off right now.

Given the compressed time frame, the calibers that I've listed are the ones that \(I\) felt were principally for use, and I'm not saying that there are not other calibers out there that would also fit this definition,
but the ones that \(I\) have listed are the ones that I -- I feel strongly about.

Q BY MR. MONFORT: So was that a yes or a no?
MR. KRAUSE: Clint, he's given you his answer.
He doesn't have to answer yes or no.
Q BY MR. MONFORT: I'm not trying to be, you know --

A Did you not understand that that was an affirmative?

Q Okay. Okay. So we're - so we're clear. I did not understand that. Thank you for clarifying.

MR. KRAUSE: Well --

THE WITNESS: Yeah. I mean --

Q
BY MR. MONFORT: The answer to my question is yes?

MR. KRAUSE: No, I don't think that's his answer. The answer was the answer given.

MR. MONFORT: He said did I understand that that was an affirmative. So was the answer an affirmative?

MR. KRAUSE: At this point, I don't even know what question we're talking about. The popularity question?

MR. MONFORT: No, I'll be happy to answer it again -- to ask it again.

Q Did you leave unpopular calibers of ammunition
off your list even though they are principally for use in a handgun?

MR. KRAUSE: Objection. Vague and ambiguous as to "unpopular."

THE WITNESS: If there were calibers left off that do meet the definition, I didn't have time to research further than the calibers that \(I\) did identify. I don't want to say that there are no others because \(I\) don't know that for sure. Q BY MR. MONFORT: Okay. We'll move on.

And real quick here, \(I\) was trying my best to wrap this up within an hour, but it doesn't look like we're going to be able to wrap it up in an hour today, so I mean, if we want to pick a leaving time for everyone and reconvene tomorrow...

MR. KRAUSE: What time -- how much more time do you need?

MR. MONFORT: Two hours, I believe.
MR. KRAUSE: Are you available tomorrow?
THE WITNESS: I don't know. I'd rather just get this over with, honestly, but \(I\) don't - I can't speak for everyone in the room.

MR. KRAUSE: Do you want to go off the record and have the conversation?

MR. MONFORT: Okay. Yes, let's go off the record

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COUNTY OF SAN FRANCISCO ;

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I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record of the testimony given. (Civ. Proc. § 2025.540(a))

\title{
Forensic Firearm and Toolmark Terms. Abstracted from The GLOSSARY OF THE ASSOCIATION OF FIREARM AND TOOL MARK EXAMINERS [AFTE]
}
with sulected terxum refcranced to the CA Penal Code and Cal, Code.Regs,
and
- A Short Acronym Pinder [AB]

\section*{GLOSSARY}

\section*{Action}

The wording meobarism of a frearn. May be brokion down into actloa types as follow:
A. AUTOMATXC - A fireirm design that feeds cartridges, fires, extracts and ofects oartuldge cases as long as the trigger is fully dopressed and thare are cartridges in tho feed system. Also daliced FULL AUTO and MACEINB GUN.
B. BOLT - A firearm in wiblch the brecoh closure:
(1) is in lino with the bore at all tixnes
(2) manually rectprocates to lobd, unload aun cock,
(3) is looked in place by breach bolt huge and engaping abutraents usually in the recedvex. There are two principal types of both actions: fhe tum boll and the atraight pull.
C. BOX LOCK - A dosign in which the hammer and hammer springss are located within the frame and the trigger assombly in tho lower tang. Gancrally foumd on double barrel shotgons such as Parkor, Fox, Stovans, Winchaster Modols 21 and 24 , etc.
D. PALIINO BLOCK - A aingle shot lever eotion mechapdem. Tho breechbloak alides vertically or neiarly vertionlly, when the lever is meved, to expose or lock the brecah. Example: Rugar No. 1.
B. HINGED FRAME - A design wherein the barrel(s) is pivoted on the frame. When the action is open, the bartol (2) may plvot up, down, or sidewaya for loading or
unloading. When the action is closed the breoch of the barrel (b) swings agalnat the stunding broeoh. Opening is nomally accomplishod by movement of a top, side, or undor-jever.
F. LEVRR - A design whersin the breech mechanimm is cyoled by an exterall lover genorally balow the recolver.
G. MARTINI - A bemmerless single shot rfle acton, lever operated, in which tho movement of the breechblock is centrely within the recesiver and ptvots at the rear.
H. REVOLVBR - A firearm, uswally a handgan, with a cyltador haying soveral ctrarnbers so arrenged as to rotate around an axds and be disobarged successivoly by tho samo firiog mochandsia, Ste also REYOLYBR.
1. ROLIING BLOCK - A singie shot aotion in whioh a breoohblock and bammer each . rotate about their eoparato transverso pins in the receiver. The two members are swoig rearwerd, away from tho barral brecech to load the meoliandsm; or extrect a oartridge case. To firo a cartridge, the broectblock is clored and lockdens is acoomplished by tho faling hammer engaging an abutmont on the breechblock. Example: Remington No. 4.
J. SEMLAUTOMATIC - A repeationg firoarm requiring a soparato pull of the tilgger for each shot fired, and which uses the ewergy of dischange to perforn a portion of the operating or firing cyole (usually the loading portion).
K. SDOELOCK-A design to which the firing meobenimn is attached to a sideplate rather than boing integral with the framo.
L. SLIDE - An acton whiob teabures a movable foreasm which is manually sotuated in motion parallel to the barral by the abooter. Forearm motion is tranamitted to a breech bolt assembly which perforans all the functions of the fring oyole pasigned to th by tho dosign. Also known as PUMP ACIION.
M. TRAP DOOR - An action in which a top hinged brecchblook pivots up and forward to open. Locking on this action is accomplishad by a cam located at the rear of the brecohblock that fits into a raating recess. Also known as a CAM LOCK.

\section*{Air Gun}
A. gun that uses compressed air or gas to propel a projectile. Also called AIR RIFLB, PELLET RIFLE, PELIET OUN and BB GUN.

\section*{Ammantion.}
1. One or more loadad cartriges consisting of a primed caso, propellant, and with one or more projectiles, Also refered to as PIXBD or LIVE AMMUNITION.

\section*{Ammanition, Bal}

A tern gonerally used by the military for a cartridge with a fill metal jaokoted ballet or solid motal projeotle.

\section*{Asraalt Rtfle}
1. A compact, SELECT-FRRB, detachable box magazine-fod weapon, that utilizes a centerfire rifle cartdige and is deaigned primarly for military uso.
2. A slang' torm, used INCORRECTLY to deacribe any fineanm with a military appearance or largo magarimo capacity.

\section*{Ballistics}

The study of a projeotlo in motion; offen confinsod with Firarms identification.

\section*{Ballistics, Exterio}

The saudy of the moton of the projectio(a) after it leaves the barrel of the freanm.

\section*{Ballutics, Interior}

The study of the motion of the projectile(s) wiftin the firerm from the moment of . igaition until it leaves tho banch.
Ballistics, Terminel
The stady of the profectile's impact on the target.
Berrel
That part of a firearn through which a projectile or shot ohsige travels under the impetus of powder gasses, compressed air, or otbor like means. May berfled or smooth.
Barrel Length
Tho distanco betwoen the and of the barral and the face of the closed broechblock or bolh. On revolvers, tt is the overall length of the barrol inoluding the threaded portion within the frams. Barrel leagth normally should tnelade.compensators, flash biders, eto, if permanortly affixed.

Bore
The interior of a barrel forward of the chamber.
Bore Dlameter
1. Rifled bancle; the minor diametor of a bartel whicb is the diamoter of a circle formed by the tops of the lands.
2. Shotguns: tha interior dimensions of the barrel forward of the chamber but bebind the choko.

\section*{Botteneck Cartridgo}

A aartidgo case having a main dismetar aud a distinct angular shoulder stopping down to a small ar diamotar at the pack portion of the asa.

- Broch

The part of a firearm at tho rear of the bore into which tho cartridge or propellant is inserted

Breech France
That part of the breechblock or braces bolt which le against the head of the cartridge peso or shotaholj during frog.
Ballot
A oon-sphericos projecollo for use in a rifled barrel.
Bullet Corn
The moue portion of a jeokoted ballot, usually lead
Ballet Copper Jacketed
A bullet having an outer jacket of copper or copper alloy and combating a lead alloy core.
Bullet, Damduna
 Dumdum, India
Ballet, Fall Metal Jacket
A projectile in watch tho balled junket encloses tho entire bullet, with tho usual exception of the base, Also called PULLYACKSTBD, FULL PATCT, FULL METAL CASE and BALL AMMUNITION.

Ballot Ogre
Tho curved forward part of a bullet.


\section*{Bullot, Hollow Potht}

A bulted with a cavity in the nono io frailitato expmeloo.


Bullit, Land and Groove Impressions
Tho negative impressions oo the boesting sarfice of a bollet crased by to riting io tho learrol from prifech It weip alrod.

\(\dot{B}\) Bullet, Bombrwadoutter
A projectilo with a distingt, short tronorted coner at the forward aso.


Bullet, Wedentter
A cylindrical bullet destgo having a
sharp abouldered pove lurended to cut targot paper cleanty to flolltate sasy and acoutare scoring.


Cablout
1. Frroancos: The approximato dinsolor of the oirclo formed by the tops of the landz of a ifled barrel.
2 Ammuntion: A crumerical term, without the docimal point haladed in a cartrigige mamo to indicate tho nomingl brallet dianotor.

\section*{Canoetare}

A circmoferatial groovo gcaetally of a inuried or plain appatance in bullet or cartidgo caso. Threo uase tacludo crimping tarication und identification.

\section*{Cartidge}
A. itagle urit of amomition consiatiog of the caso, primer, and propeliant with ons or moro projeotile(s). Also appliar to a ahouball.

\section*{Cartridge Cass}

Tho container for all the other corruponentr which cornprise a ourtidge:

\section*{Cartridge Case Extractor Groovs}
A) antule groovo ort in rimiens, sami-rimmed, ar beited cantridgo oasos, formand of tho bead, for toe propers of providlog a surflico that the
 extractor may grip to renoya the oaso from the chanter.

\section*{Cartuldge Care Atmd}

The baso of the cartildgo caso whildh containg the priner.

\section*{Curtridge, Centor Fire}


\section*{Curtideg, Magnum}

A term ased to describa a rimitire or centerdro certridge, or shotsibell, that is largat contatas cooto shot or producea blgher valocitios than standard cantuldges or shobshall of a given caliber or gange. Refica, handgua aud shotyons that are designed to fire magnum cartidgos on whells may aloo bo dearaibed with the term, MAGNUM

\section*{Cartidge, NATO}

A common despgontion for 9 moo and 7.62 mm NATO nullinay cartid́ges. Theso. cartidgere are produced ander the speal fications of tho North Athento Troaty Orgarization

\section*{Cartrldet, Rta, fire}

A fiengo headed cartrodgo containlug
the priming mixturo triside tho rim cavily.


\section*{Chashbering}
1. The roming out of a chamber in the end of \(\theta\) barrel blank or cyllader.
2. The act of inserting a centridga in the chamber.

Clup
1. A soparato cartidgo container to rolosd repidly the magation of a firearm. Also caljed STRUPPRK CLIP.
2. A term sometimea improperly ued to describo removable magartans.

\section*{Comparison Meterorcope}

Eseantally two microscopes connected to an optcal bridgo whlch allows the vower to
observe two objects simulitaneonsly with the samo degreo of magntication. This instrument can have a monocular or binocular oyepieos. Somotimes refered to as a COMPARISON MACROSCOPE.

\section*{Componastor}

A device attachod to or intogral with the mazale end of the barrel to utilize propelling gases for counter-recoll, Also callod MUZZ]. BRAKB.

\section*{Criminalistics}

An early definition was- 'That selence which applies the physical sefences in tho tmvestigation of crimes." Derived from the Gemman word Kriminalittik, criminalistios bas tulicon on a broader defindion and would be more properly defined as, "That sciance direoted to the recognitlon, Ideatification, thdividuallzation and eveluation of physical ovidence as it relates to some law-science matter. It also includes the roconstruction of events based on the analysis of physical orideaco. It drawe upon the physical and astural sciences to accompliah its miasion."

\section*{Cyllinder}

The rotatable part of a revolver bat contains the chambers.
Dexrtuger
The gonoric term applied to many variations of pocketsize pistols, efther percussion or cartridga made by manufacturers other than Henry Derringer, op to present timo.
Deprat
An acronym for Deantivated War Trophy.
Qisconnector
A device intended to disengage the sear from the tidger. In a gemalatomatic Arearn it is intended to prevent full automatic firing. Sorme pump action shotguns also have disconneotors.

\section*{Distance Determidiation}

The procese of dotumining the distance from the fiream, usailly the muzzle, to the targot based upon patterns of gunpowder or gunshot residues doposited upon that target. Where multiplo projectiles, such es shot, have beon fired the spread of those projectiles is also indicative of distanco.

\section*{Doable Action}

A hardgun mechanism in which a single puli of the rigger cocks and releaso tho hammer.

\section*{Dumdun Bullé}

An obrolete term used to describs an expanding bullet. Derives its name from bullets
manufactured at the Bittish Argenal in Dumdum, India around 1900.

Ejection
The act of expelling a cartidge cass from a firoarm.
Ejocton Patiorn
The charting of wheri a particular firearm ojecta fired cartridgo casss.
Ejector
A portion of a firearm'a mectaviom whidh ejeots or expels cartridges or cartridgo cases flom a firearn.

\section*{Extraction}

Tho not of witidrawtag a dartridgo or cartidge case from the chamber of a firearno.

\section*{Rxtrector -}

A mechanism for withdrawing
the cartidge or cartridge caso from
the chamber.
Firearm


An assembly of a barrol and action from which a projectile(s) ts propelled by products of combustop. [ "flrasm"s defined in Penal Cude section 12001, subolvisions (b), (c), (d) and (e) [osferent mesinhgs for differenf purposes].
FLratinas Identification
A discipline of forcasio scienco whith has as its primary concen to determipe if a bullot, cartrldge case or other ammunition component was fired by a particular firearm.

\section*{Firing Pin}

That part of a firearm meohandsan which atrikes the primer of a cartridgo to mitiato ignition. Sometimes oulled HAMMER NOSE or STRIKER.

\section*{Firtng Pin Impression}

The indentation of the primer of a centerfire oartridge case or in the rim of a rimflue cartidgo case caused when It is strack by the firing pin,

\section*{Flash Suppressor}

A muzzle attachment destined to reduce muzzle llash. [ "lash' suppressor" is deflned in regulabion. (Cal. Coda Regs., th. 11, subdi (b).A

\section*{Ful Auto.}

A frearm decign that fecods oartidges, fires, extracts and cjeots cartridge casea as long us the trigger is fully deprossed and there are cartridges in the feed sybtem, Actuation of the meohanism raay bo from an internal powor source such as gas preksuro or recoil, or external power source, such as electricity. Also called MACHINZ GUN.

\section*{Praction Thating}

 capable of firing a cartridgo.

\section*{GSR}

Abbrevintion for Gurshot Restdue.

\section*{Generdl Rufing Charseterbitics}

The manbor, widih and dircotion of twist of tho dfling grooves th a barrol of a gived caliber Ereaim.

\section*{Gmahot Roaidae}

Tho total readdues reauling from tho discharge of a Arearri. it hidudea both propolinat and
 and my fubricand aseoolated with the bullets.

\section*{Endgran}

A frearos doed gned to be hald and tired with ono hend ["hanagun" is dafinad in CA Panal Code suction 12001, subdivision (a)].

\section*{Head}

The baso of the certridge case which contuins tho primor.

\section*{Headstamp}

Numarals, lotiors and aymbols (ox comblostion thereof) stainped into tho bead of a
 mflomsillon.

\section*{Individual Characterdetic:}

Marks protuced by the randomituprifections or triegularites of tool ruffaces. Thesa random inperfections or incegularitios wo prodvced inddental to manofereure and/rr cansed by use, conrarion, or damage. They aro uniquo to that tool and distingulah it from all other tools.

Land
The radsed portion borwean the grooves in a rifted bora:

\section*{Land end Groove Imprention}

The negativo tropressions an tho boetring surfico of a bulle causad by tho riffog in the barsel from prisch is was Ared.

\section*{Loggth, Overall}

In a fireamo it is the dmenslan measured perallal to the adde of the boro from muzsie to e line at iggta angles to tho aris and tangeat at the rearmost polvi of the butt plale \(\sigma\) r grip.

\section*{Magaxtac}
1. A containax for castridgeas which bias a sporlog and followar to fend thaso oartriegos into tho ahamber of a finemil. The magarino may bo dotachable or an miogral part of tho foroera.
A. RUIND HOX- Ag intogral magaride having a poramently olosed bottom Loading and anloeding aro accomplishat through the samo opeaing.
B. BOX - A reotionguler receptacie attanhad to or inserted into a firmum that holds ourtridges racked on top of ons apother ready for feoding into the chember.
C. DETACEARLEE - ADy of a large atay of megratnon which ero removablo
 ( O . Coode Rigs, bt 11, sec, 5459 , subd. (a).)
D. DROMM - A drum shaped mogarino in which the cartridges ate arranged spirally movud the central wxis of the whed-ap mechanism of the magazinc. Theso waro generally lenga-capadty magarines, beling naod moet commonly on
 PPSH and Doglyerov mathine gams.
B. ROTARY - A fom of magadio in whiob tho oentridgee aro artanged about a ccontral roteting spindje ur carier. Bxamplos: Sivige Model 99 nod Mannlaher riflioe
F. STAOGERED COLDMN - A box magailoo wodch, rather than baving a tioglo column of cartridgen, has two colunnas etaggered. This incteages tho cepadty whwow leuptheoing the magazine. Examplea: Browntag Hi-Pówor and SkW Modal 59.
O. TUBULar - A tobe-staped magardae in whioh the cartoldges are arrangod ande-co-med It may bo offor andar tho baatol ot in tha butt stock.
2. A seoure storage place for gumpowder, ammunition, or oxplosives.

\section*{Magraine Safety}

A safoty doviat found on aome semiatomaflo bandguas that provents fring unicss tho magazine is fally lisserted tato the firearm.

\section*{Mierophotograph}

A very imall photograph: Microphotogreph to a misnomer for PHOTOMCROORAPH.

\section*{Murale Brake}

A device at or in the mozale end of a bantel that uses tho omarging gas behind the projectile to reduce recoil.
NATO Curtuldge
A common designation for militery cartridges produced under the spectfications of the North Atlantio Treaty Organization (NATO).
NSSP
The acranym for Nattosal Sbooting Sports Found ation. .
Overall Length
1. Frearm: The dimenslon measired parallel to the axis of the bore from mazzlo to a line at right angles to the axds and tmgent at the rearmost point of the butt plate or grip.
2. Ammanition: Thi greatost dimension of a loadod cartudge, i.e., from face of the bead to the tip of the ballet for centertue or rimftre or to crimp for sbotshells or blanks. Not to bo confused with be mariuiped leagth of a shotshell.

\section*{Photomicrograph}

A photograph taken through a maroscope.

\section*{Pístol}

A handguo in which the chismber is part of the barrel. A torm somotimes used for HANDGUN.
Pistol, Double Action -
A pistol mechanism in which a single pull of the thigger cocks and releases the hammer.

\section*{Pistol, Siagle Action}

A plstol mechanism, which requirea the manual cocldng of the bammer or striker betore pressure on the trigger releases the firing mechanism.

\section*{Powder Stppling}

Small heroondagic manks on the akdn produced by the impact of gumpowder partloles, or tranimate objeots. Also used when reforting any small pits or defects to objecta inpasted
by unbumed and partially burned powder partioles.

\section*{Powder Tattooing}

The embedding of partilly consumed and unconsumed porider purtioles in the sidn with accompanying hemorrhagio marks associated with İving skin.

\section*{Primor}

The !godion component of a cartridge.

\section*{Primer, Centerfire}

A cartridgo indtiator which is assembled ceatral to the axis of tho head of the cartridge case end which is actuated by a blow to the cartar of the adis as opposed to dimfire which must be struak on the circamiorence.

\section*{Primer, Rimfiro}

A primer system in which the priming
mixture is found in the ofrcumferential rim cavity of a particular type of ammunition


\section*{Range of Concluaions Possfble When Comparing Toolmarks}

The oxaminet is encouraged to report the objeotive obsorvations fint support the findinga of toolmark examinations. The examinter should be consorvative when reporting the signifioance of thesi observations.

\section*{IDENTIFICATION}

Agreanent of a combination of individual characteristics and all discernible oless charactertstics whors tho axteif of agreement exceeds that which can occur in tho comparisou of tooharks made by different tools and is congsistent with the agroament demonstrated by toolmarks known to havo been produced by the same tool.

\section*{anCONCLUEIVE}
A. Some agreement of tndividual characteriotlcs and all discernibls class charactenstics, but insufficient for en identification,
B. Agroemeat of all discernible class chartetenstics without agreoment or disagreement of individual characteristios duo to an absence, insufficienoy, or lack of reproduadbility,
C. Agreoment of all discomablo class charaoteristios and disagreamout of individual aharacteriatics, but insufficient for an eliminstion.

\section*{ELIMINATION}
A. Significant dizagrecment of ifscortible class characteristics mad/or individual

\section*{characteristos.}

\section*{ONSOTCABLE}
A. Unsuitable for exanination.

\section*{Recatver}

The basic unit of a frearm which bouses the firing and brooch mechanism and to whioh tho barrel and stock are asscubled.
Recoll
The rearward moyeneat of a firearm resulting from firing

\section*{Reconstruction}

The deternination of the sequence of two or more ovents in a partioular incident uritiding information derived from the physioal evidencs, date from the analysis of physical ovidence, recogrized physical lawns and/or infercaces drawn from axpertrnontation related to the incident under inverdgation.
Reload
A cartridgo which bas becn reassembled with a new primer, powder, projoctle(a) end/or other comporents.
Revolvar
A fircarm, nsually a handgun, with a oylinder having several chambers so arranged as to rotate around an axis and bo disaharged suocessively by the same firing meohanism. See SINGLE ACTION and DOUBLE ACTION.

Ricochet
The deflection of a projectile(s) after impact.
Ricochet Angle
The path taken by the rifocheted projectile or major projectile fragments as they dopart the tupacted sunfaco.
Rifle
A firoarm having rifing in the bore and designed to be fired from the should or ["rffle" is defined in Penal Code section 12010, subd. (c)(20)1.
Rining
Helical grooves in tho bore of a froarm barrol to impart rotary motion to a projectile. SAAMI

The scionym for the Sporting Arms and Ammunition Manufacturers Institute, Inc,
Safety, Manamlly Operated
Crosa Bolt - A typo of firaarm safety operated by lateral forco on a button usually located in the trigger guard.

Grip - An audiliry locking device in the grip of some handguns which prevents fring untli it ds depressad. Bxample; US 1911 pistol.
Half Cock - This so-called safety is a sear engagament whiloh holds the hammer back awry from the finge pin.
- Lever - A type of firearn safoty operated by the movement of a pivoted lever. Example. Luger pistol.
Shding Button - A safoty mechanism on a firearm that is oporated by a sliding motion. Tang - A safety mountod on the uppar recolver tang of a firarm.
Thumb - A. safety on a ffrearm so located as to be operated conveniently by the thumb of the trigger hand.
Whig - A safety found on boit action rifles, uspally momented at tho roar of the boit .assambly, and pivots up and down at right angles.to the bore tine in a matner of a bird's whog.
Shot
Spharical pellets used in loading ahotshell or cartridges.
Shotgun
A smooth boro stowider freamo designod to firs shotshalls contaicing manerous pellets or • sametimes a single projectile ["shorgun" Is defined in Penal Code section 12020, subd. (c) \((2 \mathrm{I})\) ].

\section*{Shotshell}

A cartidge containing projoctile(s) deaigned to be frod in a shotgun. The cartridge body may be metal, plastic or papar. .
Sluencar -
A misleading pord used to deseribo a device athached to the barrol of a frearm designed to reduce the noiso of discharge, Sunh a dovice is more acarately identifice as a SOUND SUPPRESSOR.
Smgle Action
An aotion requiring the manual cocking of the hammer before saffioiont pressure on the trigger releases the firing mechandiom.
Sham Nore
Tho aced dental discharge of a firearm upon alosing of the action wisich miny be due to one of the following:
1. A firing pln that has stuck and failed to setrait.
2. A primer that is elthor inadequatoly seated or overly aenastive.
3. A weak or broken flitng pin retaining spring which fails to ovorcome fhe

Luatia of motion imparted to the firing pin duning closme, theroby allowing the firing pin to stanke the primer thith infficient forco to cause discharge.
4. A firearm with inudequate hoadepace.

\section*{Sodion Rbodizonate Test}

A mothod of detecting primer and lead bullet roosidue.

\section*{Stripper Cllp}
- A clip which may hold fom five to ten cartridges and is used to load the magazine of a pistol or riflo. In the cast of somo rifles, there aro elip guides michined into tho roceiver to gudde the clip into the proper position, Also called STRIPYBR or CHARGER. See CLIP,

\section*{Subciasa Characteristics}

Discernible surface features of an object which aro more restrictive than CLASS CHARACTERISTICS in that they aro:
- Produced inctdental to manufachiro.
- Are significant in that they relate to a smaller group source (a subset of the class to which they belong).
- Can arise from a souros whioh changes over time.
- Expmples would include: buntor merks, extrasion marks on pipe, etc.
[Caution abould be exerorsed in distroguighing subolass dharactaristics from ' INDIVIDUAL CEARACTERISTICS.]

\section*{Bub-Machłne Gun}

An automatio or selective fire firearm ohambered for a pistol oartridgo. These freams are nomally compaot, and intonded to be used at close combat ranges.
.Tést-Firtog
The term used to designate the actual firing of a firearm in a laboratory to oblain ropresentativo bullets and carteddgo cases for comparison or analysis.

\section*{Theory of Identification as tt Relaties to Toolmarks}
1. The theory of idendfication as it portains to the comparison of toolmarks enables opinions of common origin to bo made when the unique sarface contoute of two toolmarks are in "sufficient agreemont.
2. This "sufficiont agrecmant" is related to the signdicant duplication of randorn toolmarks as ovidenced by the conrespendenies of a pattem or combination of patterns of surface cantours. Stgolficance is determined by the comparative examination of two or more sets of sarface contour patterns comprised of tidividual peaks, didges and firrown, Speatioally, the relative height or dopth,
width, curpaturo and spatial relationship of the Individual peake, ridges and firrows within one sot of surfice contoura are defined and compared to the corresponding featuren in the second sat of sarfies contours, Agreament is siguificant when it excoeds the best agreement demonstrated between toolmarks known to bave been producod by different tooks and is consistont with agreement demonstrated by toolmarki kown to have been produced by the same tool. The stalemont that "sufficiant agreement" exlsts batween two toolmarks means that the agreoment is of a quantity and quality that the likolihood another tool could have made the mark is oo remoto as to bo considered a practical impossibility,
3. Currontly the interpretation of individualizationAdentfficetion is sabjectivo in natuse, founded on scientific principles and based on the examiner's training and. expriance.

\section*{Triggor Pull}

The amount of force whloh must be applied to the trigger of a firearm to cause soar releass. It is measured with hanging wrights or an appropriate soalo touching the tigger at a point whare the trigger fingor would nomally rost, and with the forco applied approximataty paral lel to the bore axis.
Triger, Hair.
- A slang term for a trigger requiring very low forco to actuate Sounetimea used to describe the light prill of a sccond trigger in a doublo bet trigger mechamisar.

\section*{Acronym Finder [AF]}

\begin{tabular}{|c|c|c|}
\hline DATE & CALIBER & CALIBER COUNT \\
\hline 2006 & 45 & 34,233 \\
\hline 2006 & 91 & 32.597 \\
\hline 2006 & 40 & 26,820 \\
\hline 2006 & 22 & 17,297! \\
\hline 2006 & 357 & 14,890 \\
\hline 2006 & 38 & 11,223j \\
\hline 2006 & 44 & 5,905 \\
\hline 2006 & 380 & 5.013 \\
\hline 2006 & 454 & 3.987 \\
\hline 2006 & 32 & 2,830. \\
\hline 2006 & 10 & 1.464 \\
\hline 2006 & 5728 & 9071 \\
\hline 2006 & 25 & 900 \\
\hline 2006 & 460 & 688 \\
\hline 2006 & 500 & 560 \\
\hline 2006 & 50 & 5011 \\
\hline 2006 & 01 & 4601 \\
\hline 2006 & 763 & 429 \\
\hline 2006 & 41 & 357 \\
\hline 2006 & 17 & 221 \\
\hline 2006 & 765 & 135 \\
\hline 2006 & 30 & 134 \\
\hline 2006 & 7621 & 134. \\
\hline 2006 & 223. & 117 \\
\hline 2006 & 3220 & 116 \\
\hline 2006 & 475 & 71 \\
\hline 2006 & 8 & 69 \\
\hline 2006 & 4801 & 53 \\
\hline 2006 & 4570 & 48 \\
\hline 2006 & 375 & 40 \\
\hline 2006 & 71 & 291 \\
\hline 2006 & 455 & 28 \\
\hline 2006 & 735 & 26 \\
\hline 2006 & 3081 & 24 \\
\hline 2006 & 8888 & 21 \\
\hline 2006 & 35 & 20 \\
\hline 2006 & 444 & 19 \\
\hline 2006 & 635 & 18 \\
\hline 2006 & 222 & 16 \\
\hline 2006 & 221 & 15 \\
\hline 2006 & 4 & 14 \\
\hline 2006 & 243 & 12 \\
\hline 2006 & 270 & 11 \\
\hline 2006 & 36. & 8 \\
\hline 2006 & 54 & 8 \\
\hline 2006 & 730 & 8 \\
\hline 2006 & 556 & 5 \\
\hline 2006 & 13 & 4 \\
\hline 2006 & 250 & , \\
\hline 2006 & 256 & 4 \\
\hline 2006 & 358 & \\
\hline
\end{tabular}
\(\Delta\) ExHIBrT_D
Deponent Graham
Date \(12 / 1 / 10\) Refr. LP WWWPEPSOOKCOM
\begin{tabular}{|c|c|c|}
\hline 2006 & 445 ! & 4 \\
\hline 2006 & 61 & 3 \\
\hline 2006 & 11 & 2 \\
\hline 2006 & 257 & 2 \\
\hline 2006 & 280 & 2 \\
\hline 2006 & \(31)\) & 2 \\
\hline 2007 & 45 & 35,742 \\
\hline 2007 & 9. & 35,205 \\
\hline 2007 & 40 & 31,084 \\
\hline 2007 & 22 & 17.746 \\
\hline 2007 & 357 & 15,155 \\
\hline 2007 & 38 & 12,104 \\
\hline 2007 & 44 & 5,778 \\
\hline 2007 & 380 & 5,222 \\
\hline 2007 & 454 & 4,428 \\
\hline 2007 & 32 & 2,690 \\
\hline 2007 & 10 & 1.690 \\
\hline 2007 & 25 & 852 \\
\hline 2007 & 5728 & 680 \\
\hline 2007 & 460 & 675 \\
\hline 2007 & 763 & 493 \\
\hline 2007 & 500 & 480 \\
\hline 2007 & 50 & 388 \\
\hline 2007 & 0 & 380 \\
\hline 2007 & 41 & 312 \\
\hline 2007 & 762 & 176 \\
\hline 2007 & 17 & 167 \\
\hline 2007 & 765 & 133 \\
\hline 2007 & 223 & 126 \\
\hline 2007 & 30 & 120 \\
\hline 2007 & 8 & 87 \\
\hline 2007 & 3220 & 84 \\
\hline 2007 & 475 & 60 \\
\hline 2007 & 4570 & 51 \\
\hline 2007 & 375 & 49 \\
\hline 2007 & 455 & 40 \\
\hline 2007 & 71 & 40 \\
\hline 2007 & 8888 & 36 \\
\hline 2007 & 308 & 30 \\
\hline 2007 & 480 & 30 \\
\hline 2007 & 735 & 29 \\
\hline 2007 & 222 & 27 \\
\hline 2007 & 635 & 26 \\
\hline 2007 & 4 & 22 \\
\hline 2007 & 35 & 19 \\
\hline 2007 & 221 & 18 \\
\hline 2007 & 2701 & 13 \\
\hline 2007 & 556 ! & 13 \\
\hline 2007 & 2431 & 12 \\
\hline 2007 & 361 & 12 \\
\hline 2007 & 54 & 9 \\
\hline 2007 & 444 & 8 \\
\hline
\end{tabular}
\begin{tabular}{|c|c|c|}
\hline 2007 & 250 & 5 \\
\hline 2007 & 730 & 4 \\
\hline 2007 & 13 & 3 \\
\hline 2007 & 256 & 3 \\
\hline 2007 & 445 & 3 \\
\hline 2007 & 260 & 2 \\
\hline 2007 & 450 & 2 \\
\hline 2007 & 11 & 1 \\
\hline 2007 & 31 & 1 \\
\hline 2007 & 3581 & 1 \\
\hline 2007 & 6 & 1 \\
\hline 2008 & 9 & 43,559 \\
\hline 2008 & 45 & 40,840 \\
\hline 2008 & 40 & 36,199 \\
\hline 2008 & 22 & 20,088 \\
\hline 2008 & 357 & 16,772 \\
\hline 2008 & 38 & 13,400 \\
\hline 2008 & 380 & 7,115 \\
\hline 2008 & 44 & 5.947 \\
\hline 2008 & 454 & 4,971 \\
\hline 2008 & 32 & 2,791 \\
\hline 2008 & 10 & 2231 \\
\hline 2008 & 25 & 979 \\
\hline 2008 & 5728 & 959 \\
\hline 2008 & 0 & 485 \\
\hline 2008 & 460 & 473 \\
\hline 12008 & 500 & 421 \\
\hline 2008 & 763 & 400 \\
\hline 2008 & 50 & 380 \\
\hline 2008 & 41 & 306 \\
\hline 2008 & 17 & 185 \\
\hline 2008 & 223 & 171 \\
\hline 2008 & 765 & 171 \\
\hline 2008 & 30 & 132 \\
\hline 2008 & 762 & 123 \\
\hline 2008 & 3220 & 93 \\
\hline 2008 & 475 & 75 \\
\hline 2008 & 8 & 67 \\
\hline 2008 & 4570 & 53 \\
\hline 2008 & 308 & 42 \\
\hline 2008 & 375 & 42 \\
\hline 2008 & 7 & 40 \\
\hline 2008 & 735 & 38 \\
\hline 2008 & 455 & 36 \\
\hline 2008 & 480 & 25 \\
\hline 2008 & 635 & 24 \\
\hline 2008 & 222 & 22 \\
\hline : 2008 & 8888 & 21 \\
\hline 2008 & 556 & 20 \\
\hline 2008 & 221 & 19 \\
\hline 2008 & 4 & 17 \\
\hline 12008 & 35 & 15 \\
\hline
\end{tabular}
\begin{tabular}{|c|c|c|}
\hline 2008 & 243 & \(13!\) \\
\hline 2008 & 730 & 12 \\
\hline 2008 & 327 & 11 \\
\hline 2008 & 444 & 9 \\
\hline 2008 & 270 & 6 \\
\hline 2008 & 445 & 6 \\
\hline 2008 & 6 & 5 \\
\hline 2008 & 13 & 4 \\
\hline 2008 & 31 & 4 \\
\hline 2008 & 36 & 4 \\
\hline 2008 & 256 & 3 \\
\hline 2008 & 54 & 3 \\
\hline 2008 & 12 & 2 \\
\hline 2008 & 250 & 2 \\
\hline 2008 & 260 & 1 \\
\hline 2008 & 356 & 1 \\
\hline 2008 & 450 & \\
\hline 2009 & 9 & 51.137 \\
\hline 2009 & 45 & 42,097 \\
\hline 2009 & 40 & 38,557 \\
\hline 2009 & 22 & 22,458 \\
\hline 2009 & 357 & 18,156 \\
\hline 2009 & 38 & 15,041 \\
\hline 2009 & 380 & 9,216 \\
\hline 2009 & 44 & 5,599 \\
\hline 2009 & 454 & 5,158 \\
\hline 2009 & 10 & 2,540 \\
\hline 2009 & 32 & 2,445 \\
\hline 2009 & 25 & 1.051 \\
\hline 2009 & 5728 & 1.029 \\
\hline 2009 & 763 & 736 \\
\hline 2009 & 0 & 629 \\
\hline 2009 & 460 & 432 \\
\hline 2009 & 50 & 341 \\
\hline 2009 & 223 & 340 \\
\hline 2009 & 500 i & 303 ; \\
\hline 2009 & 41 & 292 \\
\hline 2009 & 762 & 288 \\
\hline 2009 & 765 & 166 \\
\hline 2009 & 17 & 146 \\
\hline 2009 & 30 & 138 \\
\hline 2009 & 5561 & 136 \\
\hline 2009 & 327 & 106 \\
\hline 2009 & 475 & 93 \\
\hline 2009 & 8 & 90 \\
\hline 2009 & 3220 & 74 \\
\hline 2009 & 4570 & 52 \\
\hline 2009 & 480 & 44 \\
\hline 2009 & 735 & 42 \\
\hline 2009 & 375 & 35 \\
\hline 2009 & 8888 & 33 \\
\hline 2009 & 635 & 31 \\
\hline
\end{tabular}
\begin{tabular}{|c|c|c|}
\hline 2009 & 2221 & 29 \\
\hline 2009 & 7 & 26 \\
\hline 2009 & 308 & 22 \\
\hline 2009 & 455 & 22 \\
\hline 2009 & 221 & 18 \\
\hline 2009 & 444 & 17 \\
\hline 2009 & 35 & 15 \\
\hline 2009 & 4 & 13 \\
\hline 2009 & 54 & 8 \\
\hline 2009 & 2431 & 6 \\
\hline 2009 & 270 & 6. \\
\hline 2009 & 36. & 6 \\
\hline 2009 & 730 & 6 \\
\hline 2009 & 6 & 3 \\
\hline 2009 & 250 & 2 \\
\hline 2009 & 257 & 2 \\
\hline 2009 & 260 & 2 \\
\hline 2009 & 445 & 2 \\
\hline 2009 & 256 : & 1 \\
\hline 2009 & 264 & 1 \\
\hline 2009 & 303 & 1 \\
\hline 2009 & 311 & 1 \\
\hline 2009 & 358 & 1 \\
\hline 2010 & 9 9, & 46,319 \\
\hline 2010 & 45 & 35,146 \\
\hline 2010 & 40 & 30,334 \\
\hline 2010 & 22. & 19,651 \\
\hline 2010 & 357 & 13,799 \\
\hline 2010 & 38 & 12,798: \\
\hline 2010 & 380 & 8.899 \\
\hline 2010 & 44 & 4.461 \\
\hline 2010 & 454 & 2,891 \\
\hline 2010 & 32 & 2,150 \\
\hline 2010 & 10 & 1,867 \\
\hline 12010 & 5728 & 984 \\
\hline 2010 & 25 & 872 \\
\hline 2010 & 762 & 672 \\
\hline 2010 & Of & 589 \\
\hline 2010 & 763 & 322 \\
\hline 2010 & 327 & 311 \\
\hline ¢2010 & 500 & 272 \\
\hline 2010 & 50 & 254 \\
\hline 2010 & 41 & 251 \\
\hline 2010 & 556 & 237 \\
\hline 2010 & 223 & 235 \\
\hline 2010 & 460 & 234 \\
\hline 2010 & 765 & 223 \\
\hline 2010 & 17 & 135 \\
\hline 2010 & & 116 \\
\hline 2010 & 30 & 100 \\
\hline 2010 & 3220 & 82 \\
\hline 2010 & 8 & 79 \\
\hline
\end{tabular}
\begin{tabular}{|c|c|c|}
\hline 2010 & 475) & 52 \\
\hline 2010 & 4440 & 42 \\
\hline 2010 & 4570: & 40 \\
\hline 2010 & 3089 & 38 \\
\hline 2010 & 455 & 36 \\
\hline 2010 & 480 & 35 \\
\hline 2010 & 635 & 32 \\
\hline 2010 & 7 & 32 \\
\hline 2010 & 8888 & 31 \\
\hline 2010 & 375 & 28 \\
\hline 2010 & 735 & 25 \\
\hline 2010 & 222 & 20 \\
\hline 2010 & 35 & 14 \\
\hline 2010 & 444 & 13 \\
\hline 2010 & 12 & 8 \\
\hline 2010 & 221 & 8 \\
\hline 12010 & 3840 & 8 \\
\hline 2010 & 4451 & 8 \\
\hline 2010 & 1015 & 7 \\
\hline 2010 & 75 & 6 \\
\hline 2010 & 243 & 5 \\
\hline 2010 & 256 & 5 \\
\hline 2010 & 4 & 5 \\
\hline 2010 & 3201 & \\
\hline 2010 & 204 & \(3!\) \\
\hline 2010 & 218 & 3 \\
\hline 2010 & 270 & 3 \\
\hline 2010 & 361 & 3 \\
\hline 2010 & 3855 & 3 \\
\hline 2010 & 981 & 3 \\
\hline 2010 & 104 & 2 \\
\hline 2010 & 31 & 2 \\
\hline 2010 & 410 & 2 \\
\hline 2010 & 450 & 2 \\
\hline 2010 & 6 & 2 \\
\hline 2010 & 601 & 2 \\
\hline 2010 & 68 , & 2 \\
\hline 2010 & 11 & 1 \\
\hline 2010 & 13 & \\
\hline 2010 & & 1 \\
\hline 2010 & 250 & \\
\hline 2010 & \(300!\) & 1 \\
\hline 2010 & 356. & 1 \\
\hline 2010 & 400 & 1 \\
\hline 2010 & 54 & 1 \\
\hline 2010 & 545 & 1 \\
\hline 2010 & 65 & 1 \\
\hline 2010 & 730 & \\
\hline 2010 & 77 & \\
\hline 2010 & 859 & 1 \\
\hline
\end{tabular}

I have not, and shall not, offer or provide any services or products to any party's attorney or third party who is financing all or part of the action without first offering same to all parties or their attorneys attending the deposition and making same available at the same time to all parties or their attorneys. (Civ. Proc. § \(2025.320(b))\)

I shall not provide any service or product consisting of the deposition officer's notations or comments regarding the demeanor of any witness, attorney, or party present at the deposition to any party or any party's attorney or third party who is financing all or part of the action, nor shall I collect any personal identifying information about the witness as a service or product to be provided to any party or third party who is financing all or part of the action. (Civ. Proc. § \(2025.320(c))\)

Dated: DECEMBER 3, 2010


\section*{EXHIBIT " 58 "}
```

    1 ** UNEDITED REALTIME TRANSCRIPT - NOT CERTIFIED **
    ```
\begin{tabular}{|c|c|}
\hline & 0 \\
\hline \multicolumn{2}{|l|}{14 anything. I don't} \\
\hline 15 & that we need to keep the lid on. He's pretty much \\
\hline 16 & identified what we talked about. \\
\hline 17 & MR. DALE: Okay. With that representation, \\
\hline 18 & Mr. -- I'm going to do this again -- Mr. Krause. My \\
\hline 19 & apologies. With that representation, I think we're okay \\
\hline 20 & on that issue. I don't see a need to go any further on \\
\hline 21 & that. \\
\hline 22 & Let's go ahead and -- \\
\hline 23 & MR. KRAUSE: Can I ask you one question? \\
\hline 24 & MR. DALE: Yeah. \\
\hline 25 & MR. KRAUSE: I sent Clint an e-mail this morning \\
\hline
\end{tabular}
```

    One thing Mr. Graham did do was go back and find the
    answer key, if you will, to the DROS listing.
    MR. DALE: Yes. Do you have a copy of that in
    front of you, Mr. Krause?
    MR. KRAUSE: I do.
    MR. DALE: Let's go ahead and mark that as
    Exhibit E so we can have it as an exhibit.
    MR. KRAUSE: Okay. Did you -- so you got it from
    Mr. Monfort?
    MR. DALE: I did.
    MR. KRAUSE: Okay.
    MR. DALE: And this will be a document that, at
    the top, says "AFS Gun Caliber Table" with a date of
    July 23, 2010; is that right?
    MR. KRAUSE: Yes.
    ```
                                    Page 7

THE WITNESS: Correct.
MR. DALE: Let's go ahead and mark that as
Exhibit \(E\), and we' 11 attach that to the record.
MR. KRAUSE: Okay. Okay. There's one for the
court reporter.
Do you have a copy?
THE WITNESS: I don't have a copy with me, no.
MR. KRAUSE: Okay.
MR. DALE: Well, you know what. I don't plan to ask any questions about that right away. I just want to

1 make sure that we're keeping all our ducks in a row, so if 2 we want to get a copy of that a little later today, that's

3 fine.
4 MR. KRAUSE: Okay.
5 MR. DALE: We'll take care of it as part of
6 housekeeping matters.
7 MR. KRAUSE: Okay.
\(8 Q\) BY MR. DALE: Okay. Mr. Blake (sic), yesterday,
9 as you pointed out, you were asked a lot of questions
10 about different cartridges and calibers. One of the
11 things you testified about was the method you used in
12 order to establish the calibers and what we've now
13 transitioned to is cartridges that you were including as
14 part of what we've termed the DOJ caliber list?
15 Do you remember that testimony?
16 A
17 Q Okay. And I believe you said you used Exhibit D,
18 the DROS records, as sort of a starting point for helping Page 8
19 to compile that list; correct?
20 A Yes.
21 Q And then you moved on and you used a book called
22 Cartridges of the world; correct?
23 A Correct.
24 Q Okay. And -- and do you have that - a copy of
25 that book in front of you?
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    A I do.
    Q Okay. And I want to make sure we're working
    under the same edition.
    What edition do you have in front of you?
    A It says the 12th edition.
    Q The 12th edition. Okay. Very good.
    Now, after you went -- let's talk a little bit
    about how you went through the DROS records.
    So you went through the DROS records and you
    looked for calibers as they're listed in the DROS records.
    Specific types of weapons that had been purchased --
    specific types of handguns; is that correct?
            MR. KRAUSE: Objection. Mischaracterizes the
    witness's prior testimony.
            MR. DALE: Well, let's back up and make shire we
        have this right.
            You went through the DROS records and the DROS
    1 8 records list either specific calibers or, in some
19 instances, specific cartridges used by handguns that were
20 the subject of this DROS records; is that correct?
Page 9

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    believe you testified to was that in some instances, the
    DROS records would list sales by caliber, and in other
    instances they would have listings which would indicate a
    particular cartridge that was used with that handgun sold;
    is that right?
    MR. KRAUSE: Objection. Mischaracterizes the
    witness's prior testimony.
    THE WITNESS: The DROS -- the -- the -- what
    that -- the -- I forget. It's Exhibit D. If I can look
    at it right now, I'll be able to answer your question a
    little better.
    MR. DALE: Go right ahead.
    THE REPORTER: I have it. Just one moment.
    THE WITNESS: Okay.
    Okay. So I'll try to summarize what this
    document provides some information on just so we start
    fresh on the new day with what I believe I said yesterday
    and what I would continue to say now, is this document
    shows handgun transactions, meaning sales or transfers,
    between individuals in specific calibers and cartridges,
    in some case -- cases. That -- the specific numbers --
    you know, it's broken down by year and then the count of
    the individual transactions on those handguns.
                            Page 10
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        12-02-10
    Q BY MR. MONFORT: Yeah, let me see if I can't
    short circuit this.

``` D.

Do you have what we have now -- oh, you don't. You don't have Exhibit \(E\) in front of you.

Mr. Krause, would it be a problem to go ahead and get Exhibit E? I think we'll probably -- we'll use it to kind of shorten up this portion of the testimony.

MR. KRAUSE: Exhibit \(E\) being the thing that was produced this morning?

MR. DALE: Correct.

MR. KRAUSE: Yeah, we have it.
MR. DALE: Oh, it was the AFS gun caliber table, yes.

MR. KRAUSE: Yeah, we have that
MR. DALE: Okay. Go ahead and, if you could, put that in front of Mr. Graham side by side with the Exhibit

MR. KRAUSE: It's in front of him.
MR. DALE: Perfect
If you look on the first page of Exhibit \(E\), one of the gun caliber codes on the left-hand side is . 45?

Do you see that, Mr. Graham?

A Yes.

Q And next to that under what's called gun caliber description or DESC, there's a listing, it looks like, of four different cartridges of what would be .45 caliber ammunition; is that correct?
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12-02-10
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    1 A Yes.
    2 Q Okay. So we have . 45 ACP, . 45 Auto Rim, . 45
    3 Short/Long Colt, and . 45 Winchester Mag, right?
    A Correct.
    Q And on the DROS records on Exhibit D, all of the
    6 sales of weapons which used those cartridges are just
    7 Iisted under .45; correct?
    A Correct.
    Q Okay. But, for example, if you then move down to
    10 55, the -- on Exhibit E under gun caliber, it says 55.
11 And then you look next to it. There's only one cartridge
12 Iisted. That's the 5.5-millimeter Velo Dog; correct?
13 A Correct.
1 4 Q Would it be fair to say that, in some instances,
15 the codes that are Iisted in the DROS records in Exhibit D
1 6 will refer to more than one cartridge within a given
1 7 ammunition, and in other instances, those codes will just
18 refer to a gun that uses one type of cartridge?
19 MR. KRAUSE: Objection. Calls for speculation.
20 THE WITNESS: The -- yeah, the breakdown here,
21 again, is for dealers to make the entries and it's -- it's
22 something to -- makes it a little simpler for them to
23 identify the type of weapon that they're selling to a
24 particular person. You know, the reason that there are
25 multiples under some of the caliber listing is just to

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qive some sample rounds that are out there that would Eit
into that same block of rounds, if that makes sense.
Q BY MR. DALE: Okay. So -- well, let me --
actually, I'll be frank with you, Mr. Graham. I'm not a
gun guy, so it -- I'm going to need a little clarification
here?
Under the .45 ACP, if I -- is this what you're
testifying to, that -- well, let me withdraw that
question. I'm going to restate it.
Under the . }45\mathrm{ gun caliber listing on the AFS gun
caliber table, are you saying that the . 45 ACP, the . }4
Auto Rim, the . }45\mathrm{ Short/Long Colt and the . }45\mathrm{ Winchester
Mag would all fit in the same . }45\mathrm{ caliber weapons? In
other words, they're interchangeable?
MR. KRAUSE: Objection. Calls for speculation.
BY MR. DALE: If you know.
A They wouldn't necessarily fit because of, you
know, head space issues, so the -- you know, again, it's
going to depend upon gun by gun by gun, so the -- again,
this is a list that's used for guns. It's not necessarily
created to be exact and specific down to a scientific
level for ammunition. So there's -- again, this was a
starting point just to have a place to start from.
Q Correct. I -- and I understand that. I just
want to make sure we're all operating off the same

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So just to be clear, when the DROS records say a .45 caliber weapon was brought, that could be one of several cartridges. Specifically, that particular weapon could take one of the four cartridges that's listed under 45 on Exhibit \(E\); is that correct?

MR. KRAUSE: Objection. Vague and ambiguous. Calls for speculation. Lacks foundation.

THE WITNESS: The dealers are able to pick, you know, the appropriate -- what they think the appropriate caliber for the specific weapon that they're selling based on this list, and they might have others that they feel -that aren't listed that would have -- you know, be applicable. And this is not an all inclusive -obviously, there's -- there are many more cartridges out there, and this is just meant to help the dealers fill out the -- the computer screen and to get their customers out the door in a timely manner. It's not an absolute, you know, this is everything that's out there type of list. Q BY MR. DALE: Okay. So if I understand your testimony correctly, your understanding of Exhibit D is that it's essentially a list that the dealers helped generate based on their understanding of the type of weapon they're selling to the customer; is that correct?

MR. KRAUSE: Objection. Mischaracterizes the
witness's testimony.
THE WITNESS: We were just talking about Exhibit E, and then you just said Exhibit D, so I want to make sure I answer it correctly, sir.

Page 14

11 A Yes. They were -- they were listed there as a 12 way to help further identify cartridges for the dealers
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13 that .-

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14 Q I see. Okay. Thank you I appreciate --
    MR. KRAUSE: He wasn't finished answering. Could
16 you --

17
Q BY MR. DALE: I see. Well, thank you for clearing it up. As Mr. Krause will tell you, for some
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2 widgets to me. I appreciate that.

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2 widgets to me. I appreciate that.
3 So in other words, the dealers, when they are
3 So in other words, the dealers, when they are
4 going to classify a sale in the DROS system, they can pull
4 going to classify a sale in the DROS system, they can pull
5 up this drop-down menu and it will list these four
5 up this drop-down menu and it will list these four
6 examples of cartridges within handguns they sell which
6 examples of cartridges within handguns they sell which
7 might be appropriate for that particular classification;
7 might be appropriate for that particular classification;
8 is that correct?
8 is that correct?
10 witness's testimony.
10 witness's testimony.
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    people, these are all widget. So this is -- these are all
    ```
    people, these are all widget. So this is -- these are all
    MR. KRAUSE: Objection. Mischaracterizes the
    MR. KRAUSE: Objection. Mischaracterizes the
    THE WITNESS: I think as I previously testified,
    THE WITNESS: I think as I previously testified,
                                    Page 17
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                                    Page 17
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I itself's basically a guideline to help them, you know, put the information into the system as they're required to do. And if they find something that's -- they think is similar but maybe not listed, they might call and verify, hey, what should I put this in as? Or they're going to click the appropriate box on the drop-down menu to populate that field. Q BY MR. DALE: I see. So -- I just want to make sure. I think we're on the same page, but -- but again, I keep getting objections that I'm not quite getting this right, so I want to make sure we are?

So these are listings that dealers may select, but they don't necessarily have to select when they're help -- when they're filling out electronically the DROS
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    form as part of ringing up a customer sale?
    MR. KRAUSE: Objection. Mischaracterizes the
    witness's prior testimony.
    I don't think he testified that -- that they can
    drop down any of these calibers -- drop down any of those
    particular cartridges on the DROS system, but I could be
    wrong.
    THE WITNESS: Yeah, the way it happens is if they
    pick 45, it's any one of those 45 or other 45s would be
    lumped in there. It's not -- like I said, it's not a
    scientific down to each individual cartridge. It's --
    MR. KRAUSE: Based on the gun?
    THE WITNESS: It's based on the gun and can --
    can the -- what's the most accurate thing available, given
    Page 18
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the field length in the system and, you know, there are limitations due to the programming, as I understand and have been told; that, you know, we can't have 1,500 versions of the 45 1isted here for the dealer to put the exact cartridge in just because of space concerns in the computer programming.
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BY MR. DALE: Okay. So would it be fair to say,

``` then, in this example in Exhibit \(E\) of cartridges which would fall under a particular caliber, there are some cartridges that might fall under a particular caliber that aren't listed simply due to space reasons?
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    MR. KRAUSE: Objection. Asked and answered. If
    there's anything else you can add --
THE WITNESS: Nothing new. I have answered that.
MR. DALE: Madame Court Reporter, can you go
ahead and read back that question? I don't know that I
got a yes or a no to it, and I'd really like a yes or no
to it.
THE REPORTER: Sure.
(The following was read back as requested:
Question: Okay. So would it be fair to
say, then, in this example in Exhibit $E$
of cartridges which would fall under a
particular caliber, there are some
cartridges that might fall under a
particular caliber that aren't listed
simply due to space reasons?)

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    MR. KRAUSE: He -- I believe the witness
explained in great deal three or Eour times what the --
Exhibit E shows. IE there's anything he can add, it's not
a yes or a no question.
MR. DALE: Okay. Are you instructing your -your witness not to answer, Mr. Krause?
MR. KRAUSE: No, I'm not. I'm instructing him to answer to the extent he has any additional information that hasn't been provided three times already.

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MR. DALE: Okay. Well, it sounds like you're testifying on his behalf, and I'd really appreciate if you wouldn't do that.

I -- all I would like is a simple yes or no answer. It is, in fact, a yes or no question. It requires an affirmation or a declination of an affirmation, and so I'm going to have the court reporter read it back one more time and either he can give me a yes or a no or I don't know or -- you know, those would be appropriate responses.

So Madame Court Reporter, can you go ahead and read that question back, please?

THE REPORTER: Yes.
(The following was read back as requested:
Question: Okay. So would it be fair to
say, then, in this example in Exhibit \(E\)
of cartridges which would fall under a
particular caliber, there are some
cartridges that might fall under a Page 20
\[
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\]
particular caliber that aren't listed
simply due to space reasons?)
MR. KRAUSE: Same objections.
To the extent you can add anything to your prior
answers...
THE WITNESS: Mr. Dale, my answer is such -- as I
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believe I've previously testified, space was a concern in
this field, and there was -- there just wasn't enough
space to list out every single cartridge pertinent to the
numbers on the left side in the first column.
Q BY MR. DALE: Okay. So would it be fair, the
thing I said, would it be fair to characterize it that way
or would it not be fair to characterize it that way?
A I think I just answered that. Yes. It's --
there's not enough space.
Q Okay. Terrific. And that's all I was looking
for. And hopefully if we come upon these issues again in
the future, maybe we can kind of short circuit the
process. And again, I'm not trying to belabor this
process or make it any longer, so I will move forward now
that I've gotten that answer.
All right. So you, at some point, pulled up the
DROS list and got -- and among the listings and, in fact,
one of the top listings for 2006 was the . }45\mathrm{ caliber,
correct, Mr. Graham?
MR. KRAUSE: Objection. Misstates the witness's
prior testimony.

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    Go ahead.
    'THE WITNESS: Looking at Exhibit D, page one, the
    top line, 45 has the highest sale amount.
    Q BY MR. DALE: For 2006; correct?
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    Yes, sir.
    Okay. And so I want to walk you through the
    process that you went to then make a determination that
    this is -- this particular type of ammunition indicated by
    the 45 is principally used in handguns, so I'm not trying
    to trick you here. I just want to walk you through the
    process.
    So at the point, then, that you used the DROS
    Iist as a starting point, for example, the 45, what was
    the next step that you took, then, to try to determine
whether or not the ammunition for that particular caliber
weapon was principally used in handgun?
A Basically, I went to the Cartridges of the World
reference manual, reviewed the -- you know, the entries
for some of the }45\mathrm{ rounds and read the round descriptions
in there, coupled that with the personal experience with
firearms over the years and, you know, that's -- that was
kind of the second phase, if you will.
Q Okay. Let's talk about that second phase a
little bit. We'll kind of do this in two parts.
You said you coupled that with your personal
experience. Let's talk a little bit about your personal
experience with . 45 caliber handguns.
And let me ask you this. Are there any . 45
Page 22

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    A Yes, I think you guys have been provided with
    a -- kind of a short list of some . 45 caliber nonhandguns
    that I identified during the course of the research.
    Q Would that be the Cheaper Than Dirt Web site
    printout?
    A No. It's -- let's see. One, two, three -- about
    an hour page document. The very first, I guess,
    identifier on it would be . 45 ACP and there's a two next
    to it.
    0 Do you see that?
11 Q Taking a look here. I apologize. I've got a lot
12 of papers in front of me. I -- you know, I do not see
13 that. Hold on one moment.
14 I'm sorry. Can you tell me what the top of that
15 particular document reads?
16 MR. KRAUSE: There -- it was provided along with
17 all the other documents he relied on. It's, as he
18 mentioned, a four page document. On the very first page,
19 there's three column headings, . 45 ACP, nine-millimeter
20 and ten-millimeter. There's only text at the very top
quarter of the document. The rest of the first page is
blank. You can recognize it by all the blank space.
MR. DALE: Okay. Like lots of the paper we
24 generate, there's not much -- a lot of it goes to waste,
25 is that right, Mr. Krause?

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1 A Well, there's -- yeah. Are you speaking of
2 the . 45 ACP or what specific --
3 Q I'm talking about any type of . 45 caliber
4 cartridge.
5 A Yes, there are multiple -- you know, multiple
6 firearms out there that are not handguns that use a . 45
7 caliber round.
8 Q Okay. So based on your -- let's get back to the
9 personal experience that you used as part of step two.
10 Based on your personal experience it sounds like,
11 and you can either confirm or deny this, that your
12 understanding is there are a lot more 45 handguns than
13 there are 45 rifles; is that correct?
14 MR. KRAUSE: Objection. Vague and ambiguous.
15 Q BY MR. DALE: Well, let's break it down, then.
16 You said that you used your personal experience
17 based upon your understanding of the use of both the . 45
18 caliber in general and then we're talking specific
19 cartridges like . 45 ACP.
20 What's your experience with regard to handguns
21 that shoot . 45 ACP? I mean, how many handguns of those
22 have you, for instance, yourself, fired in your
23 experience? And I'm talking about different models.
24 A Different models of handguns that shoot the 45.
25 Well, several variants of the 1911 style pistol. I

1 carried an \(H \& K\) USP for a few years, so I fired that
2 extensively. I own a kimber 45. You know, I -- an exact
\[
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\]

3 number, I don't know. Around ten.
Q Okay. Okay. And what is your -- the personal experience that you used to help you as the second step
that you've testified to, was part of that personal
7 experience your actual use in and firing of .45 caliber
8 handguns?
9 A Yes.
10 Q Okay. What additional parts of your personal
11 experience did you use to help inform you about whether or
12 not. 45 caliber ammunition handguns -- or I'm sorry, . 45
13 caliber ammunition would be appropriately included on the
14 DOJ's caliber list?
15 A Basically, weapons that I have seized; other
16 members of the Department of Justice have seized during
17 the course of, you know, criminal investigations; weapons
18 that I've seen for sale at gun shows, gun stores; I read,
19 you know, various gun magazines which detail, you know,
20 different types of firearms and ammunition used in those
21 weapons. That type of stuff.
22 Q So would it be fair to say that all of these
23 personal experiences that you've just described helped
24 inform your choice as part of the second step of
25 determining whether . 45 caliber ammunition was properly

1 included on the DOJ's list?
2 A Yes.
3 Q Okay. Let's talk a little bit about weapons for
4 sale. You said you've observed weapons for sale.
5
\[
\begin{gathered}
\text { Approximately }--\underset{\text { Page }}{\text { again, }} 26 \text { I want your best }
\end{gathered}
\]

6 estimate. I don't want a guess.
7 How many . 45 caliber handguns have you personally
8 observed for sale in your experience?
9 MR. KRAUSE: Don't guess. Just give your best
10 estimate.
11 THE WITNESS: An estimate, I mean, between the
12 gun shows, the gun stores, online where I've seen Web
13 sites trying to sell, you know, various handguns, probably
14 in the thousands.
15 Q BY MR. DALE: Thousands. Okay. Are we
16 talking -- are we talking five figures here? Would it be
17 more than 10,000 ?
18 A Well, I mean, I don't know if -- if I've gone to
19 a particular gun show and then I saw, six months later,
20 the same gun dealer at the same show, I can't say for sure
21 it was a different gun. It might have been the same exact
22 gun with -- you know, based on the serial number on the
23 weapon, so I'm just -- I'm trying to give you a number
24 here. And again, typically on Web sites, you're not privy
25 to the serial number of a particular weapon.
1 Q Okay. Okay. So we're talking about both guns
2 that you observed for sale, which may be the same gun, but
3 also could be a different gun, at both gun shows and on
4 Web sites; is that correct?
5 A Gun shows, gun stores and, yeah, web sites that
6 offer firearms for sale.
7 Q Okay. So to the best of your recollection, and
Page 27
\begin{tabular}{|c|c|}
\hline & 12-02-10 \\
\hline 13 & Q BY MR. DALE: Yes. \\
\hline 14 & A Okay. Guns and Weapons For Law Enforcement, Guns \\
\hline 15 & and Ammo. There's a few others that I peruse, but I \\
\hline 16 & off the top of my head, those are the two that I recall. \\
\hline 17 & Q Okay. Now, at some point, you were asked by the \\
\hline 18 & DOJ to help actually put together the answers that were -- \\
\hline 19 & ended up being verified as Exhibit B; correct? \\
\hline 20 & A Exhibit B? Let me flip to Exhibit B. Stand by. \\
\hline 21 & Is it here in this stack or -- \\
\hline 22 & Q It's the special interrogatories. Let me know \\
\hline 23 & when you have them. \\
\hline 24 & A Okay, sir. \\
\hline 25 & Q Okay. Now -- so at some point, you were asked to \\
\hline & 32 \\
\hline & help review and verify the responses that ended up being \\
\hline 2 & produced here as Exhibit B; correct? \\
\hline 3 & A Yes. \\
\hline 4 & Q Okay. How long ago were you asked to do that? \\
\hline 5 & MR. KRAUSE: Objection. Vague and ambiguous. \\
\hline 6 & Q BY MR. DALE: Was it six months ago? Three \\
\hline 7 & months ago? One month ago? \\
\hline 8 & A No, I would say -- the final verification took \\
\hline & place on November 23rd, the day I signed it. \\
\hline 10 & Q Okay. And prior to that, did you do any research \\
\hline & or investigation to help inform your answer in verifying \\
\hline 12 & that? In other words, did you go back and look at \\
\hline 13 & Cartridges of the World or Web sites or anything like that \\
\hline & to help formulate that answer? \\
\hline 15 & MR. KRAUSE: Objection. Vague and ambiguous.
Page 30 \\
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\end{tabular}
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            What answer are we talking about?
                            MR. DALE: I'm talking about any and all answers
    within Exhibit B.
    MR. KRAUSE: Oh.
    MR. DALE: That he helped -- that he helped
    prepare or otherwise helped you prepare on behalf of the
    DOJ.
    THE WITNESS: Yeah, I've -- I've -- I mean, I've
    24 looked at the -- this is the second version of Cartridges
25 of the world that I've had, so I've looked at that over

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1 the last, I don't know, year or so just because of other
2 projects within the DOJ that had nothing to do with this
3 particular lawsuit.
4 Q BY MR. DALE: Okay.
5 A You know, I -- I continually try to look at
6 different ammunition and handguns and other firearms just
7 to further educate myself because of the job that I do.
8 Q Okay. But with specific regard to making sure
9 you gave your best and fullest answer on the DOJ's behalf
10 for this particular set of interrogatories, do you recall specifically being asked to help them verify these responses?

MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: I guess -- I'm not sure what you
15 mean by them.
16 Q BY MR. DALE: I'm talking specifically about your
17 employers, the Department of Justice, and Mr. Krause?

202 Okay. So within the last two weeks, did youi
21 review any gun magazines to help you verify the responses 22 Or prepare Eor this deposition?

23 A Specific gun magazines? I don't recall looking 24 at a magazine. I think we would have produced something 25 like that to you if -- if I had. I don't remember doing

1 any - doing that.
2 Q okay. So from the time period you were asked to 3 help verify the accuracy of the responses in Exhibit \(B\) up 4 till today, is -- is there any specific magazine that you 5 can recall reviewing to help -- to help you verify those 6 responses?

7 MR. KRAUSE: Objection. Asked and answered.
8 THE WITNESS: Yes, I -- I think I've answered it,
9 sir. I don't recall. And if we -- if I had, we would
10 have provided you with a copy, you know, for your
11 discovery requests.
12 Q BY MR. DALE: Okay. So you don't recall
13 reviewing a specific magazine?
14 A No.
15 Q Okay. So at any time within the past year, can
16 you recall reviewing a magazine which listed popular
17 ammunition counts in it?
18 A I may have reviewed a magazine that had that
19 information in it, but \(I\) don't recall-- you know, it's
20 not something that I made a notation on or, you know, Page 32
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    XL :%omod it away for -- you know, for that particular
22 redson. [ get magazines in the mail and ['Il read them.
23 I have one on my desk that's mopened I got this
\therefore4 morning -- or got sometime yesterday. It's still sealed
2') in a little mailing packacse.

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    1Q So if I asked you to cite a particular article
    2 that you used to help inform your decision as part of your
    3 second step of determining whether . 45 is appropriately
    4 included on the DROS caliber -- I'm sorry, on the DOJ's
    5 caliber list, you couldn't cite for me a specific articie
    6 you relied upon; is that correct?
    A That is correct.
    8 Q Okay. And within the past year, you can't recall
    9 any specific article by publication name or by author name
    10 or by date of publication that specifically listed popular
11 types of ammunition that were being sold or bought; is
12 that correct?
13 A Yes.
1 4 ~ Q ~ O k a y . ~ S o ~ o t h e r ~ t h a n ~ y o u r ~ g e n e r a l ~ r e a d i n g ~ o f
15 magazines over the years, there's no specific information
16 within magazines that you can point me to that helped
17 inform your decision regarding that second step of
1 8 determining whether . 4 5 caliber ammunition was properly
19 included on the DOJ's caliber list; is that correct?
MR. KRAUSE: Objection. Vague and ambiguous.
Misstates the witness's prior testimony.
THE WITNESS: I don't know that -- how that
Page 33

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Mu!stion i:; withoront Ehan the last onte, sire
0) BY MR. IMAIE: NeLL, whother YO| madorstamalme
mot, is rhat rrue? 'rkat you van't point ro me a

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particular magazine article that you used to help you as
part of formulating your opinion regarding whether . \& }
adliber ammunition is dppropriately included on the DOU's
caliber list?
A I believe I've already answered chis, but I -- I
can't recall any specific magazine articles that I used.
Q Okay. Very good. I appreciate that.
And then one of the things you said you looked at
are various gun web sites and your counsel was kind enough
to produce some of them.
One of those was Cheaper Than Dirt; is that
correct?
A Yes.
Q Okay. And can we --
Mr. Krause, do you have a copy of that that we
could, perhaps, mark as an exhibit?
MR. KRAUSE: Yes.
MR. DALE: Let's go ahead and mark the one that
has the November 30, 2010. It's a two-page document. Oh,
they all have November 30, 2010. Okay. Let's --
MR. KRAUSE: Yeah, I have them all bundled as
one.
MR. DALE: Let's go ahead and mark them as one
exhibit, then. That will hopefully help make it a little
easier. And we'll mark it as Exhibit F.
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THE WITNESS: Okay. Mr. Dale, can we pause for a second? The -- I don't think we have, actually, a number E marked -- or letter $E$ marked yet and I don't want to get --
MR. KRAUSE: The court reporter hasn't had time to do it yet.
THE WITNESS: Yeah. Can we take just a second to do that and we can move on?
MR. DALE: Yeah, absolutely. No problem. And by the way, if anybody on that side of the line, including the witness, needs time to take a break, just please let me know. I'm happy to do it.
THE WITNESS: Okay. I'm happy to continue, I just want to get the markings of the items --
MR. DALE: No, and I appreciate that. I appreciate your diligence.
THE WITNESS: E will be the AFS gun caliber table, correct, Mr. Dale?
MR. DALE: Correct.
THE WITNESS: Okay. And then the Cheaper Than Dirt stack, that's going to be $F$, as in Frank?
MR. DALE: I'm sorry. I understand you were asking a question. I stepped out for a second. Go ahead a repeat your question, please.
THE WITNESS: I was just confirming that you want

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the Cheaper Than Dirt stack of papers labeled letter F.
MR. DALE: That is correct.
THE WITNESS: Okay.
MR. DALE: Thank you very much.
THE WITNESS: Okay. The court reporter's been
provided a copy of both, and then I've got working copies
or, you know, same thing over here.
BY MR. DALE: Okay. Well, if you're ready to
proceed, then, I'll ask you some questions regarding
Exhibit F.
1 1 ~ A ~ O n e ~ q u e s t i o n , ~ s i r . ~ D i d ~ - - ~ d i d ~ y o u ~ g u y s ~ e v e r ~ f i n d
12 the -- just so I don't -- we don't skip ahead, the --
13 MR. KRAUSE: Oh, that's not E.
14 THE WITNESS: There's the Excel spreadsheet that
15 has the . 45 ACP and then the different calibers going from
16 left to right. It's about four pages long.
1 7 Did you guys ask for that to be marked? Because
18 I don't think we ever marked it and I don't remember you
19 guys --
BY MR. DALE: Yeah. Yeah, we did find it. I
21 will go ahead and probably mark it as a later exhibit.
22 A Okay. Thank you. I'll --
23 Q Since we didn't do any specific questions about
24 it, I'll go ahead and wait.
I'll set that aside, then.

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20 Q
25 A
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\]

2 A Okay. Now we're on to \(F\), so...
3 Q So my understanding of Exhibit \(F\), and I want to
4 make sure you guys have the same one we have. There's two
5 different printouts from the Cheaper Than Dirt Web site,
6 both of which are dated at the bottom right-hand corner
7 November 30th, 2010.
8 Is that what you have in front of you,
9 Mr . Graham?
10 A Yes, it looks that way.
11 Q
Okay. And so Cheaper Than Dirt was one of the
12 Web sites that you used to help inform this second step
13 that you took to determine whether .45 ammunition was
14 appropriately included on the DOJ's caliber list; correct?
15 A Yes.
16 Q In fact, the Web pages that are represented on
17 the printouts that are Exhibit \(F\) are, in fact, the exact
18 Web pages that you went to to help inform that opinion;
19 correct?
20 A They are representative of the date that I caused
21 these to be printed just to be able to provide you with
22 something, per your request.
23 Q Okay. But -- but at some point within the last,
24 let's say, month or so, as part of your -- helping inform
25 your opinion, you went to these two particular web pages,

1 right? Notwithstanding number --
2 A Not withstanding what?
3 Q The November 30th date that's on the lower

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right-hand corner. Sometime prior to that, you went to the two Web site pages that are -- that your counsel has produced as -- and we've now marked as Exhibit \(F\) in order to help inform your opinion?

8 A Yes.
9 Q Okay. Thank you. I apologize. That was a 10 little convoluted. Thank you for sticking with me there, 11 Mr. Graham.

12 A Okay.
13 Q Based on your review of those web sites at that
14 time and looking at Exhibit \(F\) now, is there anything on
15 Exhibit \(F\) that pops out at you that looks different from
16 what you reviewed back when you viewed these web sites \(n\)
17 order to help inform the opinions you're giving today?
18 A You know, I can't say for sure nothing has been
19 changed because I know web sites may fluctuate. They
20 might change a price or something like that, but in
21 general, it looks similar.
22 Q Okay. It looks similar. All right.
23 Well, then -- so were there any other web
24 sites -- well, let me -- I don't want to ask that
25 question. Let me go through some of the other exhibits

1 that your counsel produced.
2 Do you have in front of you a document -- and it
3 may already be marked as part of Exhibit \(F\), so I want to
4 confirm it -- something that says Cabela's Ammunition at
5 the top?
6 A Yes, I see that.
Page 38 marked as part of Exhibit E.

MR. DALE: Terrific. your counsel in front of me. that you produced? apologies.

MR. DALE: Okay. Mr. Krause, is that already

MR. KRAUSE: Yes, it's all one big bundle.

And then do you have something in front of you that says at the top "Ammunition/Shop Premium and Discount

Okay. And then I just want to confirm, I don't have any other web site printouts that were produced by

Mr. Krause, were these all the Web site printouts

MR. KRAUSE: I don't have it in front of me. No, it looks like there's one more, \(J\) \& \(G\) Sales.

MR. DALE: Yes, I actually do have that. My

Q Okay. So Mr. Graham, in front of you, do you have a document which says ammo for handguns on top? And

1 then in the -- sort of the title bar blow that, it says J \& G Sales firearms/ammunition/accessories?

A Yes, sir.
Q Okay. So all of these documents that we've just discussed, the \(J \& G\) Sales, the Cabela's, the midway USA document and the Cheaper Than Dirt, these were all Web sites that you used to help you as part of this second step of confirming that .45 caliber ammunition was

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9 properly included in the DOJ's caliber list; is that
10 correct?
11 A Yes.
12 Q Were there any other web sites besides those that
13 we've marked as Exhibit \(F\) that you used in order to help
14 inform your opinion?
15 A I'm trying to think if there's -- I think maybe
16 the -- not an ammunition vendor, if you will.
17 Is that -- are you limiting your question to
18 ammunition vendors or sellers Web sites?
19 Q I'm limiting my question to any Web sites that
20 would be accessible to the public that you used in helping
21 Eorm this second step. So, again, I'm not trying to trick
22 you. I'm just trying to make sure I'm covering all of
23 them?
24 A Okay. I would say -- possibly the -- yeah,
25 that's -- that seems like it's the right Web site list.

1 Q Okay. All right. And let me ask you, what
2 particular information on these web sites -- and you can
3 go ahead and take a look at Exhibit F -- did you rely upon
4 to help make your determination that . 45 caliber
5 ammunition was properly included on the DOJ's caliber
6 list?
7 A Some of the -- basically, some of the calibers
8 and cartridges listed here on the Cheaper Than Dirt -- it
9 says page one of two, so I'm speaking about the one that
10 says most popular handgun ammunition is kind of a second
11 column or block of rounds below that. The . 45 ACP is Page 40
\[
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\]

12 Listed in the most popular section. Down a little bit
13 Rarther down is the .45 Long Colt. You know, that type of
14 information there. The 45 GAP.
15 Q Okay. Didyou, at any point, contact the
16 administrators of this web site or the owners of the
17 Cheaper Than Dirt Web site to find out what they meant
18 about most popular?
19 A No.
20 Q No.
21 Did you do any other type of independent
22 investigation to determine whether or not Cheaper Than
23 Dirt's representation of what the most popular ammunition
24 they sold was an accurate representation?
25 A Did I contact other Web sites? Is that what your

1 question was?
2 Q Did you do anything to find out? So contact
3 other Web sites, call the owner, call a competing web site 4 and find out that Cheaper Than Dirt's reputation regarding

5 what its most popular ammuntion type sold was an accurate
6 representation?
7 A No. I made no other -- no phone calls to
8 ammunition vendors to check on the validity of Cheaper
9 Than Dirt's, I guess, statements that they make.
10 Q Okay. And then let's look at the \(J \& G\) Sales.
11 What part of this particular Web site did you
12 rely upon to help formulate your opinion that . 45 caliber
13 ammunition was appropriately included on the DOJ's caliber
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    14 List?
    L's A The section here that says ammo for handguns and
    16 it gives a listing of various rounds, there's a portion of
    17 it chat says . 45 ACP, 45 GAP and 45 LC, which I understand
    18 to be Long colt.
19 O Okay. And ugain, you didn't contact the
proprietors of J \& G Sales, either the store or Web site,
to determine how they came up with this particular
listing; is that correct?
A Correct.
Q Okay. And would it be fair to say that,
similarly true, you didn't contact the proprietors of

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    1 Cabela's or midway USA to determine how they ended up
    2 listing those calibers on their Web sites?
    3 A That's correct.
    4 Q Okay. Now, I note that on each of those, there
    \(j\) aren't listings of how much of each ammunition is sold.
    6 Is that a correct representation?
    7 A Yeah, I don't -- I didn't see anything like that
    8 when I was perusing the sites and I don't think there's
    9 that type of information at least on any site I've seen in
10 the past.
11 Q Okay. So would it be fair to say that you don't
12 know, even though they're characterizing this stuff as
13 popular, exactly how much of each ammunition they're
14 selling?
15 A Yeah, based on their Web sites, I can't tell you
16 an exact round count.

\section*{\(12-02-10\)}
17 Q Okay. Now, let's go back and take a look at the
18 Cheaper Than Dirt Web site printout that's part of Exhibit
19 F. And specifically, looking under handgun ammunition,
20 that's the page that you previously testified to that has
21 most popular and below that has handgun ammunition.
22 Do you see that web page?
23 A Yes, sir.
24 Q Okay. And one of the handgun ammunitions listed
25 is . 45 Long Colt; correct?

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    ammunition that's fired in a nine-millimeter pistol;
        correct?
    21 A Yes.
    22 Q Okay. Let me ask you. You testified previously
    23 that you used an MP5 machine gun as part of the weapons
    24 that you've been issued through the DOJ; is that right?
    25 A Yes, submachine gun.
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    Q Okay. Does that take a nine by }23\mathrm{ round or does
    ```
    that take a different round?
    A Takes a different round.
    What type of nine-millimeter round does it take?
    It takes a nine by 19 Luger or Parabellum is
    another way to say it.
    Q Okay. But that's being fired out of your pub
    machine gun, right? Not a pistol?
    A It can be fired in a pistol.
10 Q Right, but when you're firing it, you're firing
11 it out of a submachine gun mostly; correct?
12 MR. KRAUSE: Objection. Misstates the witness's
13 testimony. Vague and ambiguous.
14 MR. DALE: You're absolutely right, Mr. Krause.
15 I'll withdraw that and re-ask it.
16 Q When you were firing that particular cartridge of
17 ammunition out of your MP5, that MP5 you were firing it
18 out of was a submachine gun, not a pistol; correct?
19 A Yes.
20 Q Okay. Now, I note at the top of the Cheaper Than
21 Dirt web site under the most popular that you previously

20 were aware that some police and law enforcement agencies 21 use the MP5; correct?

22 A Yes
23 Q Okay. Did you ever go out and find out how many
24 MP fives had been issued to law enforcement agencies?
25 A No, sir.
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    Q Okay. And did you find out how many rounds that
    law enforcement agencies may fire out of their MP fives as
    part of tactical operations or training?
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    A No, sir.
    Q Okay. And did you consider the fact that MP5
    uses nine-millimeter handgun ammunition to be a Eactor
    that would suggest that it was appropriately included on
    the DOJ's caliber list?

MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: Yeah, can you rephrase that,
please?
Q BY MR. DALE: Yeah. Yeah. What I want to find
out is whether or not the fact that what you've classified
as handgun ammunition is used in a submachine gun was any
sort of factor in you determining that the nine-millimeter
caliber should not be included on the DOJ's caliber list?

MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: And I think I've already stated that I considered that weapon and the fact that it fired the -- the nine-millimeter round as part of my evaluation. Q BY MR. DALE: Okay. But -- but if I understand your testimony correctly, you didn't find out how many of Page 56

Yes, that's correct.

Q And you didn't find out how many rounds were being fired out of that weapon as part of your determination; correct?

A Correct. Q Okay. Let's take a look -- I want to kind of transition here. Let's take a look at the statute.

Have you had an opportunity to review the statute that's at issue in this lawsuit?

MR. KRAUSE: Objection. Vague and ambiguous.
Which statute are you talking about?
MR. DALE: I'm sorry. Specifically, Penal Code section 12060.

THE WITNESS: Yes, sir.
Q BY MR. DALE: Okay. We'll go ahead and pull it. And just so we're operating on the same page here, it says -- okay. It says handgun ammunition -- hold on one sec.

Do you know what subdivision this is? Okay.
18

19 This is A? Okay. All right. Hold on one sec.
(Off-the-record discussion.)
BY MR. DALE: All right. I'm getting a copy of that. I apologize. So let's move on to another issue so we don't waste time here. And I apologize for the delay. Let's go back to Exhibit \(F\) for a second.
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site under the handgun ammunition, can you go ahead and
turn to that page for me?
A Yes, sir.
Q Okay. One of the listings on there is . }30\mathrm{ Luger.
Do you see that?
A Yes.
Q Okay. Now, if I understand your prior testimony
correctly, part of the method that you undertook to
determine whether or not a particular caliber of
ammunition was properly included on the DOJ's caliber list
was to look at the various Web sites.
What, if any, factor in you forming your opinion
regarding the appropriate caliber listings on the web site
listing of the . }30\mathrm{ Luger on this particular Web site have
on formulating that opinion, if any?
A You know, it -- it didn't really factor into
my -- I guess, my evaluation. It's not something that I
tend to see in the field. It's not, you know, something
I -- we tend to, you know, seize. I don't see it sold or
being offered for sale a whole lot at shows and gun
stores. I think that's the best way to surmise that.
Q Okay. So let me walk you back through the steps
here.
You go to the DROS list as part of your initial
step to see what the popular handguns being sold are.

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Then you go to the second step, where you use your
personal experience and your review of literature and your
review of Web sites to Eurther help you determine what
appropriate caliber ammunitions are included on the list;
correct?
A Correct.
Q Okay. And when we were talking about the 45
before, one of the factors that made 45 appropriately
included based -- in your opinion, was the fact that it
was listed as popular on Web sites; correct?
MR. KRAUSE: Objection. Mischaracterizes the witness's prior testimony.

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THE WITNESS: It was listed as handgun ammunition on the Web sites. You know, this particular Cheaper Than Dirt article that you've previously mentioned as part of Exhibit F calls it most popular.
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                            BY MR. DALE: Okay. So -- so to your mind, then,
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any of these Web sites which listed this -- these calibers
of ammunition as popular, you didn't give any mind or any
weight to the fact that they may have listed it as most
popular on their Web site; is that correct?

MR. KRAUSE: Objection. Misstates the witness's prior testimony.

THE WITNESS: I gave it the most -- the most important thing that it was listed and broken down for
\(1.2-02-10\)
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onsumers as handgun ammunition. A particular Web site,
You know, however they re going to classify a particular
trpe of caliber or cartridge as most popular, you know,
that's how they wanted to list it. That's Eine. It was
most important that it was considered handgun ammunition
to me.
Q BY MR. DALE: Okay. Well, let me make sure I
understand.
So you gave some weight, but not a lot of weight,
to how the web site classified the popularity of that
ammunition.

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    Is that a correct statement?
    A I would say some, but it was not everything. It
    was more of a -- you know, a lesser factor than the actual
    delineation that it was handgun ammunition versus another
    type of ammunition.
    Q Okay. So getting back, then, to the . 30 Luger,
    given that it was listed as a handgun ammunition, what
    caused you, then, to discount its listing on the web sites
    as a handgun ammunition from formulating your opinion that
    it shouldn't be included on the DOJ's caliber list?
    MR. KRAUSE: Objection. Misstates the witness's
    prior testimony. Compound. Vague and ambiguous.
    MR. DALE: Let me go ahead and break it down.
    We'll go back because I want to make sure you understand

1 the question.
2 Q You testified that you gave some weight, but not
3 a lot of weight, to the fact that a particular type of Page 60
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ammunition may be listed as popular on the Web sites you
reviewed.
Is that a correct statement?
A Yes.
Q Okay. But you gave more weight to the fact that
the ammunition was listed as handgun ammunition at all on
the web site.
Is that a correct statement?
A Yes.
Q Okay. And then going back to Exhibit F, here we
have a listing of . }30\mathrm{ Luger.
So based on your prior testimony, did you give
some weight to the fact that . }30\mathrm{ Luger, as listed on this
particular Web site as handgun ammunition, as part of
Eorming your opinion as to whether or not it was properly
included on the DOJ's caliber list?
A Yes.
Q Okay. So what other Eactors did you consider in
then coming up with your ultimate opinion that it wasn't
properly included on the DOJ's caliber list?
A The -- I think I've already said the factors
that -- it's not something I'm -- I see here in the field.

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I don't see it in -- you know, meaning we're not seizing . 30 Lugers. We're not -- I don't see a lot of these offered for sale here. The -- you know, and also given the amount of time that was allowed for research, the -- the ones that were listed out were, in my

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    axparience and, you know, based on my knowledge, they were
    he most appropriate - - mot to exclude others that mighe
    be also titting this bill, but this is what was the
    best -- the best available at the time.
Q Okay. So I -- and I think you've testified to
this before. Part of your analysis in formulating your
opinions was influenced by the fact that you had a limited
amount of time to help the DOJ formulate this list.
Isn't that correct?
MR. KRAUSE: Objection. Misstates the witness's
prior testimony.
THE WITNESS: Well, I think within the last, I
don't know, two weeks or so, there's been somewhat of a
rush with this particular case, and, you know, that's --
that's the best way I can say it.
Q BY MR. DALE: If you had more time, would you go
and investigate additional calibers and additional
cartridges that weren't listed on the list produced in
order to determine whether or not they should be included
or shouldn't be included on any future list?

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A think that would be common sense.
Q Okay. But obviously you don't have the time to
do it right now because we have a trial coming up;
correct?
A Correct. And I've been here talking with you for
quite awhile, so it's obvious that there's -- you know,
cartridges and calibers are not synonymous, so it's -- you
know, the more time would be - you know, be a better
page 62
accurate list, I guess.
10 Q Okay. So with regard to the 30 Luger cartridge, is there a rifle that fires that particular cartridge?

A I don't know, sir.
13 Q You don't know.
14 Are you aware that there's a handgun that fires 15 that particular cartridge?

16 A Yes. I believe it's a German handgun. I don't
17 know the model off the top of my head, though.
18 Q Okay. And as you sit here today, you have no
19 knowledge whether or not the . 30 Luger is fired more from
20 a handgun than it is from a rifle.
21 Is that a fair statement?
22 A Correct. Because, again, I didn't have
23 sufficient time to do the research on every single, you
24 know, cartridge out there.
25 Q Okay. And so if the . 30 Luger -- if you did more
research and it turned out that it was fired more from that -- for example, that german handgun or any other handgun than it is from a rifle, based on your understanding of the law, it would have to be included on the list as principally fired or -- or principally used in a handgun; is that correct?

8 legal conclusion. Vague and ambiguous.
9 Q BY MR. DALE: Okay. Well, let's step back and 10 make sure that we don't have you opining on legal matters Page 63

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    the DOJ in formulating the caliber list, what efforts did
    you take, if any, to determine whether or not a particular
    caliber or cartridge of ammunition was designed and
    intended to be used in an antique firearm as defined by
    the referenced section of the U.S. code?
    A Basically, my experience, the Cartridges of the
    World reference manual. Basically, those two -- those two
    things.
    Q Okay. And in terms of your experience, what did
    your experience -- what specific parts of your experience
    helped you make a determination as to whether any
    particular type of ammunition was ammunition designed and
    intended to be used in an antique firearm?
    MR. KRAUSE: Objection. Vague and ambiguous.
    MR. DALE: Okay. Well, let's go back. I want to
    make sure I have this straight.
    Is it true that you used your personal experience
    as one of the factors in helping you determine whether a
                                Page 66
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19 particular caliber of ammunition was or was not designed
20 and intended to be used in an antique firearm, as it
21 states in 12060 ? Is that a correct statement?
22 A Could you -- could you please repeat that one?
23 Q Yeah. Yeah. Let me see if I can't break it down
24 a little further.
25 You understood that part of the list that you
```

    1 were putting together, you were not supposed to include
    2 ammunition designed and intended to be used in an antique
    3 firearm as part of that list; is that correct?
    A Yes.
        Q Okay. And I think you just testified that you
        used your personal experience. That was one of the
        factors you used in helping you determine whether or not
        the ammunition that you were attempting to provide an
        opinion on fell within that definition; is that correct?
        A Yes.
            11 Q Okay. And then the other thing that I think you
            1 2 \text { said is you used cartridges of the world to also help you}
            13 make that determination?
            14 A Right.
            15 Q Okay. Were there any other resources or methods
            1 6 \text { that you used to help you make that particular}
            17 determination?
            18 A Regarding antique weapons?
            1 9 \text { Q No, regarding ammunition that's designed and}
            20 intended to be used in an antique firearm.
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No, I don't believe so. I think that -- that limits the -- that's the limit of them. Q Okay. And at any point during the process where you were attempting to make a determination as to whether ammunition didn't fall within that definition, did you

I don't think I looked it up in the last two weeks, if that's what you're referring to. Q Okay. Did you look it up at any point prior to helping the DOJ formulate its list after you were asked by the DOJ to help formulate its list?

MR. KRAUSE: And this is just his -- just whether he has looked at it?

MR. DALE: Whether he did, yes.
THE WITNESS: I don't recall looking at it because I've grown accustomed and familiar with what an antique firearm is.

Q BY MR. DALE: Okay. What's your understanding of an antique firearm?

A Basically it's a firearm that's produced prior to 1898 and it's going to fire, you know, in general terms, not a modern firearm round.

Q Okay. To your knowledge and expertise, what calibers of weapons were produced prior to 1898? Was a 22 produced prior to 1898?

22 A I don't recall, sir.
23 Q Okay. How about a 45? Was that produced prior Page 68

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broader.

Do you have any information as to whether or not any weapon which fired a . 45 caliber round was produced prior to 1898?

MR. KRAUSE: Objection. Vague and ambiguous.
Q
BY MR. DALE: Mr. Graham, do you understand what
I mean by .45 caliber round? I think -- I don't want to have to go through all the testimony we had establishing cartridges and stuff.

You understand what a .45 caliber round is; correct?

A Correct. I think there are some rifles that carry that denomination.

Q Okay. Did the fact or your understanding that there may be some rifles that carry that denomination factor at all into the opinions that you formed in helping formulate the DOJ's caliber list?

MR. KRAUSE: Objection. Vague and ambiguous.
Are you talking only about antique rifles or -or any rifles?

MR. DALE: Yeah, let me go back.
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\]

11 prior testimony. Argumentative.
12 THE WITNESS: I don't know it to be available at

13 this time. There may be a source out there that I'm
14 unaware of, sir.
15 Q BY MR. DALE: Okay. Well, I appreciate that.
16 Let me ask you, I want to get back-- kind of get
17 back to the definition of your understanding of what you
18 were defining as principally used.
19 We talked earlier about how the MP5 fires more
20 rounds per minute in our hypothetical than the
21 semiautomatic nine-millimeter pistol.
22 MR. KRAUSE: Objection. Misstates --
23 Q BY MR. DALE: In determining whether an
24 ammunition was principally used in a handgun, did you give
25 any consideration to whether or not more rounds of that

1 ammunition may be fired from a particular weapon based on
2 the speed that that particular weapon fires or the
3 popularity of its use in one configuration, let's say a
4 rifle, versus another configuration, a handgun?


12 a handgun on the DOJ's caliber list?

13
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Q Okay. Is the fact that the use of certain
cartridges or calibers of ammunition may be fired at
different rates from different types of weapons, was that
a factor at all in you making your determination as to
whether a particular ammunition should be included on the
DOJ's caliber list?
MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: The -- I would say not much of a
factor because principally for use really deals with the
kind of firearm it's going to go into, in my -- in my
est- -- in my understanding, so if you have one weapon
that can shoot a million rounds a second and then you have
500,000 rounds -- or handguns out there that shoot ten
rounds a minute, that weapon is actually -- or the
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\(\therefore\) mmunition is primcipally for wise in the larder pool of -: 1 o weapons.
17 Q BY MR. DALE: Okay. How did you come to the 18 understanding that that is how you define principally used 19 as handgun ammunition?

20 MR. KRAUSE: Objection. Vague and ambiguous.
How does he -- what are you referring to?
MR. DALE: I'm referring -- he just testified that the total number of rounds fired wasn't his understanding of the definition of principally used in handguns for purposes of the opinions he formed and the
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    analysis he made. I'm just trying to find out what he
    based his definition that doesn't include capacity or
    rounds fired as part of his opinion.
    MR. KRAUSE: Objection. Vague and ambiguous.
    I -- if you understand his question, please --
    THE WITNESS: Yeah. Based on my understand- --
    experience and expertise, the number of handguns out there
    that shoot, let's say nine-millimeter, for example, far
    exceed the H & K MP fives or the other, you know,
    nonhandgun firearms out there that also happen to be
    chambered in the nine-millimeter.
    BY MR. DALE: Okay. Are you talking about total
    number of weapons in circulation in California?
    A Yeah. I mean, it's kind of a common sense thing.
    I mean, it's -- there's just -- I don't see a lot of MP
    16 fives for sale at gun shows or out there or licensed.

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    It's even somewhat of an exclusive weapon in police
agencies. It's not -- you know, the full automatic
versions that we're speaking of, a lot of times, just --
you know, the swat team or parts of the swat team might
have that specific weapon. It's -- it's not a -- a weapon
that you see every day. You know, you're going to see
many, many, many more nine-millimeter handguns out there
than you're going to come across, you know, the MP fives.
Q Okay. Well, let me ask you this:

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17 nine-millimeter semiautomatic pistols that use the
18 nine-millimeter Luger cartridge, you wouldn't be able to
19 give me a number, as we sit here today; correct? Page 78
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2 prior testimony.
3 THE WITNESS: There was a -- basically, there is 4 a breakdown that -- like there's a nine-millimeter rim 5 fire shotgun cartridge out there, and that's obviously not 6 going to be for a handgun.

7 Q BY MR. DALE: Right. So that wouldn't be 8 included as part -- based on your understanding, as

9 ammunition principally used in handguns?
10 MR. KRAUSE: Objection.
11 THE WITNESS: What would be, sir?
12 Q
BY MR. DALE: What nine-millimeter rim fire you
13 just described.
14 A No, I said it would not be, because it's a
15 shotgun round. If I was asked at some point by somebody, 16 hey, is the nine-milimeter rim fire shotgun cartridge 17 principally for use in handguns, I would probably come to 18 the conclusion, no, it's not, A, because it's from a 19 shotgun. I don't know of any other, you know, way to 20 answer that question.
21 Yeah. And for example, the nine by 57-milimeter 22 cartridge, is it your opinion that that's principally for 23 use in a handgun?
24 A
Nine by 57?

25 Q
Yeah.

1 A I don't recall giving previous testimony on that
2 round, sir.
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Q Okay. Do you -- have you ever heard of the nine
by 57-millimeter cartridge?
A I may have, but given all the cartridges we've
gone through in the last day and a halE, it's somewhat
muddy in my brain right now.
Q I understand.
Now, do you have any idea as to where that
automated firearms list that you would review -- that you
have reviewed, whether you would be able to determine
whether or not a firearm sold that was listed as
nine-millimeter on that list would have taken a nine by
57-millimeter cartridge as opposed to a nine-millimeter
Luger?
MR. KRAUSE: Objection. Compound. Vague and ambiguous.
THE WITNESS: Again, the dealers can put what -you know, if they had a particular weapon in there that they classified as a handgun that was also a nine-millimeter of some sort, it's theoretically possible that that -- there could be a -- you know, a certain percentage of the data reflected regarding that kind of a Eirearm in this -Q BY MR. DALE: Based on your experience, is it

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1 possible the nine-miliimeter rim fire could have also been
2 included on that list?
3 A Nine-millimeter rim fire shotgun round?
4 Q
Yes.
5 A Yes, it's there available for the dealers to Page 84

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    put -- put into the system. So it's posisible, yes.
    Okay. So the dutomated fircarms systems
    information that you used to determine how many
    nine-millimeter guns there are out there, it could have
    included nine-millimeter Luger, it could have included
    nine-millimeter rim fire, it could have included nine by
    57 millimeter.
    Is that my understanding of your testimony?
    MR. KRAUSE: Objection. Misstates the witness's
    prior testimony and vague and ambiguous.
    THE WITNESS: The numbers that -- from Exhibit D, again, have reflected handgun specific data, so if the dealer, for some reason, checked the box as a handgun and then they also checked the nine-millimeter, they would have made an erroneous entry. If it was a shotgun, they should have put this in as a long gun, which wouldn't have populated the list in exhibit did.
23 Q BY MR. DALE: I see. Okay.
24 A So I'm relying upon the information the dealers
25 provided to, again, just have a basis and a starting point

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of calibers and cartridges to consider for this list for your question on interrogatory number five.

Q Okay.
MR. KRAUSE: Which, as we've discussed, is not the clearest interrogatory on the planet.

BY MR. DALE: Let me ask you, Mr. Graham, are you
7 aware of any database which identifies the number of long Page 85
(3) 1:41 :3.11.!:3:
1) MR. KRAUSE: (b)juction Asked umb mawneme
(0) Yesiterday.
L. THE NLINESS: zoan, we're nut allowed ro rabla

I t innt intormation, sir. And \([\) -
13 Q BY MR. DALE: What about the bureau of alcohol,
Lf tobacco and Eirearms? Do they keep a list of certain long
L' gun siles?
16 MR. KRAUSE: Objection. Calls for speculation.
17 Q BY MR. DALE: Well, Let me ask you this:
18 Are you aware if they keep a list of
19 manufacturers' totals regarding long gun sales?
20 A I'm not aware of that, sir. If they do, I - I
21 don't recall learning of that. It would be nice to know,
22 I'm sure, for some other projects unrelated to this issue
23 to be able to query that system, but \(I\) don't have
2.4 knowledge of that now.

25 Q Okay. So would it be fair to say that, prior to

1 Eorming your opinions, you did not review a report titled
2 "Annual Firearms Manufacturing and Export Report" that's
3 published by the BATFE?
4 A Correct.
5 Q Okay.
6 MR. KRAUSE: Is that something you want to mark
7 as an exhibit.
8 MR. DALE: No. In fact, I don't even have a copy
9 of it.
10 Q But \(I\) do want to ask this: Page 86
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As a hypothetical, Mr. (irahan, it there were a report out there that identified manufacturer's total sales by state of particular types of long guns, would that have been a helpeul report for you to review in forming the opinions that have been expressed in the DoJ's caliber list?

MR. KRAUSE: Objection. Vague and ambiguous. Incomplete hypothetical. Calls for speculation. I mean, without seeing a report --

THE WITNESS: Yeah, assuming something like that existed, I would at least review it. I don't know that it would be -- how much benefit it would have, but I would -I would consider it.

Q BY MR. DALE: Okay. Well, if I understand your methodology, your initial methodology of determining

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whether a particular ammunition's appropriate involved determining how many handguns were issued that fire that particular caliber cartridge.

Is that a correct statement of your initial methodology with the DROS report?

MR. KRAUSE: Objection. Misstates the witness's prior testimony.

THE WITNESS: Yes, I attempted to use the DROS and AFS systems to just get a starting point to identify the most commonly sold firearms here in Califormia over the last five years or so. And -- well, I think that answers your question.
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                            BY MR. DALE: Okay. Would it have been helpful
    13 0
to you in forming your opinion if you had a similar list
of rifles and other long guns which used the same calibers
as the handguns you referenced in the DROS list? Would
that help you in forming your opinion?
MR. KRAUSE: Objection. Vague and ambiguous.
Calls for speculation.
THE WITNESS: It may.
BY MR. DALE: It may. But obviously you
didn't -- you don't have that report, and so -- I'm going
to withdraw that.
Can we take a five-minute break? Do you folks
mind?

``` 9 meeting at 1:30 I need to be to, and I've got to drive --
10 MR. DALE: Oh, I'm talking about the middle of
11 the noon hour.
MR. KRAUSE: No. How is the timing looking?
MR. DALE: I think -- I apologize. I'm not going to get it done this hour, but I think I'm going to get it done -- I'll get it done before our drop deadine. That I promise you.

MR. KRAUSE: Okay.
THE WITNESS: Sir, just to confirm, what's your interpretation of the drop deadiine? I do have another
.
MR. KRAUSE: Like 12:45?
MR. DALE: Yeah.
MR. KRAUSE: Okay. Five-minute break.
MR. DALE: Five minutes.
(Recess taken.)
\(Q \quad\) BY MR. DALE: I'm going to go ahead and, if
Mr. Graham is ready, ask him to pick up the copy of Cartridges of the world 12 th edition that he has in front of him?

MR. KRAUSE: Actually, I was thumbing through it for grins and giggles.

MR. DALE: I know. It's interesting reading, huh?

MR. KRAUSE: It is.
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MR. DALE: You know, for a guy who deals in widgets. I could get some pretty good sleep reading this.
MR. KRAUSE: Now, we-- I don't know how -- the pages you're going to reference, I'll have to copy them afterwards and --
MR. DALE: Well, you know, I have an idea.
Are you willing to stipulate that we consider Cartridges of the world a treatise that's relied upon by experts in this particular field?
MR. KRAUSE: Yeah.
MR. DALE: Yeah, I think given that, I don't want to attach a copy of the pages. I think we can just -- we know that we're using the 12 th edition and we have references there. And that way, we don't have to worry about copying pages.
MR. KRAUSE: Okay. That sounds good to me.
MR. DALE: Okay. All right.
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see a dash after a particular caliber, it indicates the
powder grains in there. And typically, those are
associated with rifles. This one, based on the general
comments here, states that it's a rifle cartridge.
Q Okay. Well, but you note in the general
comments, I think you just read it, that although it was
designed as a rifle cartridge, according to Cartridges of
the World, it became very popular as a revolver cartridge.
Do you see that?
A Yes.
Q Did that particular statement in Cartridges of
the World have any influence on whether or not you were
going to form an opinion regarding . 32-20 cartridge
ammunition?
MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: That statement on page 285, I can
want say that it had any particular relevance to my
evaluation.
Q BY MR. DALE: Okay. well, let me ask you this:
Based on your understanding of what you were to
give opinions regarding, specifically, whether ammunition
was principally used in a handgun, was it your
understanding that if you came to learn and formed the
opinion that a cartridge that had previously been used as
a rifle cartridge was now principally used in a handgun,

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that it should be included on the DOJ's caliber list?
MR. KRAUSE: Objection. Vague and ambiguous.
Compound. Calls for speculation.
THE WITNESS: Could you just repeat the question,
sir?
Q. BY MR. DALE: Yeah. I wart to know that -- you
know, notwithstanding you just testified that your
understanding is that if it's got a pended number after
it, it's probabiy a rifle cartridge.
Was it your understanding that if something that
was previousiy a rifle cartridge had become popular as
handgun ammunition that you would need to include it on
the 1ist of DOJ -- I'm sorry, on the DOJ caliber list?
MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: Popular doesn't necessarily equate
to principally for the use in, so, you know, they're two
separate issues.
Q BY MR. DALE: Okay. Well, let me ask you, what
would you do and what methodology did you use in order to
delineate between popular versus principally used in
handguns?
MR. KRAUSE: Objection. Misstates the witness's
prior testimony. Vague and ambiguous.
iRR. DALE: Well, let's clarify. Did you do
any -- I'm sorry. I stepped on your objection. Go ahead,

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between popular ammunition and ammunition which is
principally used in handguns?

MR. KRAUSE: Dbjection. Vague and ambiguous as to the word popular.

MR. DALE: Well, let's go back.
You just, right now, Mr. Graham, testified that there's a difference between popilar armunition and ammunition that's principally used in handguns. You made that delineation as part of your testimony.

So what, in your opinion, is the difference between popular versus principally designed for use in a handguns?

MR. KRAUSE: Objection. Misstates the witness's prior testimony.

THE NITNESS: Sir, the difference that I would see is that there might be -- let's see there's a rifle chambered in a specific cartridge that's been around for ten years and then all of a sudden there's a handgun created in the same cartridge. That, for some reason, generates interest with firearms enthusiasts and perhaps
that cartridge sees an upswing in purchases, so that might cause it to become labeled as popular by a particular ammunition web site, for example.

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2 BY MR. DALE: okay. So ie may - it may gain some popularity in terms of customers wanting to buy it. Based on your understanding of what you've just talked about, your understanding of popular, and your understanding of what you were looking for in cerms of prircipally designed Eor handguns in the situation, the hypothetical you just described, based on your methodology, when would that popular handgun -- what factors would it take for it to become principally used in handguns, in your opinion?

MR. KRAUSE: Objection. Vague and ambiguous. Compound.

THE WITNESS: You know, potential things you're going to consider would be different manufacturers that might make a firearm that chambers a certain cartridge, number of sales in a particular gun, if a particular cal:ber is, you know, considered obsolete or -- or at least obscure. Those types of things.

Q
BY MR. DALE: Okay. So getting back to the \(.32 \cdot 20\), which we've noted from the Cartridges of the wor". d, started out as a rifle cartridge, but became popular as a revolver cartridge, according to the
treatise.

2 A Right.
\(3 Q\) What steps, if any, did you undertake co
4 determine whether or not that popularity had sort of crossed that threshold we've described as making it principally used in handguns? Page 96
., Mr. KraUSE: Objection Vaque and ambicuous.
8 Calls Eor speculation.
9 BY MR. DALE: Did you undertake any -- did you
10 undertake any effort to make that determination?
11 A With respect to the \(32-30\), no, sir, I did not.
12 I did not consider it a -- given the amount of time I had,
13 it wasn't one that I see here in California at gun shows
14 or cun stores, and that's -- you know, I basically had a
15 Limited amount of time and had to concentrate on the --
16 the ones I felt comfortable tescifying today about.
17 Q Okay. So would it be fair to say, as you sit
18 here today, you have no opinion as to whether the .32-30
19 (sic) cartridge is ammunition principally used in a
20 handgun?
21 MR. KRAUSE: Objection. Misstates the witness's 22 prior testimony.
23 Q BY MR. DALE: Okay. Do you have an opinion as to 24 whether the .32-20 cartridge is one principally used in

25 hanclguns?
I A I don't have enough information to determine if
2 that particular cartridge is principally for use. It
3 sourlds like it's used in both rifles and handguns, but
4 like many other calibers and cartridges that we've
5 discussed over the last day and a half, this was not
6 included on the list.
7 Q okay. If you had more time, I'm going to give
8 you a hypothetical here, if you nad more time to research
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    the issue, we didn't have this time constraint of the
    trial, what method would you undertake to determine
    whether a .32-20 was principally used in handguns?
    A I might take a poll of over available experts in
    the field. I might interview manufacturers of, you know,
    various firearms and ammunition, you know, those types of
    things.
    Q You said you'd take a poll of other experts in
    the field.
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As you sit here today, can you give me the names of some of the experts you might poll or -- or, no, let me step back.

As you sit here today, please name for me other experts in the field whose identities that you're aware of, whom you consider experts?

MR. KRAUSE: Objection. Vague and ambiguous as 25 to -- what field, exactly, are you talking about?
take a poll of other experts in the field if you had the
    time to do so.

What field were you speaking about when you made that statement?

A I would probably say firearms and amunition.
Those types of -- those areas.
And who do you consider to be experts within the firearms and ammunition field whom you would talk to in order to form an opinion if you had further time? Page 98
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A
Probably members of the Department of Justice
bureau of forensic services. There are criminal lists
that are in the DOJ labs up and down the state. I would
probably ask them. They see a lot of firearms on an
evidentiary scale and they have a great number -- or a
great amount of experience.
Q Okay. Who -- who are those members of the
Department of Justice bureau of forensic services whom you
would consult specifically? Do you have names?
A I'd probably go ask Steve Lindley, our chief, to
contact the chief of the bureau of forensic services for
some kind of a list, because I haven't personally met, you
know, all the people in all the labs out there.
Okay. Who else, specifically, can you think of

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within the bureau of forensic services whom you know, whom you have spoken to before or interacted with that you would consult?
A There's a gentleman by the name of Mike Giusto.
    I'll try to spell his last name. It's G- -- I think it's
    G-i-u-s-t-o. He's in Sacramento here. And, let's see.
    Robert Wilson. He's someone I deal with at the Sacramento
    crime lab.
9 Q Anyone else?
10 A I probably -- again, I'd probably go through the
11 chief of BFS if I could and have recommendations from that
12 person.
13 Q Let me ask you, among those people whom you would
                                    Page 99
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    consult with as experts if you had more time. is rorrey
Johnson, is he one of those people?
A He's another member of the bureau of forensic
services.
Q Okay. All right. So I want to ask you a
question about your methodology.
At the point in which you were forming opinions,
did you give any consideration at all to use of handguns
or use of rifles by members of the military in -- in
California?
A Well, I considered -- I guess I considered the --
in the sense the use of the machine guns that I've spoken

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did consider some of the weapons that they would, you
6 know, use. They also use -- the military members use
7 Beretta pistols 19-millimeter.
8 Q Okay. Did you undertake to determine how many of
9 each type of weapon the military uses as part of
10 Eormulating your opinion?
11 A No, sir, I -- I -- again, given the time I had, I
12 don'こ believe that -- I'm not even sure that they would
13 release that information, but I -- I didn't do that.
14 Q Okay. Let's see. Did you ever undertake to
15 determine how many rounds of a particular cartridge of
16 amminition are fired by the military located within the
                                    Page 100
Calls for speculation.
17 service members stationed in California, as part of
18 Forming your opinions regarding which ammunition should be
                                    Page 101
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                            12-02-10
    included on the DOJ's maliber list; is that a correct
    starement?
MR. KRAUSE: MDjection. Vague and ambiguous.
MiE NITNESS: E don't see the difterence in that
question versus the last question you asked.
BY MR. DALE: Well, and I appreciate that,
nonetheless, but I would like to know, you dicn't use any

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information regarding the number of handguns used by
service members stationed in Califormia as part of your
forming your opinion regarding whether a particular
ammunition should be on the DOJ's caliber list; is that
correct?
MR. KRAUSE: Objection. Lacks foundation.
Compound. Vague and ambiguous. Calls for speculation.
THE WITNESS: Again, those numbers are not
available to me, sir, so I could not use whatever numbers
those are.
BY MR. DALE: Okay. As you sit fere today, do
you know -- do you have any basis for knowing whether or
not the number of handguns that are used by members of the
military stationed in California exceeds the numbers that
are in circulation in the general population?
MR. KRAUSE: Objection. Vague and ambiguous.
Calls for speculation.
MR. DALE: I'm sorry.
Mr. Graham, do you understand what I'm asking?
I think you're asking if members -- well, if the
United States military, in all of its branches, have in
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22 their inventories, whether they're issued or unissued
23 status, more guns than the residents of the state of
24 California have purchased since time began?
25 Q That's correct.

Q Okay. And what about submachine guns? Do you have any idea whether -- let me -- I'm going to step back. We previously talked about how there are certain submachine guns, specifically the ones that you've classified as submachine guns, such as the MP5, that fire handgun ammunition; correct?

A Say that again. What -Q Yeah, there are certain submachine guns that fire handgun ammunition; correct?

A Yes.
Q Okay. And do you have any idea how many of those weapons that you've identified as submachine guns are currently used by members of the military stationed in California?

MR. KRAUSE: Objection. Misstates the witness's prior testimony. Vague and ambiguous.

THE WITNESS: No, sir, I have no knowledge of how many submachine guns are in the possession and use by the Page 103
24 military in California. \(12-02-10\)
25 Q BY MR. DALE: Okay. Do you know whether the
Q Okay. Let's see. Hopefully we can get this
wrapped up within the next half hour.

Let's go back to an area that we didn't finish up
with.

You talked about how part of your methodology was looking through books such as Cartridges of the World, your own personal experience and looking at Web sites to help you form an opinion regarding whether ammunition is principally used in handguns.

Do you recall when we went over that testimony? A Yes, sir. Q Okay. What other methods did you use, if any, in addition to that besides what you've previously testified to in order to help you form an opinion regarding whether particular ammunition should be included -- I'm going to withdraw that.

What other methods did you use besides the ones you've testified to to form your opinions regarding whether ammunition was principally used in a handgun?

MR. KRAUSE: Objection. Vague and ambiguous.

Calls for a narrative.
THE WITNESS: I think my previous testimony speaks for itself. I have nothing to change at this time. Q BY MR. DALE: Okay. So let's -- let's make sure I understand it.

You took a look at the DROS list. That was your first step, right?

Yes, the DROS and AFS list, correct.
9 Q Okay. And -- I'm sorry. Could you repeat that
10 last acronym?
11 A The DROS and AFS list. Automated firearm systems
12 and what the AFS stands for.
13 Q Okay. And to your understanding, what is the
14 difference between the information on the AFS list and the
15 DROS list?
16 A Well, maybe we should be speaking in terms of the
17 exhibits just so we're clear. Let me look at the list
18 here. The AFS list, I'm understanding that to be E.
Correct, sir?
Q Well, I understand AFS -- Exhibit E is a portion
of a reference guide from the AFS list; isn't that correct?

A Well, this is a -- it's like a breakdown that the dealers can see when they make their entries into the DROS system, which then populates the AFS system.
 was happening recently.
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    3Q i}YMR. DALE: OkaY. IkAY.
    Mr. Graham, the reason you chose 2006 was, in pare, based
on the time constraints. You didn't have time to go back
Eurther and look at records older than 2006.
Is that a fair stacemert?
MR. KRAUSE: ODjection. Mischaracterizes the
witness's cestimony.
THE NITNESS: The -- Yeah, just given the -- the
amount of time I had to pull something together. I just

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Nantec a Ejace =0 stare. I do='= know if -- if ary oE
this would have changed given rore data or less data. It
just -- I just wanted to see, ney, what's a -- wha='s a --
give me a -- I'd like a count of how popular Ehese Ehings
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.fe dver a specific time period and that would give me
inid ot a starting place to kind of start my evaluation.
Q BY MR. DALE: Okay. As you sit here today, do
you have any knowledge as to whether or not handgun sales
within California have been increasing, decreasing or
staying the same over the past decade?
A I believe gun sales in general, I would say in
the last two years, have -- have spiked. I think around
20 percent higher, but I can't break it down by caliber --
I'm sorry, by handgun versus long guns. Typically, in
California, handguns are either 49 or 51 percent, and
it -- sometimes it seems to flip-flop year to year on the
breakdown.
Q Okay. And I think I already asked you this, but
I just want to make sure.
You don't have any understanding, as you sit here
today, or any opinion as to what percentage of handguns
sold within the past five years comprised the cotal number
of guns that are currently in circulation in California;
correct?
MR. KRAUSE: Objection. Vague and ambiguous.

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    Q BY MR. DALE: Yeah, let me ask it an easier way.
    You don't know whether or not the guns sold in
    the last five years comprise five percent of the total
guns in circulation or 75 percent, right?
7 A No --
    Page 108
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        12-02-10
    ?) You lon't hove any busis for Eorming an opinion
    Bous that; correct?
    A No, sir. Not dt rinis Eime.
    Q Okay. Okay. And I think you testified that if
    you went back and got to look du more of the records, some
    of the ones that you identified might -- might change; is
    that correct?
    A Yeah. Obviously, given more information, one's
    opinion can change over time with more information
    available, but given what I had available to me, I -- I
    chose to list certain calibers. That's all.
    Q Okay. Okay. As part of your methodology, at any
    point, did you attempt to identify research studies that
    might have examined what the most popular or the most
    prevalently used types of ammunition are?
    A No, sir. That was not a consideration that I
    thought of during the course of this evaluation.
            Okay. As you sit here today, are you aware of
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1 any research studies that attempt to identify things such
    as the popularity of a particular type of gun or
    particular type of ammunition?
    MR. KRAUSE: Objection. Vague and ambiguous.
    What do you mean by type of ammunition?
    MR. DALE: Okay. We'll go back and do this step
    by step.
    MR. KRAUSE: All I want you to do is identify
9 what you mean by type.
                            Page 109
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    MR. DALE: And I'm just asking him a general
    question as to whether or not he's aware of the existence
    of research studies that attempt to determine the
    popularity ot a particular cartridge or of a particular
    caliber or even of a particular handgun. I'm not trying
    to tie him into one exact caliber cartridge handgun. I
    just want to know if he knows if anybody has ever done
    those types of research study.
    THE WITNESS: Sir, to answer your question, I --
    I don't know of a study like that.
    Q BY MR. DALE: Okay. As part of your methodology,
did you attempt to see if there were any polls out there
which nad been taken to determine if a particular type of
cartridge was more popular than any other type of
cartridge in the State of California?
MR. KRAUSE: Objection. Vague and ambiguous.

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Argumentative.
THE WITNESS: I think I've explained my
methodology at this point. Beyond, that, I don't think I
have anything to add.
Q BY MR. DAIE: Okay. So you didn't -- you didn't
attempt to determine if there were any polls that had been
taken regarding ammunition in general?
A NO.
Q Okay. Did you, yourself, attempt to conduct any
polls with members of the general public regarding what
types of ammunition they use in their handguns?
MR. KRAUSE: Objection. vague and ambiguous.
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    18 if I understand; correct?
A Yeah. I've -- if I'm at a show and I see people
buying up a certain caliber, that's something I'll pay
attention to and that type of information.
Q Okay. And as you observe -- as you have attended
these gun shows and watched people buying certain
calibers, did you take any notes regarding what particular
calibers were selling particularly well and which ones

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weren't?
MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: I don't know if I took any -- any
notes, whether they be written or electronic. It was more
of just, you know, memory; that I remember seeing people
buying, you know, certain calibers and not buying other
calibers.
Q BY MR. DALE: I see. So based on your personal
observations, you formed opinions regarding whether or not
particular calibers or particular cartridges were more
popular at gun shows than other ones; is that correct?
MR. KRAUSE: Objection. Misstates the witness's
testimony.
MR. DALE: Okay. Look, I'm not trying to lock
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15 him into anything here, so I I can walk him back through it,
16 peter, but -- I'm sorry, Mr. Krause, but -- I'll do it. I
17 don't want to. I just want to nail down the fact that the
18 basis for his opinion regarding what ammo sells better at
19 gun shows is based on what he observed. And I can lay ali
20 the foundation for it and we can spend ten minutes doing
21 it, but I'd rather not.
22 MR. KRAUSE: I just don't know that that was
23 actually his testimony.
24 MR. DALE: Okay. Well, I -- I want to find out.
25 Did he --
Q Mr. Graham, did you take any written notes
regarding what you observed as to the sale of specific
types -- I'm sorry, specific cartridges of ammunition at
any gun show you attended?
A Sir, I've already testified I took no notes,
whether they be written or electronic, regarding a
particular cartridge being more popular. It was just
something that I saw and, you know, remember certain
calibers selling bet ter than others.
Q Okay. So this was all based on your personal
observation?
MR. KRAUSE: vague and ambiguous.
Q BY MR. DALE: Mr. Graham, do you understand what
I mean by personal observation?
A I am, but I'm not sure what "this" means. What
do you mean when you say "this"?
Q okay. The testimony you're giving regarding your
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    regarding the number of rounds sold to help form your

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opinion regarding ammunition primarily used in -- I'm
sorry, principally used in handguns?
A No.
Q Okay. And I'm sorry, what was the third one
again? I apologize.
A It's called gun traders guide.
Q Okay. Would it be fair to say that gun traders
guide doesn't have a listing of the number of rounds of a
particular cartridge sold in it in any given year?
A I didn't note that it did, so I -- but I cannot
say that it does not, though.
Q Okay. Okay. Well, as you sit here today, do you
have any specific recollection of using information
regarding the number of rounds sold that you got out of
that particular book in order to form your opinion?
A No.
Q Okay.
Okay. Why don't we -- I -- I think we're close
to getting this wrapped up. Why don't we take about a
five-minute break so I can sort of figure out some of my
final questions and we'll go from there.
MR. KRAUSE: That sounds wonderful.
MR. DALE: Perfect.
MR. KRAUSE: Thank you.
THE WITNESS: Back in -- 12:20? I guess they're

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OEE.
MR: DALE: Yep. That works.
THE WITNESS: Okay.
(Recess taken.)
Q BY MR. DALE: Mr. Graham, have you ever heard of
a cartridge called a five by 54 FN round?
A 554 FN?
Q Five by 54.
A I don't recall that off the top of my head.
Q Okay. Because I want to try to clarify something
here. I'm a little unclear as to -- we've talked about
how your definition of principally used in a handgun
means -- part of it means majoricy, and I'm trying to
figure out what that majority is, so I want to give you --
I'm going to give you a hypothetical to find out where
this would fall in your methodology.
A Okay.
Q IE there was a particular cartriage and there was
one model of handgun and three models of rifles, but there
were more individual copies of the handgun in circulation
than there were of the three rifles, for the purposes of
the definition that you used to form your opinions, would
you consider that hypothetical gun to be -- have a
cartridge -- strike that.
Would you consider that cartridge used in both

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    -he rittle mrad the qum to be primoipally used ms hamdoran
mmmumition?
MR. KRAUSE: (O)joction.
i< BY MR. DALE: And it you need clarification, bet
me know.
MR. KRAUSE: Objection. Incomplete nypothetical.
Compound and vague and ambiguous.
Q BY MR. DALE: Yeah. Let me -- what I'm trying to
Eind out is, are we -- in your coming to your opinions as
what's principally used as handgun ammunition, were you
counting the numerosity of total weapons? Were you
counting numerosity of total models that use that
particular cartridge? How did you make that
determimation?
MR. KRAUSE: Objection. I think this has been
covered. Asked and answered, but if you can answer.
THE WITNESS: Given the available information in
the amount of time I had, I tried to compare the number of
manufacturers that may have produced a weapon in a
particular caliber, the number of models that each
manufacturer used in that caliber, and then, perhaps, the
length of time that a particular gun has been available in
a particular caliber and then also factored in are there,
you know -- are there rifles in that caliber. Are
there -- or is it strictly a handgun issue.

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BY MR. DALE: Okay. What information did you use to determine if there were rifles that used a particular cartridge that you also identified as being used in a Page 118
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\]
handgun?
A Probably my experience and, you know, Rifles of
the world. That's one of the -- there's some pages at the
back of the book. I've you've been provided with the
information. The gun traders guide. That lists, you
know, weapons in there and their calibers and cartridges
that are applicable.
Q Okay. Now, let me -- let me clarify.
    Cartridges of the world, even though it lists all
the cartridges and it lists that they may be used in
rifles and in handguns, it doesn't actually list which
weapons are chambered with that particular cartridge
that's listed in that book; is that correct?
    MR. KRAUSE: Objection. Vague and ambiguous.
    THE WITNESS: There are -- within the pages of --
when it's broken down by handgun, by rifle, and then
there's a rim fire section too, and then \(I\) think a shotgun
section, there's usually a little synopsis about the round
itself. And depending on the author's; I guess,
information he had available, it appears he put in certain
information about weapons in there when he either wanted
to or had that information available.
understanding that if you look at, for example, the .32-20
Winchester listing we previously talked about, it's not
going to list all particular weapons that chamber that
round underneath that listing in Cartridges of the World?
                                    Page 119
\begin{tabular}{|c|c|}
\hline 2 & MR. KRAUSE: Vague and ambiguous. Objection. \\
\hline 3 & THE WITNESS: When you say -- \\
\hline 4 & Q BY MR. DALE: Okay. And did you attempt to speak \\
\hline 5 & to the rangemaster at ail to help inform your opinions \\
\hline 6 & regarding ammunition that's principally used in handguns? \\
\hline 7 & A Who is the rangemaster you're speaking of? \\
\hline 8 & Q I'm -- at the DOJ range. \\
\hline 9 & A We have approximately, I don't know, several \\
\hline 10 & hundred agents throughout the state. There's range \\
\hline 11 & masters in -- in different -- you know, there's four or \\
\hline 12 & five different bureaus, multiple range masters within each \\
\hline 13 & bureau. I'm a rangemaster myself. \\
\hline 14 & Q Okay. Did you speak to any of the other range \\
\hline 15 & masters prior to formulating your opinion? \\
\hline 16 & MR. KRAUSE: Objection. Vague and ambiguous. \\
\hline 17 & Did - \\
\hline 18 & Q BY MR. DALE: Did you speak to any of the other \\
\hline 19 & range masters at any of the other DOJ facilities in the \\
\hline 20 & State of California in order to get information to help \\
\hline 21 & you form the opinions you're expressing today? \\
\hline 22 & A I can't recall specifically asking them, after \\
\hline 23 & being given this assignment, to -- you know, in answer to \\
\hline 24 & your question, no. \\
\hline 2.5 & Q Okay. And I'm assuming you did not receive any \\
\hline
\end{tabular}
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written materials from any of the range masters at any of
the DOJ facilities regarding their observations as to
types of ammunition used at the ranges or cartridges or
calibers or any information of that sort?
A I dicn't receive any information, but I know that
we all shoot the same caliber weapons and there is a
standardization throughout the Department of Justice, if
that -- are you getting -- is that what you're asking.
Q Yes.
A Okay.
Q All right. So I'm going to go ahead and wrap up
here so I understand.
In forming your opinions, you based those
opinions on a review of the DROS and AFS records
initially; correct? That was your first step?
A Yes.
Q Okay. And then your second step was you looked
at the web sites we've identified, the books we've
Ecentified and then called upon your personal knowledge in
order to augment that first step; is that correct?
A Yes.
Q Okay. And you didn't take any polls in order to
form your opinion; correct?
MR. KRAUSE: Objection. Vague and ambiguous.
THE WITNESS: I -- I did not poll members of the

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    today.
    Q BY MR. DALE: Right. Did you poll any firearms
    dealers?
    A No.
    & No. Okay.
            So were there any other sources of information
    that you used other than what we just went over to help
    inform your opinion regarding which ammunition is
    principally used in handguns?
    A Other than the document that I prepared here
    breaking down nonhandguns that use handgun ammunition.
    And again, that's something that I just created then I
    was, you know, trying to think of weapons that fired these
    calibers.
    Q Okay. All right. And nothing besides that
    document which you generated and the other items which we
    just discussed were used by you to help you formulate your
    opinion; is that correct?
    A I can't think of any -- you know, I think you've
    been provided with that document. There's the document
    from SAAMI, which is the Small Arms Ammunition
    Manufacturers Institute. It gets into some -- what they
    consider handgun ammunition.
    25 Q Okay. Hold on one sec.

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    MR. KRAUSE: So stipulated.
    MR. DALE: Great.
    Hey, Mr. Graham, thank you very much Eor your
time today. And I do apologize for taking additional
time. I do appreciate your patience.
    THE WITNESS: Sure.
    MR. DALE: All right.
    (Off-the-record discussion.)
    THE REPORTER: Mr. Krause, do you want a rough
draft of today as well?
    MR. KRAUSE: NO.
    THE REPORTER: You would like a copy, though,
right?
    MR. KRAUSE: Yeah, please.
    (Whereupon the deposition adjourned
    at 1:06 p.m.)
```


## PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF FRESNO
1, 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, Califomia 90802.

On December 6, 2010, I served the foregoing document(s) described as

## PLAINTIFFS' EVIDENCE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJLDICATION / 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.
Attomey General of Califormia
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255

Sacramento, CA 94244-2550
(BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the
U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on December 6, 2010, at Long Beach. California.

- (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on December 6, 2010, at Long Beach, California.
X (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on December 6, 2010, at Long Beach, California.
$X$ (STATE) I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

C. D. Michel - SBN 144258

Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
MICHEL \& ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com
Attorneys for Plaintiffs/Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA ) CASE NO. 10CECG02116 COUNTY SHERIFF; HERB BAUER ) SPORTING GOODS; CALIFORNIA RIFLE) NOTICE OF LODGING FEDERAL AND PISTOL ASSOCIATION AUTHORITIES IN SUPPORT OF FOUNDATION; ABLE'S SPORTING, ) MOTION FOR SUMMARY JUDGMENT INC.; RTG SPORTING COLLECTIBLES, ) OR IN THE ALTERNATIVE FOR LLC; AND STEVEN STONECIPHER, ) SUMMARY ADJUDICATION / TRIAL ...

Plaintiffs and Petitioners,
vs.
Date: Time: Location: Judge: THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY Date Action Filed: June 17,2010

January 18, 2011
8:30 a.m.
Dept. 402
Hon. Jeff Hamilton AS ATTORNEY GENERAL FOR THE ) STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25,

Defendants and Respondents.

NOTICE IS HEREBY GIVEN that PLAINTIFFS are hereby lodging the following
Federal Authorities in support of our Motion for Summary Judgment Or in the Alternative for Summary Adjudication / Trial:

1. U.S. v. Cabaccang, (9th Cir. 2003) 332 F.3d 622 ...................... Exhibit 1
2. U.S. v. W.R. Grace, (9th Cir. 2007) 504 F.3d 745 . .................... . . Exhibit 2
3. Baggett v. Bullitt, (1964) 377 U.S. 360, 372 .......................... . Exhibit 3
4. City of Chicago v. Morales, (1998) 527 U.S. 41 . ..................... . . Exhibit 4
5. Coluati v. Franklin, (1979) 439 U.S. 379 .............................. . Exhibit 5
6. Connally v. General Const. Co., (1926) 269 U.S. 385 . . . . . . . . . . . . . . . Exhibit 6
7. Grayned v. City of Rockford, (1972) 408 U.S. 104 . . . . . . . . . . . . . . . . . Exhibit 7
8. Hoffman Estates v. Flipside (1982) 455 U.S. 489 . . . . . . . . . . . . . . . . . Exhibit 8
9. Kolender v. Lawson, (1983) 461 U.S. 352 . . . . . . . . . . . . . . . . . . . . . . . . . Exhibit 9
10. Malat v. Riddell, (1966) 383 U.S. 569 . . . . . . . . . . . . . . . . . . . . . . . . . . Exhibit 10
11. Smith v. Goguen, (1974) 415 U.S. 566 .............................. Exhibit 11
12. United States v.Harriss, (1954) 347 U.S. 612 . . . . . . . . . . . . . . . . . . . . Exhibit 12
13. United States v. Salerno, (1987) 481 U.S. 739 ....................... . . Exhibit 13
14. District of Columbia v. Heller, (2008) 128 S.Ct. 2783 ................ . Exhibit 14
15. McDonald v. Chicago, (2010) 130 S.Ct. 3020 ........................ Exhibit 15
16. State ex rel. Martin v. Kansas City, (1957) 181 Kan. 870 . . . . . . . . . . . . Exhibit 16
17. Andrews v. State, 50 Tenn. 165, 178, 8 A. Rep. 8, 13 (1871) .......... Exhibit 17
18. Schrader v. State, (1986) 69 Md. App. 377, 3901146 ............... Exhibit 18
$\begin{array}{ll}\text { Dated: December 6, } 2010 & \begin{array}{l}\text { Respectfully Submitted, } \\ \text { MICHEL \& ASSOCIATES, P.C. }\end{array}\end{array}$


## EXHIBIT " 1 "

LEXSEE 332 F.3D 622
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES CABACCANG, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHARD T. CABACCANG, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROY TOVES CABACCANG, Defendant-Appeliant.

No. 98-10159, No. 98-10195, No. 98-10203
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
332 F.3d 622; 2003 U.S. App. LEXIS 11315; 2003 Cal. Daily Op. Service 4785; 2003
Daily Journal DAR 6088
December 9, 2002, Argued and Submitted En Banc, San Francisco, California
June 6, 2003, Filed

SUBSEQUENT HISTORY: Clarified by United States v. Cabaccang, $3 \neq 1$ F.3d 905, 2003 U.S. App. LEXIS 17756 (9th Cir., 2003)

PRIOR HISTORY: [ ${ }^{* *}$ I] Appeal from the United States District Court for the District of Guam. John S. Unpingco, District Judge, Presiding. D.C. No. CR-97-00095-3-JSU D.C. No. CR-97-00095-2-JSU D.C. No. CR-97-00095-1-JSU.
United States v. Cabaccang, 36 Fed. Appx. 234, 2002 U.S. App. LEXIS 10842 (9th Cir. Guam, 2002)

United States v. Cabaccang, I6 Fed. Appx. 566. 2001 U.S. App. LEXIS 15454 (9th Cir. Guam, 2001)

DISPOSITION: Affirmed in part, reversed in part, and remanded. Panel decisions adopted in part.

COUNSEL: Rory K. Little, San Francisco, California, for the defendants-appellants Cabaccang.

Elizabeth A. Fisher, Honolulu, Hawaii, for the defen-dant-appellant James Cabaccang.

Arthur E. Ross, Honolulu, Hawaii, for the defen-dant-appellant Richard T. Cabaccang.

Sarah Courageous, Honolulu, Hawaii. for the defen-dant-appellant Roy Toves Cabaccang.

Kathleen A. Felton, Assistant United States Attorney, Washington, D.C., for the plaintiff-appellee.

JUDGES: Before: Mary M. Schroeder, Chief Judge, Alex Kozinski, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Michael Daly Hawkins, Susan P. Graber, M. Margaret McKeown, William A. Fletcher, Raymond C. Fisher, Richard A. Paez and Richard C. Tallman, Circuit Judges. Opinion by Judge Fisher; Concurrence by Chief Judge Schroeder; Dissent by Judge Kozinski.

OPINION BY: Raymond C. Fisher

## OPINION

[*623] FISHER, Circuit Judge:
Appellants James, Richard and Roy Cabaccang appeal their convictions on a variety of charges relating to their involvement in a drug trafficking [**2] ring that transported large quantities of methamphetamine from California to Guam in the early and mid-1990s. The Cabaccangs' primary contention on appeal is that the transport of drugs on a nonstop flight from one location within the United States to another does not constitute importation within the meaning of 21 U.S.C. $\$ 952(a)$, even though the flight traveled through international airspace. We agree, and therefore we reverse the appellants' convictions on all importation-related counts.

## Factual and Procedural Background

In the early 1990s, Roy Cabaccang began selling methamphetamine out of his house in Long Beach, Califormia, to customers introduced to him by his younger brothers Richard and James. The Cabaccangs eventually
expanded their operation to include large-scale shipments of methamphetamine to Guam for local distribution. To transport the drugs to Guam, Roy recruited various people to fly from Los Angeles to Guam with packages of [*624] methamphetamine concealed under their clothing. Richard helped the couriers tape the packages of methamphetamine to their bodies. The Cabaccangs also sent packages of methamphetamine from California to Guam through [**3] the United States mail. After Roy's associates sold the methamphetamine in Guam, they sent the proceeds back to California via courier and wire transfer. Each of the Cabaccang brothers received wire transfers of profits from the drug sales.

After a long investigation, the Cabaccangs were indicted in 1997 on numerous charges relating to their involvement in the methamphetamine ring. A jury convicted all three brothers of conspiracy to import methamphetamine, in violation of 21 U.S.C. $\$ \oint 952(a), 960$ and 963; conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ $841(a)(1)$ and 846 ; and conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956 . $^{\text {' The district court sentenced all three }}$ brothers to concurrent terms of life in prison on at least one of the importation counts and at least one of the non-importation counts (with concurrent shorter terms on other counts). :

I Richard and Roy were also convicted of importation of methamphetamine, and Roy was convicted of conducting a continuing criminal enterprise, possession of methamphetamine with intent to distribute, attempted importation of methamphetamine and possession and receipt of a firearm by a convicted felon.
[**4]
2 Roy received concurrent life sentences on all of the drug counts. James received concurrent life sentences on the counts of conspiracy to import and conspiracy to distribute. Richard received concurrent life sentences on the counts of conspiracy to import, conspiracy to distribute and conspiracy to launder money.
The Cabaccangs appealed their convictions to this court, claiming that the transport of drugs from California to Guam does not constitute importation merely because the drugs traveled through international airspace en route to Guam. ' Relying on our decisions in Guam $v$. Sugiyama, 876 F.2d 570 (9th Cir. 1988) (per curiam), and United States v. Perez, 776 F. $2 d 797$ (9th Cir. 1985), a three-judge panel affirmed the convictions in an unpublished disposition, stating that "we have clearly declared that transporting drugs from one point in the United States to another through or over intemational waters constitutes importation." + United States v. Ca-
baccang, 16 Fed. Appx. 566, 568 (9th Cir. 2001) ("Cabaccang $\Gamma^{\prime \prime}$ ). We granted rehearing [**5] en banc to reexamine the importation statute and determine whether it does prohibit the transport of drugs through international airspace on a nonstop flight from one point within the United States to another.

3 The Cabaccangs asserted numerous other grounds for reversal of their convictions, including insufficient evidence, constructive amendment of the indictment, multiplicitous counts, ineffective assistance of counsel, erroneous jury instructions and erroneous denial of Roy's motion to suppress evidence. The brothers also claimed that their sentences violated the rule announced in Apprendiv. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. $23 \not 78$ (2000), because drug quantity was not charged in the indictment or submitted to the jury.
4 The panel also rejected the Cabaccangs' other challenges to their convictions, see United States v. Cabaccang, 16 Fed. Appx. 566, 568-70 (9th Cir. 2001), and it denied the Cabaccangs' Apprendi-based challenges to their sentences in a subsequent memorandum disposition. See United States v. Cabaccang, 36 Fed. Appx. 234 (9th Cir. 2002) ("Cabaccang II").

## [**6] Standard of Review

The construction or interpretation of a statute is a question of law that we [*625] review de novo. United States v. Carranza, 289 F.3d 634, 642 (9th Cir.), cert. denied, 537 U.S. 1037. 154 L. Ed. 2d 458, 123 S. Ct. 572 (2002).

## Discussion

I.
"We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will." Bedroc Ltd. v. United States, 314 F. 3 d 1080 , 1083 (9th Cir. 2002) (internal quotation marks omitted). The starting point of this inquiry is the language of the statute itself. United States v. Hackett, 311 F.3d 989, 991 (9th Cir. 2002). Section 952(a) states that "it shall be unlawful [1] to import into the customs territory of the United States from any place outside thereof (but within the United States), or [2] to import into the United States from any place outside thereof, any controlled substance." 21 U.S.C. § 952 (emphasis added). Section $951(a)$, which furmishes the relevant definitions for the terms used in § 952, defines "import" broadly as "any bringing in or introduction of such article into any area (whether [**7] or not such bringing in or introduction
constitutes an importation within the meaning of the tariff laws of the United States)." Id. § $95 I(a)(1)$. It is the second clause of $\oint 952(a)$ that is at issue here, as it is undisputed that the Cabaccangs did not bring drugs into the customs territory of the United States. ${ }^{\text {s }}$

5 The Cabaccangs brought drugs into Guam, which is not part of the customs territory of the United States. See Harmonized Tariff Schedule of the United States ("HTSUS"), General Note 2, 19 U.S.C. § 1202 (defining the customs territory of the United States as "the States, the District of Columbia and Puerto Rico"), available at http://dataweb.usitc.gov/SCRIPTS/tariff/toc.html.

The Cabaccangs argue that they are not guilty of importation because they did not bring drugs into the United States from a "place outside thereof." They contend that the transit of drugs through international airspace en route from one location in the United States (Califomia) to another [ ${ }^{* *} 8$ ] (Guam) is insufficient to support a charge of importation under $\$ 952 .{ }^{\text {" }}$ The government counters that international airspace is itself a "place outside" the United States within the meaning of the statute. Pointing to $\oint 95 I$ 's definition of "import" as "any bringing in," the government argues that the entry of contraband into the United States from international airspace is all that the statute requires. That the flight carrying the contraband departed from a domestic location is irrelevant, the government maintains, because $\}$ 952 (a) is unconcerned with the origin of a shipment of drugs that enters the United States from international airspace.

6 The airspace of the United States currently includes that airspace overlying the waters within 12 nautical miles of the land borders of the United States. See Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (extending the territorial sea of the United States to 12 nautical miles from the baselines of the United States, and defining the territorial sea of the United States as a "maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil." (emphasis added)).
[**9] The problem with the govemment's argument is that despite $\} 951$ 's broad definition of importation as "any bringing in," section 952(a) itself specifies that the bringing in be "from any place outside" the United States. (Emphasis added.) This requirement was not an element of $\$ 952(a)$ 's predecessor statute, 21
U.S.C. § 174, which provided criminal penalties for "fraudulently or knowingly importing [*626] or bringing any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law." (Emphasis added.) ${ }^{\top} \ln$ 1970, Congress replaced $\$$ 174 with $\oint 952$, inserting the phrase "from any place outside thereof" after the words "into the United States" without explanation. ${ }^{8} 1 \mathrm{f}$, as the government urges, Congress was concerned only with the destination of the drugs, it would have been sufficient to retain the original language of the importation statute, simply prohibiting the import of drugs "into the United States" without reference to the point of origin. The addition of the phrase "from any place outside the United States" undercuts the government's contention that Congress intended the origin of a drug shipment [ ${ }^{* *} 10$ ] to be irrelevant to a finding of importation under $\S 952(a)$. See Webster's Third New International Dictionary 913 (1981) (defining "from" as "used as a function word to indicate a starting point: as (1) a point or place where an actual physical movement . . . has its beginning . . ."); The American Heritage Dictionary of the English Language 729 (3rd ed. 1996) (defining "from" as "used to indicate a specified place or time as a starting point: walked home from the station... ").

7 Section 174 traced its origins to 35 Stat. 614 (1909), which prohibited the importation of opium into the United States. The statute was amended in 1922 to extend the prohibition to the importation of "any narcotic drug." 21 U.S.C. § 174 (1922).
8 The legislative history is silent as to why Congress made this change.

The question, then, is whether drugs that pass through international airspace on a nonstop flight en route from one U.S. location to another, without touching down on either [**11] land or water, are "from" a "place outside" the United States for the purposes of $\S$ 952(a). When Congress has not provided special definitions, we must construe words in a statute "according to their ordinary, contemporary, common meanings." Hackett, 3II F.3d at 992 (alteration in original) (internal quotation marks and citation omitted). Turning to the word "place," we acknowledge that it can have many meanings, some of which, when viewed in isolation, might seem to apply to international airspace. The critical question, however, is what the term reasonably can be understood to encompass as it is used, not in isolation, but in the phrase "from any place outside [the United States]," and in the larger context of § 952 , which is concerned with the importation of drugs into the United States.

In the ordinary sense of the term, drugs do not come from international airspace, although they certainly can move through that space. Unlike, for example, a foreign nation -- which is unquestionably a "place outside" the United States -- intemational airspace is neither a point of origin nor a destination of a drug shipment; it is merely something through which an aircraft [**12] must pass on its way from one location to another. We do not treat passengers who travel through international airspace on a nonstop flight between two U.S. locations as having crossed our borders (i.e., as having entered the United States from a place outside thereof), and thereby subject to immigration inspections or border searches -as they would be if the flight had originated in a foreign country. Cf. United States v. Garcia, 672 F.2d 1349, 1357-58 (1lth Cir. 1982) (doubting the validity of a border search of an airplane that traveled through international airspace en route between known points of origin and destination within the United States, because "there is no more justification for searching the aircraft or passengers who make such flights than there would be for searching those whose domestic flights do [*627] not happen to take them over the ocean on the way"). Moreover, were we to ask anyone familiar with the facts of this case from what place the Cabaccangs brought drugs into Guam, the answer surely would be "California" -- not "international airspace." See United States v. Ramires-Ferrer, 82 F.3d 1131, 1137 (1st Cir. 1996) (en banc) (using [**13] the same reasoning in concluding that the term "place," as it is used in $§ 952(a)$, does not include in-transit international waters).

The dissent rejects this analysis of the plain meaning of the statutory language, arguing that an item in transit is from all of the places through which it passes en route from its starting point to its destination. We recognize that, like the word "place," the word "from" can have different meanings, depending on the context of the inquiry. We think it is clear, however, that a defendant who has brought drugs on a non-stop flight that lands in the United States can most reasonably be said to have brought drugs from the point of the flight's departure -and not the airspace through which the plane traveled on the way."

9 The dissent posits that "[a] person traveling from Place A to Place B to Place C arrives at C both from A and from B." (Italics added.) We find such a reading to be strained and implausible in the context of a nonstop flight. The flights at issue in this case, for example, undeniably flew from Los Angeles ("Place A") to Guam ("Place C"), but not "to" international airspace ("Place B, " per the dissent).
[**14] Although we conclude that a commonsense reading of the plain language of the statute forecloses its application here, we are also persuaded that our reading is consistent with the statute's structure. "We must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991). Under the government's interpretation of the statute, however, any conduct proscribed by the first clause of $\oint 952(a)$ also would have been covered by the statute's broader second clause when $\S 952$ was enacted in 1970, rendering the first clause of the statute superfluous.

The first clause of § 952 (a) prohibits the importation of drugs "into the customs territory of the United States from any place outside thereof (but within the United States)." 21 U.S.C. § 952 (a). The customs territory of the United States consists of "the States, the District of Columbia and Puerto Rico." See HTSUS at General Note 2. At the time of $\S 952$ 's enactment, when the territorial [**15] sea of the United States extended only three miles out from the coast, ${ }^{10}$ all of the U.S. territories that were outside the customs territory, e.g., the U.S. Virgin Islands, Guam and American Samoa, were not contiguous with the customs territory. It therefore would have been impossible to bring drugs from the non-customs territory into the customs territory without passing through international airspace (or waters). "Under the government's reading of the statute, however, the entry of drugs into the United States from international airspace already would have been [*628] prohibited by the second clause of the statute. Therefore, any importation proscribed by the first clause also would have been proscribed by the second clause, rendering the first clause superfluous. We cannot conclude that Congress intended the opening clause of the statute to have no independent force. See Am. Vantage Cos. v. Table Mountain Rancheria, 292 F.3d 1091. 1098 (9th Cir. 2002) ("It is a well-established principle of statutory construction that legislative enactments should not be construed to render their provisions mere surplusage." (intemal quotation marks omitted)).

10 See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428,441 n.8, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989) ("The United States has [until 1988] adhered to a territorial sea of 3 nautical miles ....").
[**16]
11 As the dissent notes, this is not entirely the case today: given the current 12 -mile limit of the territorial sea, it is possible to travel from St. Thomas (noncustoms territory) to Puerto Rico without leaving United States airspace or waters,
as the tiny island of Culebra, Puerto Rico (but not the main island of Puerto Rico) is within 24 miles of St. Thomas.

In an attempt to save its interpretation of $\oint 952$ (a) from superfluousness at the time of the statute's enactment, the dissent argues that Congress did not intend the three-mile limit of the territorial sea to be the relevant boundary. According to the dissent, when Congress defined the "United States" for the purposes of $\oint 952$ as "all places and waters, continental or insular, subject to the jurisdiction of the United States," see 21 U.S.C. $\oint$ 802(28), incorporated by $\$ 951$ (b), it could hove meant "waters . . . subject to the jurisdiction of the United States" to refer to the limited 12 -mile customs interdiction jurisdiction codified at 19 U.S.C. $\$ \S 1401(j)$, 1581(a)-(b), rather [**17] than the three-mile limit of plenary sovereign jurisdiction within the territorial sea. ${ }^{12}$

12 This limited customs jurisdiction is also referred to as the "contiguous zone." See United States v. Rubies, 612 F.2d 397, 403 n. 2 (9th Cir. 1979); see also Convention on the Territorial Sea and the Contiguous Zone, art. 24, 15 U.S.T. 1606 (1964).

It is not enough, however, that Congress "reasonably could have believed" that $\oint 952$ invoked this 12 -mile limited interdiction jurisdiction, rather than the three-mile sovereign jurisdiction. Our role is to determine Congress' actual intent, not its possible intent, and the Supreme Court has instructed that in the absence of a clear statement, we should not assume that Congress intended to include the waters beyond the territorial sea when defining the United States. See Argentine Republic, 488 U.S. at 440 . In Argentine Republic, the respondents argued that under the Foreign Sovereign Immunities Act -- which defined [**18] the "United States" as all "territory and waters, continental and insular, subject to the jurisdiction of the United States" -- the term "waters . . . subject to the jurisdiction of the United States" included the high seas, which are within the admiralty jurisdiction of the United States. ${ }^{13} \mathrm{Id}$. (citing 28 U.S.C. § $1603(c)$ ). The Supreme Court rejected this attempt to broaden the statute's definition of the United States, holding that
the term "waters" in § 1603(c) cannot reasonably be read to cover all waters over which the United States courts might exercise jurisdiction. When it desires to do so. Congress knows how to place the high seas within the jurisdictional reach of a statute. We thus apply "the canon of construction which teaches that legislation of Congress, unless contrary intent ap-
pears, is meant to apply only within the territorial jurisdiction of the United States."
ld. (emphasis added) (foomote omitted) (quoting Foley Bros.v. Filardo. 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949)). Because there was no evidence of congressional intent to include the high seas within the definition of the [ $\left.{ }^{* *} 19\right]$ United States, the Court held that the incident at issue did not occur within the United States, because [*629] it occurred "outside the 3-mile limit then in effect for the territorial waters of the United States." Id. at 441.

13 The high seas are those waters that are seaward of the territorial sea, and they include the contiguous zone. Rubies, 612 F.2d al 403 n.2.

Evidence of congressional intent to incorporate the limited jurisdiction of the contiguous zone, rather than the plenary sovereign jurisdiction of the territorial sea, is similarly lacking here. The dissent points to nothing in the statutory language or the legislative history of $\S 952$ to indicate that Congress intended to include the contiguous zone in its definition of the United States. Instead, it relies on the decisions of three circuits that have assumed that $\{952$ incorporated the 12 -mile limit of the contiguous zone. See United States v. Nueva, 979 F.2d 880. 884 (1st Cir. 1992); United States v. Goggin, 853 F.2d 843, 845 (11th Cir. 1988); [**20] United States v. Lueck, 678 F.2d 895, 905 (1lth Cir. 1982); United States v. Seni, 662 F.2d 277, 286 (4th Cir. 1981). But none of these decisions addressed whether that interpretation properly construed Congress' intent to invoke a definition different from the three-mile territorial limit in effect when the statute was enacted. In the absence of some indication that Congress actually intended to include the contiguous zone within its definition of the United States for purposes of $\S 952$, we follow the Supreme Court's interpretive mandate in Argentine Republic and conclude instead that Congress intended the operative boundary of the United States to be the three-mile limit that defined the U.S. territorial sea in 1970, until it was extended in 1988. Under this limit, it would have been impossible to travel from the noncustoms territory of the United States to the customs territory without passing through international airspace. Clause I of $\S 952(a)$ thus would have been superfluous if, as the government contends, clause 2 prohibited the transport of drugs through international airspace on a domestic flight. We decline, as we must, to attribute [**21] to Congress an intent to create such a redundancy.

Moreover, even if we were to accept the dissent's contention that Congress intended to invoke the 12 -mile
limit, and thus that it would have been possible in 1970, as it is today, to violate clause $I$ (and not clause 2) by transporting drugs from St. Thomas to Puerto Rico, we still would be hard pressed to find a plausible legislative purpose for clause 1 . Under the government's interpretation of the second clause of $\oint 952(a)$, the only conduct that clause $l$ would prohibit that would not be prohibited by clause 2 , even under the broader 12 -mile limit, is the drug trade from the Virgin Islands to Puerto Rico. This lone point of contiguity between the customs territory and the noncustoms territory exists only by virtue of the location of tiny islands that are so obscure that even the First Circuit -- the very Court of Appeals that has jurisdiction over Puerto Rico -- is seemingly unaware of them. See Ramirez-Ferrer, 82 F.3d at $1 / 38$ (stating that "there is no 'place' just outside of the jurisdictional limits of the customs territory of the United States, that is also within the United States. Any place that is just [**22] outside the customs territory . . . is intemational waters"). So too, apparently, is the government, which has not thought to invoke the Culebra-St. Thomas aberration in support of its construction of the statute. That the govemment still has not managed to appreciate the relevant geographic nuances only serves to underscore the improbability that Congress was aware of them, let alone motivated by them, as the dissent would have us believe.

Perhaps recognizing the unlikelihood of this scenario, the dissent offers an alternative explanation for the inclusion of clause 1 : Congress was aware that the boundaries of the customs territory and the noncustoms territory might change [*630] over time, so it "drafted a generic statute that would cover future contingencies." We are unwilling to speculate, however, that Congress included a statutory provision that was inoperative or nearly so at the time of its enactment just in case there might one day be a need for it. ${ }^{4}$ Although we recognize that Congress may legislate with an eye towards the future, we hesitate to make the unsupported inference that Congress intended clause I to have little, if any, current application at the time of its enactment, [**23] and only speculative future application, as would be the case if the second clause of $\oint 952(a)$ prohibited the domestic transport of drugs through international airspace. Instead, we consider it far more likely that Congress elected to use the first clause of $\$ 952$ (a) specifically to target the transport of drugs from the noncustoms territory into the customs territory precisely because it believed that such transport was not proscribed by the statute's second clause.

14 Of course, such a need has not yet materialized. Despite the post-1970 changes in the composition of our noncustoms territory and the limits of our territorial sea that the dissent catalogues in bringing us up to date, there still remains only
one point of contiguity between the customs territory and the noncustoms territory: Puerto Rico and St. Thomas.

Indeed, Congress' use of the more specific, limited language of clause $l$ presents yet another hurdle for the government's interpretation of § 952(a): clause I prohibits only the transport [**24] of drugs from the noncustoms territory to the customs territory -- it does not address the drug trade in the reverse direction. Thus in 1970 when Congress crafted § 952(a), it made a deliberate choice not to make the first clause reciprocal -- banning the importation of drugs from, for example, Guam to California but not from California to Guam. (That one-way ban remains true whether the territorial limit is three or 12 miles.) Under the interpretive maxim of expressio unius est exclusio alterius, we "read the enumeration of one case to exclude another [if] it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." Barnhart v. Peabody Coal Co., 537 U.S. 149, 123 S. Ct. $748,760,154$ L. Ed. $2 d 653$ (2003). That Congress chose to single out only the transport of drugs from the noncustoms territory to the customs territory rather than the transport between the two territories is a strong indication that Congress did not intend $\$ 952(a)$ to address "importation" in the opposite (i.e., "outbound") direction. We are thus justified in inferring that "items not mentioned were excluded by deliberate choice, not inadvertence. [**25] " Barnhart, $123 \mathrm{~S} . \mathrm{Ct}$. at 760.

It is no answer to suggest that Congress considered it unnecessary to address the drug trade from the customs territory to the noncustoms territory (e.g., California to Guam) because it intended clause 2 to cover such conduct through the concept of "coming from" international airspace. Under that theory, once again clause $I$ would be redundant because clause 2 would have sufficed to reach the very conduct clause I was carefully drafted to proscribe. If it is necessary for a drug shipment to travel through international airspace to get from a customs territory to a noncustoms territory, then it is also necessary for that shipment to travel through international airspace to go in the reverse direction, and clause 2 would apply to both trips. Moreover, even if we indulge the dissent's assumption that Congress was legislating to cover drug shipments between St. Thomas and Puerto Rico, under any interpretation of the statute the transport of drugs from Puerto Rico to St. Thomas is not punishable as importation. This reinforces our [*631] conclusion that in drafting and structuring $\$ 952(a)$, Congress was not extending its concept of importation into [**26] the United States to drug shipments from customs territories to noncustoms territories.

Finally, we reject the government's interpretation of $\S 952$ (a) because it would sweep within the ambit of the
statute a wide range of conduct that cannot reasonably be characterized as importation. Whenever possible, "we interpret statures so as to preclude absurd results." Andreiu v. Ashcroft, 253 F. 3 d 477, 482 (9th Cir. 2001) (en banc) (citing United States v. Wilson, 503 U.S. 329, 334. 117 L. Ed. 2d 593,112 S. Ct. 1351 (1992)). Under the government's broad reading of $\$ 952(a)$, the transport of drugs on a flight from any U.S. city to another would be punishable as importation so long as the flight passed through international airspace, no matter how briefly. A quick glance at a map of the United States reveals the large number of routes that would be implicated by this reading of the statute. In addition to the obvious example of flights between the 48 contiguous states and Alaska or Hawaii, planes routinely fly through international airspace when they travel from Miami to Baltimore, Tampa to Houston and New York to Detroit, to list only a few examples. The $\left[{ }^{* * 27]}\right.$ transport of drugs on these indisputably domestic flights can only be characterized as domestic conduct -- for which rather steep penalties are already available -- rather than importation.

Here in the Ninth Circuit we may encounter even more absurd results under the government's interpretation of § $952(a)$. For example, dozens of commercial flights (to say nothing of noncommercial flights) travel daily up and down the Califormia coast between San Francisco and Los Angeles, and between Los Angeles and San Diego. Given the configuration of the coastline, any one of these flights may travel through international airspace off the coast, perhaps entering and reentering United States airspace several times. Yet nothing on the face of $\oint 952(a)$ even suggests that Congress intended the transport of drugs on one of these 45 -minute intrastate flights to constitute importation within the meaning of the statute. ${ }^{1 s}$

15 That the government has refrained, so far as we are aware, from charging the transport of drugs on one of these flights as importation does not affect our analysis. Unlike the dissent, we are unwilling to rely on prosecutorial discretion for assurance that indisputably domestic conduct will not be charged under § 952 .
[**28] Moreover, we are unable to conceive of an articulable legislative purpose for punishing the transport of drugs on a domestic flight that passes through international airspace more severely than the identical conduct on a flight that travels entirely within United States airspace. Consider the following example: Under the government's interpretation of $\$ 952(a)$, a passenger who carries a bag of marijuana on a flight from Portland to Anchorage has committed the crime of importation, while a drug-carrying traveler who departs from the same terminal at the Portland airport is guilty only of
mere possession (or perhaps possession with intent to distribute) if his flight lands in Phoenix rather than Anchorage. But what, exactly, is the additional evil committed by the Alaska-bound traveler? The govemment does not tell us, and we cannot imagine, why Congress would have wanted to penalize the first traveler more heavily. " Our inability to [*632] identify a purpose for differentiating between these two cases of domestic transport leads us to conclude that $\S 952$ (a) was not intended to draw such distinctions. Indeed, with the specific exception of the conduct proscribed by the first clause of [**29] the statute, it was not intended to reach domestic conduct at all.

16 We recognize, as the dissent notes, that both of our hypothetical travelers have engaged in conduct that is not "otherwise innocent" and that may well be "incredibly stupid." However, neither of these observations is relevant to the question of whether the conduct violated $\oint 952(a)$.

## 11.

We find support for our interpretation of § 952(a) in the First Circuit's decision in Ramirez-Ferrer, the only Court of Appeals opinion to analyze the statute's text and history with respect to the question at issue here. United States v. Ramirez Ferrer, 82 F.3d 1131, 1137 (lst Cir. 1996) (en banc). The defendants in Rumirez-Ferrer were convicted of importation under $\S 952(a)$ for transporting cocaine from Mona Island, Puerto Rico to the main island of Puerto Rico. "In a decision whose reasoning is similar to our own in this case, the First Circuit reversed the convictions, holding that "transport from one part of the United $\left[{ }^{*} 30\right]$ States to another does not rise to the level of importation simply by involving travel through international waters." Id. at ll36.

17 Mona Island is located 39 miles off the coast of the main island of Puerto Rico. See id. at 1132-33.

Looking first to the statutory text, the First Circuit reached the same conclusions as we do regarding the plain meaning of the phrase "from any place [outside the United States]," including the redundancy between the two clauses that would result from the government's construction of the statute. Id. at 1137-38. ${ }^{18}$ The court also was influenced by the historical application of the statute, noting that $\S 952$ (a) had not been used at all in the manner advocated by the government. Id. at 1/43. The court interpreted this inaction as a "tacit recognition that such acts [of domestic transport of drugs cannot] reasonably be considered 'importation' within $\oint 952(a) . "$ ld. at 1141 .

18 The court also rejected the government's reading because it concluded that it would make clause 1 impossible to violate. The First Circuit explained that under the government's reading of the statute, "the phrase 'any place outside thereof' essentially means the point at which the drugs were located immediately before passing into the United States (i.e., the international space just outside the jurisdictional limit of the United States)." Id. at $/ 138$. The court reasoned that such a reading would make the statute impossible to violate because "there is no 'place' just outside of the jurisdictional limits of the customs territory of the United States, that is also within the United States. Any place that is just outside the customs territory . . . is international waters." Id. As we noted earlier, the First Circuit apparently was unaware of the proximity of Culebra, Puerto Rico to the U.S. Virgin Islands.
[**31] Finally, the First Circuit considered the future implications of the government's interpretation of the statute. The court reasoned, for example, that under the government's reading of the statute, a sailboat tacking up the coast would commit a separate act of importation every time it entered international waters and then reentered domestic territory. Id at 1142. The court further observed that under a logical extension of the government's reading of the importation statute, the act of leaving domestic territory and entering international waters would have to be considered an illegal exportation under § $952(a)$ 's companion statute, 21 U.S.C. § 953(a), "even though there was no intention or act of visiting a foreign territory or off-loading the exported contraband onto a vessel in intemational waters." Id. Finding these scenarios unreasonable, the First Circuit emphatically rejected the government's effort to transform the domestic [*633] transport of drugs into importation under $\}$ 952(a). ${ }^{19}$ Id. at 1143.

19 The error in the government's interpretation of $\oint 952(a)$ is even more apparent in this case, which deals with the domestic transport of drugs through international airspace rather than international waters. Contrary to the dissent's assertion, the distinction between air and water transport of drugs is hardly arbitrary. It is possible for a ship to pick up foreign passengers or cargo while passing through international waters, whereas the same cannot be said of a nonstop flight between two domestic locations. When a nonstop domestic flight lands at its destination, we know for certain that any drugs on board were there when the plane departed and could not have been acquired from a foreign aircraft. Cf. Garcia, 672 F. $2 d$ at 1358 (noting that, unlike ships that travel
in international waters, "planes that pass through international airspace do not present any possibility of foreign contacts other than that presented by their actual stopping in a foreign country"). Even the dissent in Ramirez-Ferrer conceded that "it is far from clear whether carrying drugs aboard a scheduled nonstop airline flight between two U.S. points could ever be treated as importation under the [statute's second] clause; a defendant would certainly argue that for all practical purposes, drugs on such a flight are never outside the country." 82 F. 3 d at 1146 (Boudin, J., dissenting).
[**32] In an effort to discredit the Ramirez opinion, the government treats it as an outlier that conflicts with the great weight of authority on the reach of $\xi$ 952(a). As the First Circuit recognized, however, the cases on which the government now relies are inapposite, as they do not directly address the factual scenario presented here: a case where the government's own evidence shows that the drugs at issue were transported from one point within the United States to another. Nor do these decisions carefully analyze the language of $\S 952$ or the implications of their broad reading of the statute.

The government directs our attention to United States v. Peabody, 626 F.2d 1300, 1301 (5th Cir. 1980), in which the Fifth Circuit affirmed the importation convictions of defendants who were apprehended with narcotics 35 miles off the coast of Florida. With no reference to the language of $\oint 952(a)$, the court rejected the defendants' claim of insufficient evidence of intent to import. The court noted that the defendants were arrested outside the United States, on their way into the country, and simply stated that "had their cargo of contraband originated in, say, Texas, [**33] that would not alter the fact that it was meant to re-enter the United States from international waters. That is enough." ${ }^{20} \mathrm{Id}$. In stark contrast to this case, however, there was no evidence that the boat on which the Peabody defendants were arrested was heading into the United States from another domestic location. The court's statement about the hypothetical origin of the cargo is therefore dictum at best. Moreover, the court did not even cite $\$ 952(a)$, let alone analyze it. As the First Circuit aptly remarked, "Peabody and its progeny constitute flimsy precedent upon which to hang one's hat." Ramirez-Ferrer, 82 F.3d at 1140 .

20 But cf. United States v. Cadena, 585 F. $2 d$ 1252, I259 (5th Cir. 1978) ("Because importation necessarily originates in an act in a foreign country, it is apparent that Congress intended that 21 U.S.C. § 952 and § 963 apply to persons who commit acts or a series of acts that at least commenced outside the territorial limits of the United

States."), overruled on other grounds by United States v. Michelena-Orovio, 719 F.2d 738 (5th Cir. 1983).
[**34] The government also cites United States v. Phillips, 664 F. $2 d$ 971, 1033 ( 5 th Cir. 1981), in which the Fifth Circuit held that proof of importation from a place outside the United States may be established by circumstantial evidence, including "evidence that a boat from which marijuana was unloaded went outside United States territorial waters or met with any other [*634] vessel that had -- for example, a 'mother ship.'" As was the case in Peabody, however, there was no evidence that the drugs in question originated in the United States. The facts of Phillips involved drugs that were brought into the United States from Colombia from mother ships off the coast of Florida. Id. at 987. Phillips therefore does not provide support for the contention that $\$ 952$ (a) prohibits the domestic transport of drugs through international airspace.

The Eleventh Circuit cases cited by the government are similarly inapt. In United States v. Lueck, 678 F.2d 895, $904-05$ (1lth Cir. 1982), the court relied on the dictum from Peabody in holding that "any point outside [the] twelve mile limit of airspace and waters constitutes 'a place outside [**35] the United States' for purposes of proving importation under $\oint 952$ (a) .... The fact of crossing the boundary of the United States with contraband suffices to establish importation." The Eleventh Circuit reiterated this point in United States v. Goggin, 853 F. $2 d 843$ (1lth Cir. 1988), holding that "the government may prove that a defendant imported cocaine into the United States 'from any place outside thereof by showing that the defendant brought cocaine into the country from international waters or from airspace in excess of twelve geographical miles outward from the coastline." Id. at 845 (citing Lueck, 678 F.2d at 905). In both Lueck and Goggin, however, the evidence suggested that the flights in question had originated in the Bahamas -- not in the United States. Lueck, 678 F.2d at 896-97; Goggin, 853 F.2d at 843, 844. The domestic transport of narcotics was not demonstrated in either case.

In fact, the only cases to adopt the government's proposed interpretation of $\oint 952(a)$ under factual circumstances similar to those presented here are our decisions in Perez, 776 F.2d at 80l, [**36] and Sugiya$m a, 846$ F.2d at 572 . As an en banc court we are not bound by these panel opinions. Upon analysis, given the factual circumstances here, we no longer consider them to have correctly construed the starute.

In Perez, the defendant was convicted under $\S$ 952 (a) of importing drugs on a boat that sailed from Rota. an island in the Commonwealth of the Northem Ma-
riana Islands (a United States territory), to Guam. We affirmed the convictions, holding that all that the govemment must show for a finding of importation under $\oint$ 952(a) is that the drugs entered the United States from intemational waters or airspace. Perez, 776 F.2d at 801 (citing Lueck, 678 F.2d 895). In reaching this conclusion, the opinion did not analyze the statute or the implications of its interpretation. Instead, it rested its holding on the dicta in Peabocy and Lueck, which themselves failed to address the statutory language. Id.

Sugiyama likewise adds nothing to our understanding of the scope of $\oint 952$ (a), as it relied solely on Perez in affirming the conviction of a defendant under $\S 952(a)$ for importing drugs on a flight from the [ ${ }^{* * 37]}$ island of Palau (which at the time was part of the United States Trust Territory of the Pacific Islands) to Guam. Sugiyama, 846 F.2d at 572. Neither Sugijama nor Perez spoke to the concerns we confront today regarding the plain meaning of the statutory language, the statutory structure or the implications of a finding that $\oint 952$ (a) reaches domestic conduct. To the extent that Sugiyama and Perez address the transport of drugs through international airspace on a nonstop domestic flight, they [.*635] are overruled. ${ }^{21}$

21 Because we confine our holding to the transport of drugs on an aircraft that travels nonstop through international airspace en route between two United States locations, we express no opinion on the continuing vitality of Perez with respect to the maritime transport of drugs in international waters. That is an issue for another day.

## III.

Our analysis leaves little doubt that the second clause of $\xi 952(a)$ does not proscribe the transport of drugs on a non-stop [**38] flight from one domestic location to another, but to the extent that any doubt remains, the scope of the statute is sufficiently ambiguous to invoke the rule of lenity. "In these circumstances -where text, structure, and history fail to establish that the Govemment's position is unambiguously correct -- we . . resolve the ambiguity in [the defendant]'s favor." United States v. Granderson, 511 U.S. 39, 54, 127 L. Ed 2d 611. 114 S. Ct. 1259 (1994) (emphasis added). See also United States v. Bass, 404 U.S. 336, 347, 30 L. Ed 2d 488, 92 S. Ct. 515 (1971) ("When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.") (internal quotation marks omitted); People v. Materne, 72 F.3d 103. 106 (9th Cir. 1995) ("The rule of lenity applies
where a criminal statute is vague enough to deem both the defendant's and the govemment's interpretations of it as reasonable."). In light of the statutory language and structure and the disagreement among the circuit courts [**39] about the reach of the statute, it is evident that the government's position is far from unambiguously correct. Accordingly, we hold that the transport of drugs through international airspace on a nonstop flight from one United States location to another does not constitute importation within the meaning of $\$ 952(a) .{ }^{22}$

22 The dissent contends that the rule of lenity is inapplicable here because the Cabaccangs were on notice from our decisions in Perez and Sugiyama that their conduct was unlawful. However, the purpose of the rule of lenity is not merely to ensure that defendants have notice of the criminality of their actions. The rule is also founded on the principle that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." Bass, 404 U.S at 348 . If there is any doubt about whether Congress intended $\oint 952$ to prohibit the conduct in which the Cabaccangs engaged, then "we must choose the interpretation least likely to impose penalties unintended by Congress." United States v. Arzate-Nunez, 18 F.3d 730, 736 (9th (ir. 1994).
[**40] IV.
We are not persuaded by wamings of the government and the dissent that our decision today will cripple the government's efforts .- any more than did the First Circuit's 1996 decision in Ramirez-Ferrer -- to fight the ongoing war on drugs. Our holding addresses those cases in which the undisputed evidence shows that the nonstop flight on which the defendant transported drugs departed and landed in the United States. Our interpretation of $\S$ 952 (a) thus does not preclude the government from proving importation when a drug-laden plane of unknown origin is discovered in international air-space before it has crossed into U.S. territory. In such a situation, the government has found the plane outside the United States and therefore has circumstantial evidence that the air-craft originated from a place outside the United States. We need not decide today whether such evidence alone would be sufficient to support a conviction under § 952, [*636] because the government here does not dispute the defendants' contention that the flights in question departed from the United States. ${ }^{23}$

23 Our decision therefore is not inconsistent with the result -- if not the reasoning -- reached
by the Fifth Circuit in Peabody and Phillips. In those cases, there was no evidence of domestic origin to contradict the government's circumstantial evidence that the vessels found entering the United States from international airspace or waters departed from a place outside the United States. See supra Part II. Nor is our decision at odds with the outcome in Goggin, 853 F.2d at 846, in which the jury rejected the defendant's testimony that his flight departed from Atlanta in favor of the government's evidence that the flight took off from the Bahamas, or with that in Lueck, in which the only evidence of domestic origin was the defendant's uncorroborated testimony that he had taken off from the Florida Keys. Lueck, 678 F.2d at 897. Because our holding is limited to cases in which the evidence shows beyond dispute that the drugs in question were transported on a nonstop flight between two domestic locations, it does not conflict with the cases applying $\oint 952(a)$ to the transport of drugs into the United States from an offshore mother ship or from an aircraft or vessel first discovered outside the United States.
[**41] Our holding also leaves undisturbed our well-settled case law establishing that importation occurs when a person reenters the United States from a foreign country canying drugs that were in her possession when she left the United States. See, e.g., United States y. Friedman, 501 F.2d l352, $1353-54$ (9th Cir. 1974) (affirming the conviction of a defendant who reentered the United States from Mexico carrying drugs that were with him when he left the United States). A defendant who drives from San Diego to Mexico with a package of cocaine in her trunk and returns to San Diego still in possession of that package has committed an act of importation, even though the drugs themselves originated in this country, because the defendant thereafter brought them back into the United States from Mexico -- from a "place outside thereof" within the commonsense meaning of $\S$ 952(a).

Moreover, we are not leaving the government without recourse to punish the Cabaccangs and others who bring drugs from one United States location to another through international airspace. As the dissent itself acknowledges, "possession of illegal narcotics is already a serious offense," and any conduct [**42] that would have been chargeable as importation under the government's reading of $\oint 952(a)$ may be charged under 21 U.S.C. $\S 8 \neq 1$ as possession with intent to distribute. ${ }^{24}$ Section 841 carries steep mandatory minimum penalties that closely track those available for violations of $\S$ 952(a). ${ }^{25}$ Indeed, this very case amply demonstrates that our decision will not deplete the government's antidrug
arsenal: Notwithstanding our reversal of their importa-tion-related convictions, each of the Cabaccang brothers will still serve a life sentence for his involvement in the methamphetamine ring. Today's decision does nothing more than prevent the government from charging as importation conduct that can only be characterized as the domestic transport of drugs.

24 Where the facts do not support a finding of intent to distribute, such as where the drug quantity at issue is too small, the government may charge the conduct as simple possession under 21 U.S.C. § 874.

25 See 21 U.S.C. § 960 (listing the penalties for violations of $\$ 952(a)$ ).
[**43] In sum, our analysis of the statutory text and structure leads us to conclude that the second clause of 21 U.S.C. § 952(a) does not proscribe -- and was not intended to proscribe -- the transport of drugs on a nonstop flight between two locations within the United States. A decision [*637] to the contrary would contravene the plain meaning of the statute and produce absurd and unreasonable results. Accordingly, we reverse the defendants' convictions for conspiracy to import methamphetamine, importation of methamphetamine and attempted importation of methamphetamine.

## V.

The effect of our decision on Roy Cabaccang's conviction for conducting a continuing criminal enterprise (Count I) is not so clear. Count I incorporated the importation charges as predicate offenses, and the jury was instructed that to convict on that count it had to find that "the Defendant committed any one or more of the following federal narcotics trafficking offenses: conspiracy to distribute methamphetamine; conspiracy to distribute methamphetamine; or, conspiracy to import methamphetamine; or, importation of methamphetamine; or, possession of methamphetamine with intent to distribute; or, attempted [**44] importation of methamphetamine." The jury was also instructed that it must find that the offenses were part of a series of three or more offenses committed by the defendant, and that the defendant committed the offenses together with five or more persons. Finally, the jury was instructed that all members of the jury must unanimously agree on which three narcotics offenses the defendant committed and on which five or more persons committed the offenses together with the defendant. The jury's guilty verdict on Count I did not specify which narcotics offenses formed the basis of the jury's finding.

It is not for us to determine whether the jury relied on the importation offenses in reaching a verdict on Count I or whether, if the jury did so rely, there was suf-
ficient additional evidence of a continuing criminal enterprise to support the conviction. These questions are more appropriately considered by the district court. We therefore remand Count I to the district court for a determination of whether Roy's conviction on that count can stand in light of our holding.

## Conclusion

Because the transport of drugs on a nonstop flight from California to Guam does not constitute importation [**45] within the meaning of 21 U.S.C. § $952(a)$, we reverse all three defendants' convictions for conspiracy to import methamphetamine (Count IlI), Richard and Roy's convictions for importation of methamphetamine (Count V) and Roy's convictions for attempted importation of methamphetamine (Counts IX, X and XI). We remand to the district court for a determination of whether Roy's conviction for a continuing criminal enterprise (Count 1) can stand in light of our reversal on the importation counts. As to the Cabaccangs' challenges to their convictions and sentences on the counts that are not importa-tion-related, we adopt the panel decisions as our own and therefore affirm the judgment of the district court as to those counts.

AFFIRMED in part, REVERSED in part, REMANDED in part.

CONCUR BY: Mary M. Schroeder

## CONCUR

## SCHROEDER, Chief Judge, concurring:

I agree with the result. All three defendants were convicted under 21 U.S.C. § 952(a), importation of controlled substances. The crime was transporting illicit drugs from California to Guam. This was transportation from the continental United States to a territory of the United States that has its own [**46] customs authority.

The language of the statute provides:
[*638] It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance . . . or any narcotic drug.

21 U.S.C. § 952(a).
The first clause states that it is illegal to take drugs from non-customs territory of the United States to cus-
toms territory of the United States. The defendants did not do this.

The second clause bars the taking of drugs from foreign territory into the United States. The defendants did not do this either. Therefore, the statute was not violated.

The concerns reflected in both the dissent and the majority opinion about crossing international waters are not relevant to the interpretation of the plain language of the statute as I read it. Nevertheless, I do concur wholeheartedly in the result reached by the majority.

DISSENT BY: Alex Kozinski, Diarmuid F. O'Scannlain, Susan P. Graber, M. Margaret McKeown Richard C. Tallman

## DISSENT

KOZINSKI, Circuit Judge, with whom O'SCANNLAIN, GRABER, McKEOWN and TALLMAN, [**47] Circuit Judges, join, dissenting:

Our job as judges is to apply laws adopted by the political branches of government. As the Supreme Court has told us time and time again, see, e.g.. HUD $v$. Rucker, 535 U.S. 125, 130-31, 152 L. Ed. 2d 258, 122 S . Ct. 1230 (2002); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490-93, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001), where the statutory text is clear and speaks to the issue before us, we must faithfully enforce it, even if we firmly believe we could rewrite the statute to make it better.

And rewrite the statute is precisely what the majority does. ' There is no conceivable interpretation of its simple words that could yield one result where drugs are brought into the United States by air and a different one where they are brought in by sea. Instead, the majority has taken a blue pencil and inserted the words "except when the drugs are brought in on a nonstop flight originating in the United States." If this is a sensible exception, it's not one Congress has adopted, and no amount of massaging the word "from" can possibly yield such a specific and finely tuned result. The majority's [**48] statutory revisionism puts us in conflict with other circuits and will immensely complicate law enforcement efforts to protect our borders from the scourge of illegal drugs. It is the triumph of judicial will over innocent words that have no way to fight back.
$1 \quad 1$ refer to Judge Fisher's opinion throughout as the "majority." Although only four other judges join, his opinion resolves the case on narrower grounds than Chief Judge Schroeder's concurrence and therefore represents the binding rationale of the court under Marks $v$. United

States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Cl. 990 (1977).

## The Text

1. Section 952 (a) states:

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance . . . .

## 21 U.S.C. § $952(a)$. And section 951 (a)(1) adds: <br> The term [**49] "import" means,

 with respect to any article, any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation [*639] within the meaning of the tariff laws of the United States).
## $2 I$ U.S.C. § $951(a)(1)$.

It's difficult to imagine what more Congress could have said to keep us from going astray. Congress did not merely use the term "import" and leave it to the courts to flesh out its meaning. Rather, it went to the trouble of defining the term as "any bringing in or introduction of such article into any area." Id. It even explicitly foreclosed the notion that tariff-law definitions of "import" are germane. Id. Thus, the majority's observation that "we do not treat passengers who travel through international airspace on a nonstop flight between two U.S. locations as . . . subject to immigration inspections or border searches," Maj. op. at 7587, is utterly irrelevant. Nor does it matter that ships only going out to international waters do not clear customs on their return. See United States v. Ramirez-Ferrer, 82 F.3d 1131, 1l36 n. 4 (1st Cir. 1996) (en banc). Congress [**50] specifically rejected traditional notions of importation as a benchmark. The only pertinent question is whether defendants brought drugs into the United States from any place outside thereof.

The Cabaccangs conspired to bring a large quantity of drugs into Guam, a U.S. island surrounded by miles of ocean. It is impossible to get there without first passing through intemational waters or airspace. Defendants' criminal scheme thus fits perfectly within the statutory definition: Their coconspirators brought drugs into the United States (Guam) from "any place outside thereof" (international airspace surrounding Guam).

The majority does not seriously dispute that international airspace is a "place" in normal English usage. Maj. op. at 7587. A "place," after all, is only a "region; locality; [or] spot" -- a "location," "position" or "site." Webster's New International Dictionary of the English Language 1449, 1877, 1925, 2350 (William Allan Neilson et al. eds., 2 d ed. 1939). None of these definitions has anything to do with whether the "place" is occupied by air or terra firma, within a country's borders or over the high seas.

What the majority is really arguing is that international [**51] air-space, although a place, is not the place drugs come from when they cross back into the United States -- even if the so-called "international" airspace is above another sovereign nation like Canada, Maj. op. at 7596. The majority claims "it is clear . . . that a defendant who has brought drugs on a non-stop flight that lands in the United States can most reasonably be said to have brought drugs from the point of the flight's departure -- and not the airspace through which the plane traveled on the way." Maj. op. at 7588. It thus reads "from" in section 952(a) to mean only "originally from." But nothing in the statute compels or even suggests that limitation.
"From". can imply origin, but it can also mean simply "forth out of," "away out of contact with or proximity to," or merely "out of." Webster's, supra, at 1012. One need look no further than Ramirez-Ferrer to find the word so used. See 82 F.3d at ll42 (discussing the sailboat that "tacks out to and from international waters" (emphasis added)). The airstrip where a defendant takes off is one place he comes from, but certainly not the only one. If I ship an antique Persian rug from [**52] Baltimore to Los Angeles, it comes from Baltimore, but also from Indianapolis, Amarillo and many other places along the way; when it enters California, it does so from Nevada or Arizona. And, of course, it originally comes from the Middle East. A person traveling from Place A to Place B [*640] to Place C arrives at C both from A and from B . He comes from A originally and from B immediately; B is both the place through which he passes on the way from $A$ to $C$, and from which he arrives immediately at $C$.

The majority would ask a hypothetical bystander "from what place the Cabaccangs brought drugs into Guam." Maj. op. at 7587. That's a trick question because it assumes the point in contention, namely, that there's a single, unique place the drugs came from. The point of departure may be the place that first pops to mind, ${ }^{2}$ but that doesn't mean the point of immediate entry into the United States is not also a place the drugs came from. The correct question is not, "From what place did these drugs come?," but "Did these drugs enter the United

States from intemational airspace?" And any bystander would readily answer that question in the affirmative.

2 Though this depends on context. A discriminating buyer who wants to know where the drugs are from might well expect to hear where the weed was grown; an air traffic controller who wants to know whence the plane with the drugs is approaching would no doubt expect coordinates in international airspace.
[**53] The majority's claim that the plain language of the statute supports its interpretation is plainly wrong. Maj. op. at 7588. A statute does not have a plain meaning just because one cherry-picked dictionary definition happens to support it. That eight other decisions -apparently every one to have addressed the issue save Ramirez-Ferrer -- have reached the contrary result undercuts the claim that the statute plainly means what the majority says. See United States v. Nueva, 979 F.2d 880, 884 (lst Cir. 1992); United States v. Goggin, 853 F.2d 843, 845 (Ilth Cir. 1988); Guam v. Sugiyama, 846 F.2d 570, 572 (9th Cir. 1988) (per curiam); United States v. Perez, 776 F.2d 797, 801 (9th Cir. 1985); United States v. Lueck, 678 F. $2 d$ 895, 905 (llth Cir. 1982); United States v. Phillips, 664 F.2d 971, 1033 (5th Cir. Unit B 1981), superseded by rule on other grounds as stated in United States v. Huntress, 956 F.2d 1309, 1316 (5th Cir. 1992); United States v. Seni, 662 F.2d 277, 286 (4th Cir. 1981); United States v. Peabody, 626 F.2d 1300, 1301 (5th Cir. 1980). [**54]

If the majority had actually picked a definition of "from" and stuck with it, I would still disagree, but our disagreement would at least be about what the word actually means. The majority does nothing of the sort. Instead, it crafts a rule that applies only to "the transport of drugs on an aircraft that travels nonstop through international airspace en route between two United States locations." Maj. op. at 7601 n.21. It thus "leaves undisturbed our well-settled case law establishing that importation occurs when a person reenters the United States from a foreign country carrying drugs that were in her possession when she left the United States." Id. at 7603 (citing United States v. Friedman, 501 F.2d 1352, 1353-54 (9th Cir. 1974)). And, because it overrules Perez and Sugiyama only "to the extent that [they] address the transport of drugs through international airspace on a nonstop domestic flight," id at 7601, it also leaves intact our prior law with respect to all maritime transportation. ${ }^{3}$

3 The majority purports to "express no opinion . . . with respect to the maritime transport of drugs in international waters. That is an issue for another day." Id. at 7601 n .21 . But it camnot so easily escape the consequences of its ruling. Be-
cause the majority overrules Perez and Sugivama only "to the extent that [they] address the transport of drugs through international airspace on a nonstop domestic flight," id. at 7601, those decisions remain binding circuit law in all other respects. Maritime transport is an "issue for another day" only in the sense that the en banc court could someday decide to overrule that aspect of Perez and Sugiyama as well; district judges and panels of our court remain bound by the cases to the extent the majority has consciously decided not to overrule them.
[**55] [*641] So the majority isn't fully persuaded by its own argument that "from" means "originally from" in section $952(a)$. If it were, it would have to overrule Friedman (because a person who takes drugs from the United States to Mexico and back is coming originally from the United States) as well as the rest of Perez and Sugivama (because a person taking a boat from the United States through international waters and back is also coming originally from the United States). Rather, "from" now means "originally from" when applied to planes, but plain old ordinary "from" for everything else. We're told:

The distinction between air and water transport of drugs is hardly arbitrary. It is possible for a ship to pick up foreign passengers or cargo while passing through international waters, whereas the same cannot be said of a nonstop flight between two domestic locations.

Maj. op. at 7598 n .19 . That's certainly a pretty good policy distinction (and one we would undoubtedly uphold as rational had Congress enacted it), but it has absolutely nothing to do with the meaning of the word "from," which is the fulcrum of the majority's analysis. After today's decision, a ship that [**56] transports a cargo of drugs from Los Angeles to Guam will be deemed to have imported them into Guam, even if it goes there without stopping or picking up anyone or anything along the way. And, a passenger carrying drugs on a nonstop bus trip from Buffalo to Detroit through Canada will be deemed to have imported the drugs, even though a helpful bystander asked where the drugs came from would say "Buffalo, of course." Why does the boat enter the United States from international waters and the bus enter the United States from Canada, but a plane on a nonstop flight that passes through international airspace or over a foreign country enter the United States only from the place it took off? "From" may have many definitions, but none is supple enough to change meanings depending on the mode of transportation employed.

The majority's insuperable problem is that the distinction it draws finds no anchor in the words of the statute it purports to interpret. The statute says nothing about planes, boats, trains or automobiles; it only says "from," an entirely neutral term. To reach the result consistent with the majority's policy preferences, the statute cannot be "interpreted" in [**57] any meaningful sense of the term; it must be rewritten. This is not a case where we must deform the English language to save the statute from unconstitutionality. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 78, 130 L. Ed. 2d 372, 115 S. Ct. 464 (1994). Rather, the majority simply rewrites the statute because it likes it better this way. That is a function entrusted by the Constitution to Congress and the President, branches of government whose job it is to make such quintessentially political choices. By usurping it, my unelected colleagues have assumed powers inconsistent with our judicial role.
2. The majority tries hard to defend its reading on statutory history grounds. It notes that Congress added the words "from any place outside thereof" when it amended the statute in 1970, Maj. op. at 7586, and reads this new "any place" phrase as a limitation on the statute's scope. Why else, wonders the majority, [*642] would Congress ever have added these words?

If the answer to the majority's ingenuous question is not immediately apparent, perhaps the following analogy will help. The Bald and Golden Eagle Protection Act makes it illegal, [**58] among other things, to "import, at any time or in any manner, any bald eagle." 16 U.S.C. $\$ 668(a)$. The majority's analysis of this statute might go something like this: "Hmmm. Congress couldn't have intended to ban all importation of bald eagles, because then the phrase 'at any time or in any manner' would be superfluous -- Congress could simply have made it illegal to 'import any bald eagle.' It must have added 'at any time or in any manner' to narrow the sweep of the statute to importation at times and in manners, and exclude importation at non-times or in non-manners." Absurd as it sounds, this is the majority's logic.

The obvious reason Congress included the words "any place" was to negate the very inference the majority draws -- that the statute reaches only importation from some places: foreign countries, foreign countries plus hovering drug boats, or foreign countries plus some other limited set of places. "Any place" is like "any time" or "any manner" -- a catchall Congress adds when it wants to emphasize that the statute applies to absolutely everything within a particular genus. See Rucker, 535 U.S. at
 ing, that is, "one or some indiscriminately of whatever kind."'"' (quoting United States v. Gonzales, 520 U.S. I, 5, 137 L. Ed. 2d 132, 117 S. Ct. 1032 (1997))/). There is
nothing superfluous about such phrases, and the reason is simple: We judges have a habit of coming up with rules like " $[A]$ thing may be within the letter of the statute and yet not within the statute." Church of the Holy Trinity $v$. United States, 143 U.S. 457. 459, 36 L. Ed. 226, 12 S. Ct. 511 (1892). "Any place" is Congress's way of telling us "We mean it!" The words have operative effect because they negate the inference that the stafute means less than it says -- an inference judges are all too willing to draw, as the majority well demonstrates.

The words are particularly apt here because Congress had good cause to worry that judges might read implicit limitations into the statute. Even when context does not require it, courts have "not unnaturally fallen into the habit of referring to imports as things brought into this country from a foreign country." Hooven \& Allison Co. v. Evatt, 324 U.S. 652, 669, 89 L. Ed. I252, 65 S. Ct. 870 (1945) [**60] (emphasis added), overruled on other grounds by Limbach v. Hooven \& Allison Co., 466 U.S. 353, 80 L. Ed. 2d 356, 104 S. Ct. 1837 (1984); see, e.g., Leary v. United States, 395 U.S. 6, 46, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969) (assuming importation is equivalent to foreign origin). There is a long line of cases, for example, adopting the following formulation:

The common ordinary meaning of the word "import" is to bring in. Imported merchandise is merchandise that has been brought within the limits of a port of entry from a foreign couniry with intention to unlade, and the word "importation" as used in tariff statutes, unless otherwise limited, means merchandise to which that condition or status has attached.

United States v. Estate of Boshell. 14 Ct. Cust. 273, 275, Treas. Dec. 41884 (1922) (emphasis added), quoted in, e.g., Estate of Prichard v. United States, 43 C.C.P.A. 85, 87 (1956); Sherwin-Williams Co, v. United States, 38 C.C.P.A. 13, 18 (1950); United States v. John V. Carr \& Son, Inc., 58 Cust. Ct. 809, 266 F. Supp. 175, 178, A.R.D. 219 (Cust. Ct. 1967); [**61] Camera Specialty Co. v. United States, 34 Cust. Ct. 27, I46 F. Supp. 473, 476, C.D. 1672 (Cust. Ct. 1955). Congress may well have been concerned that courts would read a foreign origin requirement into the statute and responded by adding the words "any place." 4

4 Congress took similar precautions by defining "import" broadly in section 951 (a). That definition does not, however, render the words "any place" in section 952(a) redundant. Courts interpreting tariff laws have read other limits into the
terms "import" and "bring in" -- for example, that the defendant have "intention to unlade" and enter "within the limits of a port of entry" rather than just passing through territorial waters. E.g., Boshell, 14 Ct. Cust. at 275. Section 951(a) rejects the technical tariff definition but doesn't specify which elements of the definition Congress views as technical and which it views as inherent in the concept of "bringing in." "Any place" resolves any lingering ambiguity over a foreign origin requirement.
[**62] [*643] The majority hands Congress a catch-22: If it uses simple language, judges will find hidden within it all sorts of implicit limitations, but if it adds language to underscore that a statute should be given a broad, literal compass, judges will point to the redundancy as a justification for a narrower reading -because, after all, the literal meaning would have been implicit in the unadorned text. This judicial three card monte is useful in letting us reach whatever result we please, but 1 suspect Congress would prefer we take it at its word.
3. The majority also purports to rely on statutory structure. Maj. op. at 7588. It borrows its argument from Ramirez-Ferrer, 82 F.3d at l137-39, which thought that the government's interpretation of the second clause of section 952(a) ("into the United States from any place outside thereof") would render the firsi clause ("into the customs territory of the United States from any place outside thereof (but within the United States)") superfluous. It explained:

The government's broad reading of clause $2 \ldots$ brings any conduct conceivably addressed under clause $l$ within the coverage of clause 2. In other words, [**63] any contraband shipped from a place inside the United States (but not within the customs territory -- e.g., the U.S. Virgin Islands) would first pass through international waters before it entered into the customs territory of the United States. . . . Hence, the government's reading of clause 2 renders clause $l$ completely superfluous.

Id. at l138. As the majority admits, Maj. op. at 7589 n.II, this theory is based on a geographical premise that's demonstrably false. The U.S. Virgin lslands -- the very noncustoms territory Ramirez-Ferrer singled out as an example -- in fact is contiguous with the customs territory, namely, Puerto Rico. See Nat'l Oceanic \& Atmospheric Admin., Chart \# 25650: Virgin Passage and

Sonda de Yieques (33d ed. Mar. 9, 2002), attached as an appendix. ' Flights from St. Thomas, Virgin Islands, to almost anywhere in Puerto Rico never leave U.S. airspace, unless they make an enormous detour to the north or south. It's easy to pass from noncustoms territory to customs territory without leaving the United States, and by doing so to violate the first clause of section 952(a) without also violating the second.

5 St. Thomas and Puerto Rico Island themselves are separated by more than twenty-four miles, but the strait between them is littered with smaller islands, notably the Puerto Rican island of Culebra. And "every island, even those too small for effective occupation, has a tertitorial sea." I Thomas J. Schoenbaum, Admiralty and Maritime Low \& 2-10, at 29 ( 2 d ed. 1994). As the attached nautical chart shows, the distance from the easternmost point of Puerto Rico (Isla Culebrita, off the east coast of Culebra) to the westernmost point of the Virgin Islands (Sail Rock, south-southwest of Savana Island, in turn west of St. Thomas) is a mere seven miles -- nowhere close to twenty-four. All points between Puerto Rico's main island and St. Thomas are well within twelve miles of some smaller island, so the two are contiguous.
[**64] [*644] Thus, when Ramirez-Ferrer claimed that "any contraband shipped from a place inside the United States (but not within the customs territory. . . ) would first pass through international waters before it entered into the customs territory of the United States," 82 F.3d at 1138 , it was wrong. When it claimed that "any place that is just outside the customs territory of the United States is international waters," id., it was wrong. When it claimed that an individual entering the customs territory "would always be directly shipping from international waters," id., it was wrong. When it spent two pages hammering away at this single point - the crown jewel of its analysis -- it was actually driving the nails into its own jurisprudential coffin.

In an effort to salvage something from Rami-rez-Ferrer's glorious wreckage, the majority offers up two anemic theories. It first argues that, even though Ramirez-Ferrer's premise is wrong today, it was correct in 1970 when Congress passed section 952(a) because the United States then claimed a territorial sea of only three miles rather than twelve. Maj. op. at 7589-92. The teritorial sea, however, is only the boundary [**65] for general-purpose jurisdiction. Congress long ago established a special, twelve-mile boundary specifically for interdiction. See Act of Aug. 5, 1935, ch. 438, §§ 201, 203, 49 Stat. 517, 521-22 (codified in relevant part at 19 U.S.C. §§ $1401(j), 1581(a)-(b))$ (granting customs and

Coast Guard officers jurisdiction to board vessels within U.S. customs waters, defined to extend four leagues, i.e. twelve miles, from shore); see also Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 24, 516 U.N.T.S. 206, 220; 4 Whiteman Digest § 20 , at 489 (Dep't of State 1965).

Section 952(a) does not refer to territorial waters, but to the "United States," 2 I U.S.C. § $952(a)$, defined as "all places and waters, continental or insular, subject to the jurisdiction of the United States." Id. § 802(28); incorporated by id. $\oint 951$ (b). Four cases have considered whether this definition invoked the federal twelve-mile interdiction jurisdiction rather than the narrower three-mile one and concluded that it did: "The twelve-mile contiguous zone over which the United States exercises customs authority . . . is included [**66] in the meaning of 'the United States' in 21 U.S.C. $\S$ 952(a)." Goggin, 853 F.2d at 845; accord Nueva, 979 F.2d at 884; Lueck, 678 F.2d at 905; Seni, 662 F.2d at 286. But cf. Perez, 776 F.2d at 802 n. 5 (addressing the analogous issue of a territorial contiguous zone). ${ }^{\circ}$

6 Nueva involved conduct occurring after the 1988 proclamation that extended the territorial sea to twelve miles. But the proclamation itself was non-self-executing, see Proclamation No. 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777, 777 (Dec. 27, 1988) ("Nothing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom . . . "), and the new boundary was not incorporated into domestic criminal law until 1996, see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § $901(\mathrm{a}), 110$ Stat. 1214, 1317. It is highly debatable whether the government could have prosecuted based on the proclamation alone. Nueva thus understandably relied on pre-1988 decisions interpreting "United States" to include the contiguous zone rather than the 1988 proclamation. See 979 F.2d at 884 (citing Goggin).
[ $\left.{ }^{* *} 67\right]$ This mountain of consistent authority is no impediment for the majority: It's two-for-one day at Circuit Split Emporium, as we boldly go where no other circuit has gone before in holding that section 952(a) does not apply to the contiguous zone. This holding will have tremendous practical significance given the President's recent extension of the contiguous zone from twelve to twenty-four miles. See Proclamation [*645] No. 7219, Contiguous Zone of the United States, 64 Fed. Reg. 48,701 (Aug. 2, 1999). But the prospect of forcing the government to follow one boundary in the Ninth

Circuit and a different one everywhere else gives the majority no pause.

The only authority the majority offers is Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 102 L. Ed. $2 d 818,109$ S. Cl. 683 (1989), a case that has nothing to do with either drug interdiction or the contiguous zone. Argentine Republic invoked the canon against extraterritoriality in holding that the Foreign Sovereign Immunities Act does not apply to the high seas. ld. at $439-41$. It is one thing to argue, as the respondents did in Argentine Republic, that the [**68] United States includes the high seas -- i.e., roughly $70 \%$ of the Earth's surface area. It is quite another to say that the term "United States" in a drug interdiction statute invokes the twelve-mile interdiction boundary rather than the three-mile plenary one. The former is a bona fide extraterritorial application of federal law, clearly implicating the purposes of the canon. The latter just as clearly is not. The twelve-mile interdiction boundary is well-recognized in both international and federal statutory law. Presuming that Congress intends to invoke it when it passes a statute relating to the specific subject mater of drug interdiction does not present the same issues of extraterritoriality as asserting jurisdiction over two-thirds of the planet.

The majority has no good excuse for putting us at odds with every other circuit to have considered this issue. We should not break ranks on an issue that's at best debatable solely to save an otherwise hopeless textual argument. Were it necessary to reach the issue, I would hold that Congress invoked the twelve-mile interdiction boundary rather than the three-mile plenary one when it enacted section 952(a). At the very least, [**69] Congress reasonably could have believed that courts would interpret the statute that way -- as in fact they have -- and that's enough to render the first clause non-superfluous. "

7 The majority misses the boat when it claims that "it is not enough . . . that Congress 'reasonably could have believed' that $\S 952$ invoked this 12 -mile limited interdiction jurisdiction." Maj. op. at 7590. It's true that when we're interpreting a statute, "our role is to determine Congress' actual intent, not its possible intent." ld. In this case, however, the three-mile/twelve-mile issue is not the question of statutory interpretation presented. We're conducting a surplusage analysis, and a provision can be nonsurplus even if it responds only to the possibility that another provision might be interpreted a particular way. See Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 87, 153 L. Ed. 2d 82. I22 S. Ct. 2045 (2002) (finding a provision nonsurplus even though it merely "made a con-
clusion clear that might otherwise have been fought over in litigation"). Congress legislates in the shadow of uncertainty over how its statutes will be construed. See, e.g., Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, § 422, 111 Stat. 2296, 2380 ("Nothing in this Act . . . shall be construed to affect the question of whether the [FDA] has any authority to regulate any tobacco product . . . ."). Our power to resolve those uncertainties doesn't change the fact that Congress can't always predict what we'll do. There are two reasonable explanations for clause $l$ consistent with the government's theory: (1) Congress actually intended to enact the twelve-mile boundary; and (2) Congress wasn't sure whether courts would use the twelve-mile boundary or the three-mile one (maybe even members of Congress couldn't agree), and it passed clause 1 so that, either way, the Virgin Islands-Puerto Rico border would be covered. Either is a perfectly valid reason to enact clause $I$, so the canon against surplusage doesn't apply.
[**70] The majority's second effort to glue Rami-rez-Ferrer's pieces back together consists of the theory that, even if Puerto Rico and the Virgin Islands were contiguous, Congress didn't know or didn't care. Maj. [*646] op. at 7592. But this stands the canon against surplusage on its head. It's one thing to give a statutory provision a strained construction to avoid what would otherwise be a genuine redundancy. It's another thing altogether to do so after manufacturing a redundancy by assuming Congress either didn't know or didn't care about the real world circumstances that give the language in question independent force. Presuming that Congress must have been confused about the details of American geography just because a bunch of federal judges and government lawyers were ignorant strikes me as very close to the classic definition of chutzpah. See Alex Kozinski \& Eugene Volokh, Lawsuit, Shmawsuit, 103 Yale L.J. 463 (1993).

That Congress went to the trouble of including the somewhat convoluted phrase "into the customs territory of the United States from any place outside thereof (but within the United States)" shows it was focused on a very specific problem. There aren't [**71] many noncustoms territories to begin with; almost all the significant ones (Guam, the Marianas and Samoa) are way out in the Pacific, about 3000 miles from the nearest customs border. After that, we get into some pretty obscure places. See, e.g., Farrell v. United States, 313 F. $3 d 1214$. 1215 (9th Cir. 2002) (locating Johnston Island 700 miles west-southwest of Hawaii and providing helpful tax advice to its thousand or so residents). But there is one sig-
niticant exception: the Virgin Islands, situated in the midst of the Caribbean, cheek-to-jowl with Puerto Rico. It is within easy reach of drug manufacturing sources in Central and South America, and an ideal launching pad for smuggling into Puerto Rico, which is only a few minutes away by plane and, at most, a couple of hours by boat. Ignoring this border because it's the "lone point of contiguity," Maj. op. at 7592, is like telling the little Dutch boy he can go home because the dike only has one leak.

Without the first clause of section 952(a), it would be impossible to prosecute as importation drug shipments from St. Thomas to Puerto Rico. Because the two territories are contiguous, any boat or plane carrying [**72] drugs across the Virgin Passage would not be "importing into the United States from any place outside thereof." This is not some well-kept secret; it is obvious from even the most cursory glance at a nautical chart. Coast Guard and customs officers use those charts daily, and if there's a hole in the customs net where drugs slip through, they have every incentive to bring that fact to Congress's attention. The statute's first clause is absolutely necessary to render this traffic illegal.

The first clause is thus not "superfluous, void, or insignificant," and that is all the canon against surplusage requires. Duncan v. Walker, 533 U.S. 167, 174, 150 L . Ed. 2d 251, 121 S. Ct. 2120 (2001) (internal quotation marks omitted). The text of the statute and the indisputable facts of American geography are proof enough that Congress knew what it was doing. It is presumptuous and somewhat insulting to a coordinate branch of government to assume Congress doesn't take its responsibilities seriously when performing its central function of drafting statutes. 1 , for one, cannot subscribe to that view.

The Virgin Islands-Puerto Rico border kicks the props out from under the majority's [**73] argument that we must ignore the literal terms of the statute in order to avoid redundancy. But no contemporary example is necessary to justify reading the law as written. Congress defined two classes of conduct it meant to prohibit. Whether those classes diverge or overlap depends on geography and politics, which are hardly set in stone. For example, [*647] since 1970, the Northern Mariana lslands have become a commonwealth, and the Marshall lslands, Micronesia and Palau have all become independent states. See Proclamation No. 6726, Placing into Full Force and Effect the Compact of Free Association with the Republic of Palau, 59 Fed. Reg. 49,777, 49,777 (Sept. 27, 1994) (summarizing developments). The Canal Zone has reverted to Panama, see Panama Canal Treary, Sept. 7, 1977, 33 U.S.T. 39, and the United States has extended both its territorial sea and its contiguous zone, see Proclamation No. 5928, 54 Fed. Reg. at 777; Proclamation No. 7219, 64 Fed. Reg. at 48,701. Many people
want Guam to become a commonwealth; others clamor for Puerto Rico to become a state. Congress was no doubt aware that the status and scope of regions [**74] subject to U.S. jurisdiction change over time, and drafted a generic statute that would cover future contingencies. That is neither silly nor implausible. It's precisely what we would expect Congress to do when legislating in an area marked by flux. Clause I would thus not be surplusage even if it were entirely redundant at a particular moment of history. ${ }^{8}$

8 The majority thinks the principle of expressio unius is "yet another hurdle" to my interpretation. Maj. op. at 7593-94. By banning importation from noncustoms territory to customs territory, Congress implied that shipments from customs territory to noncustoms territory would not be covered. I couldn't agree more. That's why someone who takes drugs from Puerto Rico to St. Thomas doesn't violate section 952(a). (How this "reinforces" the majority's conclusion, Maj. op. at 7594, is a mystery.) Someone who takes drugs from Califormia to Guam, on the other hand, does violate section 952(a) -- not because he goes from customs territory to noncustoms territory (which we all agree is OK), but because he goes from intermational airspace to noncustoms territory. The majority doesn't think that counts, but that's precisely the question -- whether bringing drugs from international airspace into noncustoms territory is importation. The majority's expressio unius argument is totally circular. At best, it's the exact same "hurdle" as its surplusage theory, just repackaged into a different argument.
[**75] In any case, the customs and noncustoms territories are contiguous, as they were in 1970 when Congress enacted the statute. This inescapable geographical fact undercuts not only the majority's only plausible argument, but also Ramirez-Ferrer's value as precedent. That case wasted nearly two pages on this issue, all based on the figment that the customs and noncustoms territories are never contiguous. It was decided by the thinnest of margins (4-3), and the outcome no doubt would have flipped had the First Circuit been aware of the truth.

## The Precedents

The effort to reconcile today's decision with cases in the Fifth and Eleventh Circuits does not bear serious scrutiny; the majority would do better to acknowledge the conflict. It claims that those cases "do not directly address the factual scenario presented here," Maj, op. at 7598, because our plane concededly took off from Califormia, while in Peaboty and Phillips, there was "no

332 F.3d 622, *; 2003 U.S. App. LEXIS 11315, **;
evidence" that the drugs had originated in the United States, id. at 7599, and in Lueck and Goggin, the evidence "suggested that the flights in question had originated in the Bahamas," id. at 7600 . Yes, but so what?
[**76] "From any place outside thereof" is an element of a criminal offense; the government bears the burden of proof. Absence of evidence favoring the government is legally equivalent to irrefutable evidence favoring the defendant -- either way, the defendant goes free. Thus, for example, it does not matter that there was no evidence in Peabocty the drugs had come from the United States, because there was also no [*648] evidence they had come from elsewhere. See Peabody, 626 F.2d at 1300-01. The conviction stuck, so the court must have believed that the point of origin -- even if it was the United States -- didn't matter. ${ }^{4}$ For all we know, the drugs did originate in the United States; the opinion simply doesn't say.

9 This conclusion is not "dictum at best." Maj. op. at 7599 . Peabody held that the origin of the drugs -- whether Texas or anywhere else -- was irrelevant. The court never determined where the drugs originated, so its disposition was necessarily based on its determination that the possible domestic origin of the drugs was irrelevant.
[**77] Lueck and Goggin fall to the same axe. The majority asserts that evidence "suggested" the planes in those cases had departed from the Bahamas, but it misreads the opinions. The only pertinent reference in either is that the planes were first detected on radar flying near the Bahamas. Goggin, 853 F.2d at 844; Lueck, 678 F.2d at 896-97. The defendant in Lueck claimed he had taken off from the Florida Keys and crossed into international airspace to avoid the controlled zone around the Miami airport. 678 F.2d at 897. The jury never decided the issue, because the instructions made it sufficient to find entry from international airspace. $l d . a t$ 904-05. Goggin interpreted a verdict to imply only that the defendant had not departed from the mainland United States. 853 F.2d at 847. It didn't say anything else about origin. For all we know, the plane took off from Puerto Rico (which, after all, lies directly across the Bahamas from Florida). In each of the two cases, the court made no determination of the plane's origin, because it deemed that fact of no legal consequence.

The even bigger [ ${ }^{* *} 78$ ] problem with the majority's Sisyphean attempt to avoid a second circuit split is that, even if the cases were reconcilable on their facts, the legal rules they articulate would still be incompatible with the majority's. Lueck and Goggin both hold that "the fact of crossing the boundary of the United States with contraband suffices to establish importation.'" Goggin, 853 F. $2 d$ at 845 (quoting Lueck, 678 F.2d at
905). And Peabody holds that "[the defendants] were apprehended outside the country, heading in .... That is enough." 626 F.2d at 1301. Neither of these rules is compatible with the majority's holding that crossing the boundary of the United States with contraband is not enough to establish importation because the government must also show the flight originated abroad.

Struggle as it may, the majority cannot escape the hard reality that its interpretation of section 952(a) conflicts with that of the Fifth and Eleventh Circuits. It also conflicts with that of the Fourth, see Seni, 662 F.2d at 286 ("The inference that the vessel sailed out from North Carolina, across the 12 mile limit permits, indeed [**79] virtually compels, the further inference that the trawler sailed back . . . The jury could, therefore, reasonably conclude that the most recent journey . . . was one involving importation."), and until recently the First, see Nueva, 979 F.2d at 884 ("Importation of a controlled substance into the United States[] requires proof that the 'defendant [conspired to bring] cocaine into the country from international waters or from airspace in excess of twelve geographical miles outward from the coastline."' (quoting Goggin, 853 F.2d at 845), not to mention our own settled circuit law. If it were necessary to trample our precedents and contort the statute to hold formation with our sister circuits, I might see the need to do so. But the only case going the majority's way is Ramirez-Ferrer -- and, now that its grand fallacy [ ${ }^{*} 649$ ] has been exposed, far better to cut the tow rope and let it find its own way home.

## The Consequences

1. No one can doubt the devastating impact our holding will have on drug interdiction. Until today, the government could support an importation charge merely by tracking a plane on radar as it entered U.S. airspace. [**80] Now it must prove the trip originated abroad. Every smuggler flying a single-engine prop has a ready-to-serve defense: He took off from a U.S. airfield, strayed into international airspace and was just coming back in when he got caught. The govemment surely cannot track the movement of every aircraft everywhere on the globe, so it must now prove foreign origin by circumstantial evidence. In some cases it may not be able to do so, and in many others it will have to divert prosecutorial resources that could be put to better use. See Ra-mirez-Ferrer, 82 F.3d at ll 48 (Boudin, J., dissenting).

The majority claims that its holding only "addresses those cases in which the undisputed evidence shows that the non-stop flight . . . departed and landed in the United States." Maj. op. at 7603 (emphasis added); see also id. at 7603 n .23 . But there are no undisputed facts in criminal cases (unless the defendant finds some advantage in stipulating what he knows the government can prove
anyway). "From any place outside thereof" is an element of the offense, so the government has a constitutional duty to prove it to a jury beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364, 25 L. Ed. $2 d$ 368, 90 S. C. 1068 (1970). [**81] 10 If the prosecution fails to present sufficient evidence to do 50 , it must lose. Because no defense lawyer would be dumb enough to stipulate away this key element of the crime, the government will always have to prove beyond a reasonable doubt that the flight originated abroad. "The majority's "undisputed evidence" limitation is a pipe dream.

10 Congress could, of course, make domestic origin an affirmative defense. See Patterson v. New York, 432 U.S. 197. 210, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977). But it has not done so. If "from any place outside thereof" is a limitation on the statute's scope (as the majority believes), there is no way to read it as anything other than an element of the offense.
11 Ramirez-Ferrer committed an equally egregious error when it said that a jury could presume foreign origin from the mere arrival of a drug-laden ship. 82 F. $3 d$ at 1144 . It relied on Turner v. United States, 396 U.S. 398, 24 L. Ed. 2d 610, 90 S . Ct. 642 (1970). Turner, however, involved a statutorily prescribed presumption. See id. at 404-05. Where a statute prescribes a presumption, the govemment need only show that the "'presumed fact is more likely than not to flow from the proved fact.'" Id. at 405 (quoting Leary v. United States, 395 U.S. 6, 36, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969)). For elements of a criminal offense, on the other hand, the standard of proof is not "more likely than not" but "beyond a reasonable doubt." See Winship, 397 U.S. at 364. Judges are not free to water down this standard by inventing their own presumptions. Rami-rez-Ferrer ignored this distinction. It's truly unfortunate that the federal courts, in an effort to save a tiny group of clearly guilty defendants caught red-handed, have diluted a bedrock rule of constitutional law designed to protect the presumption of innocence for all defendants in all criminal cases.
[**82] Of course, entry from international airspace is circumstantial evidence of foreign origin. Maj. op. at 7603. But it's circumstantial evidence the same way a defendant's presence at the murder scene is circumstantial evidence he's the killer. lt's some evidence, but hardly sufficient. To convict a defendant, the government must produce evidence excluding every possible innocent explanation for his conduct. [*650] See United States v. 'asquez-Chan, 978 F.2d 546, 549 (9th Cir. 1992). The very examples the majority offers to
prop up its reading of the statute -- the flights from the lower forty-eight to Alaska or Hawaii, from Miami to Baltimore, from Tampa to Houston, or from Los Angeles to San Francisco, see Maj. op. at 7595 -- undercut the claim that entry alone is sufficient proof of guilt. And smugglers will no doubt soon figure out the best places to enter U.S. airspace in order to make it look like a domestic reentry.

Striving once again to duck the logical consequences of its ruling, the majority stays mum as to whether entry alone would support a finding of foreign origin. See id. at 7603. It's obvious it would not. See United States $v$. Carrion, 457 F.2d 200, $201-02$ (9th Cir. 1972) [**83] (per curiam) (insufficient evidence of foreign origin where a plane landed in Los Angeles with 404 pounds of marijuana in boxes bearing Spanish writing, one defendant was carrying a map of Mexico and a matchbook from a Mexican motel, and the plane had used enough fuel for a round trip to Mexico); cf. Vasquez-Chan, 978 F.2d at 550-53 (insufficient evidence of possession where cocaine was found in the defendant's bedroom with her fingerprints on the containers). But even if it would, defense lawyers will use the majority's opinion as a hornbook in pointing out to the jury the many ways the government failed to prove that the defendant did not take off from the United States, and conscientious juries will come back with many unjust acquittals.

By rejecting both our own circuit's settled precedent and the overwhelming weight of authority elsewhere, the majority frustrates the government's vital interest in consistent and uniform interpretation of the drug laws. It's certainly our prerogative as an en banc court to overrule circuit law. See Jeffries v. Wood, 114 F.3d 1484, 1492 (9th Cir. 1997) (en banc). But that doesn't mean it's a power wisely exercised [**84] every time we disagree with long-settled precedent. See McKinney v. Pate, 20 F. $3 d$ 1550, 1565 n. 21 (11th Cir. 1994) (en banc). The government's interdiction strategies doubtless vary depending on whether it must prove foreign origin or merely entry. Our decision requires it to revamp those strategies and may well derail investigations or prosecutions already underway -- even convictions already obtained. See Bousley v. United States, 523 U.S. 614, 619-21. 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998) (holding Teague v. Lane non-retroactivity principles inapplicable to interpretation of substantive rules of criminal law).

Our holding also results in standards that vary from circuit to circuit. The government already faces this prospect from Ramirez-Ferrer, but we greatly exacerbate the problem. Our enormous circuit covers not only the entire west coast of the United States, but also Hawaii, Alaska, Guam and the Marianas. If Ramirez-Ferrer
threw a wrench into the govermment's interdiction machine, we throw in the toolbox.
2. Now for the other side of the scale -- the majority's conceit that it achieves greater fairness and [**85] consistency with its tortured interpretation. The majority laments that "a passenger who carries a bag of marijuana on a flight from Portland to Anchorage has committed the crime of importation, while a drug-carrying traveler who departs from the same terminal at the Portland airport is guilty only of mere possession . . . if his flight lands in Phoenix rather than Anchorage." Maj. op. at 7596. We are not dealing here with a statute that criminalizes otherwise innocent conduct; the difference in treatment is at best a sentencing disparity. Possession of illegal narcotics is already a serious offense, [*651] and taking narcotics on a commercial airliner -- where even the wrong pair of toenail clippers means serious trouble -- is not only illegal but incredibly stupid. This may be a form of stupidity that strikes close to home -the criminals the majority purports to spare today are not the usual inner-city casualties of draconian drug laws, cf. Bonin v. Calderon, 59 F.3d 815, 851 \& n. 2 (9th Cir. 1995) (Kozinski, J., concurring), but interstate passengers on commercial flights who look a lot like our own sons and daughters coming home from college. The majority's concern [**86] for criminal defendants we can easily identify with is touching, but should we really be rewriting the nation's drug laws just because a group we happen to favor might be treated too harshly?

Any doubt that the majority misplaces its sympathy is erased by its reliance on -- of all things -- the rule of lenity. Maj. op. at 7601-02. Of course, people should not be thrown in jail if they did not have fair waming that their conduct was illegal. See United States v. Nguyen, 73 F. $3 d 887$, 891 ( 9 th Cir. 1995). But relying on the rule of lenity as a justification for overruling settled law makes little sense. After Perez and Sugiyama, the Cabaccangs couldn't possibly have believed that their conduct wasn't covered by section 952 (a). Invoking the rule to exonerate conduct clearly illegal when committed isn't lenity; it's a windfall to convicted drug dealers.

Finally, by exempting only nonstop travel through international airspace, the majority resolves one inequity only to create several others. For example, the drug-packing college kid who flies from Portland to Juneau through international airspace now gets off easier than the one who takes a non-stop ferry [**87] through international waters. And the Cessna weaving in and out of international airspace on its way from Los Angeles to San Francisco is better off than the sailboat tacking in and out of U.S. waters. Cf. Ramires-Ferrer, 82 F. $3 d$ at 1142. Why is this mode-of-transportation discrimination any less arbitrary than the one the majority finds so repugnant?

And that's just the start. The hemp-toting freshman who flies home directly from Seattle to Fairbanks is now treated more favorably than the one whose plane touches down briefly in Vancouver, even if the latter had the drugs in his suitcase, which was checked through to his destination. Surely there is no equitable difference between the two, yet under the majority's rationale, the latter is worse off than commercial drug dealers like the Cabaccangs. The wayward hiker who strays briefly into Canadian territory (perhaps overcome by one too many handfuls of special "trail mix") is a smuggler, cf. id. at 1136 n.3, while the drug courier whose Cessna veers into international airspace to avoid a storm is not. None of these newly created distinctions is any more equitable than the one the majority purports [**88] to eliminate.

Even hard-core judicial policy-seekers should cringe at today's decision. For all their manhandling of statutory text and precedent, my colleagues only manage to replace one arbitrary distinction with many others.
3. This abortive attempt to redraft the statute teaches several lessons, the most important of which is that arbitrarily disparate treatment of closely situated individuals is all but inevitable. It may well be that there is no "articulable legislative purpose for punishing the transport of drugs on a domestic flight that passes through international airspace more severely than the identical conduct on a flight that travels entirely within United States airspace." Maj. op. at 7596. But there is certainly an articulable purpose [*652] for treating border-crossing with drugs in general more severely than mere possession. Seemingly arbitrary treatment in a particular case is not a valid reason to disregard a statute's terms; there is no free-floating "narrow tailoring" principle of statutory construction. If Congress enacts a prescription drug benefit for people over sixty-five, a sixty year old can't qualify even if he proves his unic̣ue health problems make [**89] him constructively five years older. And if Congress bans drunk driving in national parks, a motorist can't defend himself by showing that his superior skills made up for his inebriation. And if it imposes an age of majority requirement, we don't waive it for precocious seventeen year olds. All these distinctions may seem arbitrary on their particular facts, but they are all consistent with the text of the statutes and their underlying logic.

The majority's interpretive method is to ask whether a defendant poses a greater menace than some hypothetical person not covered by the statute and, if not, to conclude that the defendant must be exempt as well. There are obvious reasons we don't interpret statutes this way. Judges often disagree about what Congress's purposes are and how particular conduct implicates them. Two defendants may seem similarly situated to one judge but night and day to another. Once we discard the statute's
text as the acid test of its coverage, we lose it as a justification for our authority. If the college student who flies to Anchorage gets a few more years than the one who flies to Phoenix and wants to know why, we can point to the text and say, "Because you [**90] entered the United States 'from a place outside thereof,' and Congress made that a more serious crime." But if the one who drives home gets a few more years than the one who flies, what can the majority possibly say to convince him he is not a victim of judicial caprice? That "from" means one thing for planes and something else for cars?

Our political system has mechanisms to deal with harsh applications of unambiguous statutes. The most obvious is prosecutorial discretion. Despite its sympathy for the plight of tourists caught with personal stashes on flights from Los Angeles to San Francisco, the majority can't point to a single instance where the government has prosecuted such an offense as importation. Nor can it identify a case where the government has applied the importation laws to any of its other extreme hypotheticals. (Ours, obviously, is not such a case -- the Cabaccangs masterminded a massive drug distribution network.) Ramirez-Ferrer relied on the absence of such prosecutions as a justification for its artificially narrow
interpretation. See 82 F.3d at 1141-42. But to me, this history shows the effectiveness of prosecutorial discretion as a mechanism [**91] for avoiding the inequities the majority fears. If prosecutors start charging such offenses as importation, public outcry may prompt Congress to rewrite the statute. But statutory amendment, like prosecutorial discretion, is a function reserved to another branch.

Seemingly arbitrary distinctions are an inevitable consequence of the rule of law. The costs of governing prospectively by the written word, however, are more bearable than those of a judiciary of retrospective equi-ty-brokers. In its quest for the holy grail of faimess in the drug laws, the majority cuts a swath of destruction through statutory text and precedent, and makes the government's already hard job of policing our borders much more difficult. Because I view our role as the more limited one of applying statutes as written and leaving questions of faimess to the political -- and politically accountable -- [*653] branches of government, I respectfully dissent.
[SEE APPENDIX MAP "Three Mile Limit/Twelve Mile Limit" IN ORIGINAL]

## EXHIBIT "2"

LEXSEE 504 F.3D 745


#### Abstract

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. W. R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, De-fendants-Appellees. UNITED STATES OF AMERICA, Plaintiff-Appellant, v. W. R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; WILLIAM MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, Defendants-Appellees.


No. 06-30472, No. 06-30524

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

504 F.3d 745; 2007 U.S. App. LEXIS 22435; 74 Fed. R. Evid. Serv. (Callaghan) 849; 37 ELR 20244

## June 4, 2007, Argued and Submitted, Seattle, Washington

September 20, 2007, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by W.R. Grace \& Co. v. United States, 2008 US. LEXIS 5196 (U.S., June 23, 2008)
US Supreme Court certiorari denied by Eschenbach $v$. United States, 2008 U.S. LEXIS 5131 (U.S., June 23, 2008)

## PRIOR HISTORY: [**] ]

Appeal from the United States District Court for the District of Montana. D.C. No. CR-05-00007-DWM, D.C. No. CR-05-00007-DWM. Donald W. Molloy, District Judge, Presiding.
United States v. Grace, 455 F. Supp. 2d 1113, 2006 U.S. Dist. LEXIS 56647 (D. Mont., 2006)
United States v. W.R. Grace, 455 F. Supp. 2d 1181, 2006 U.S. Dist. LEXIS 94741 (D. Mont., 2006)

United States v. W.R. Grace, 455 F. Supp. 2d 1172, 2006 U.S. Dist. LEXIS 94742 (D. Mont., 2006)

United States v. Grace, 455 F. Supp. 2d 1122, 2006 U.S. Dist. LEXIS 58285 (D. Mont., 2006)

DISPOSITION: AFFIRMED in part, REVERSED in part, and REMANDED

COUNSEL: Todd S. Aagaard, Dept. of Justice Environment and Natural Resources Division, Washington, D.C., and Kris A. McLean, Assistant United States Attorney, Missoula, Montana, argued for the government.

With them on the briefs were Sue Ellen Wooldridge, Assistant Attomey General; William W. Mercer, United States Attorney; Eric E. Nelson, Linda Kato, Special Assistant United States Attomeys; Kevin M. Cassidy, and Allen M. Brabender, Attorneys, United States Dept. of Justice Environment and Natural Resources Division.

Christopher Landau, Washington, D.C., argued for de-fendant-appellee W.R. Grace \& Co. With him on the brief were Laurence A. Urgenson, Tyler D. Mace, Michael D. Shumsky, Washington, D.C.; Stephen R. Brown, Charles E. McNeil, Kathleen L. DeSoto, Missoula, Montana, for defendant-appellee W.R. Grace \& Co.; Angelo J. Calfo, Seattle, Washington; Michael F. Bailey, Missoula, Montana, for defendant-appellee Alan R. Stringer; Ronald F. Waterman, Helena, Montana; David S. [ ${ }^{* * 2 \text { ] Krakoff, Gary A. Winters, Washington, }}$ D.C., for defendant-appellee Henry A. Eschenbach; Mike Milodragovich, W. Adam Duerk, Missoula, Montana; Mark Holscher, Jeremy Maltby, Los Angeles, California, for defendant-appellee Jack W. Wolter; Palmer Hoovestal, Helena, Montana, Elizabeth Van Doren Gray, Columbia, South Carolina, William A. Coates, Greenville, South Carolina, for defendant-appellee William J. McCaig; Brian Gallik, Bozeman, Montana, Thomas C. Frongillo, Boston, Massachusetts, Vemon S. Broderick, New York, New York, for defendant-appellee Robert J. Bettacchi; C.J. Johnson, Missoula, Montana, Stephen A. Jonas, Robert Keefe, Boston, Massachusetts, for defen-
dant-appellee O. Mario Favorito; Catherine A. Laughner, Aimee M. Grmoljez, Helena, Montana, Stephen R. Spivack, Washington, D.C., David E. Roth, Birmingham, Alabama, for defendant-appellee Robert C. Walsh.

JUDGES: Before: Betty B. Fletcher, Harry Pregerson, and Warren J. Ferguson, Circuit Judges. Opinion by Judge B. Fletcher.

## OPINION BY: B. FLETCHER

## OPINION

[*749] Opinion by Judge B. Fletcher
B. FLETCHER, Circuit Judge:

From 1963 until the early 1990s, W. R. Grace ("W. R. Grace" or "Grace") mined and processed a rich supply of vermiculite ore outside of Libby, Montana. [**3] In response to ongoing serious health problems suffered by Libby residents, the government obtained an indictment charging W. R. Grace and seven of its executives (together "Grace") with criminal conduct arising from Grace's vermiculite operation in Libby. The superseding indictment charges defendants-appellees with (1) conspiring knowingly to release asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § $7413(c)(5)(A)$ and (2) conspiring to defraud the United States in violation of 18 U.S.C. $\{371$. In addition to the dual-object conspiracy alleged in Count I, the indictment charged defen-dants-appellees with three counts of knowing endangerment under the Clean Air Act, 42 U.S.C. $\xi$ $7 \not 113(c)(5)(A)$, and four counts of obstruction of justice in violation of 18 U.S.C. $\oint \S 1505$ and $1515(b)$.

This interlocutory appeal brought by the government concerns six orders grouped into four sections: the first order dismissed the knowing endangerment object of Count I's conspiracy charge; the second adopted a particular definition of asbestos and excluded evidence inconsistent with that $\left[{ }^{* *} 4\right]$ definition; the third denied a motion to exclude evidence related to an affirmative defense and relied on an emission standard for asbestos contained in certain Environmental Protection Agency ("EPA") regulations, see, e.g., 40 C.F.R. $\{\oint$ 61.142-61.149; and the fourth through sixth orders excluded certain evidence and expert testimony. In addition, we rule on defen-dants-appellees' motion to strike documents attached to the government's reply brief. We have jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1331 , and we reverse in part, affirm in part, and remand.

## I. Dismissal of the Knowing Endangerment Object

## 1. Background

In the original indictment, filed February 7, 2005, the government charged defendants with participating in a dual-object conspiracy. According to Count I of the indictment, which details the scope of the conspiracy, defendants conspired (1) to knowingly release asbestos, a hazardous air pollutant, and thus knowingly to endanger [*750] both EPA employees and members of the Libby community in violation of 42 U.S.C. § $7413(c)(5)(A)$ ("knowing endangerment object"); and (2) to defraud the United States by impairing, impeding, and frustrating government agency investigations [**5] and cleanup operations in violation of 18 U.S.C. $\$ 371$ ("defrauding object"). On March 20, 2006, defendants moved to dismiss the knowing endangerment object of the conspiracy, arguing that the government had failed to allege an overt act in furtherance of the alleged conspiracy within the statute of limitations period. United States v.W. R. Grace. 434 F. Supp. 2d 879, 883 (D. Mont. 2006).

Defendants' argument relied primarily on Yates $v$. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. $2 d$ 1356 (1957) (holding that the statute of limitations must be satisfied as to each object of the conspiracy when the government charges a multi-object conspiracy, overruled on other grounds by Burks v. United States, 437 U.S. I, 2, 98 S. Ct. 2141, 57 L. Ed. $2 d$ I (1978). Because the government supposedly had failed to allege a requisite overt act before the statute of limitations ran on November 3, 2004, defendants asserted that the knowing endangerment object was time-barred.

The government disputed defendants' characterization of the indictment, claiming that certain overt acts alleged in the indictment could support both the fraud object and the knowing endangerment object of Count l's conspiracy charge. Towards this end, the government directed the district [**6] court's attention to paragraphs 143, 149, and 173-184 of the indictment. W. R. Grace, 434 F. Supp. 2d at 885-87. The paragraphs cited by the government alleged that defendants had failed to remove asbestos-contaminated material from sites in the Libby community, had misled various individuals regarding current asbestos contamination, and had failed to disclose the existence of numerous asbestos-contaminated sites. What the paragraphs purportedly failed to allege was that defendants released, or conspired to release, asbestos during the relevant time period.

Analyzing both the text of the specified paragraphs and the structure of the indictment, in which the cited paragraphs were listed under the sub-heading "Obstruction of EPA's Superfund Clean-Up," the district court concluded that the indictment "more plausibly suggests a
completed operation than a conspiracy still at work." Id at 887. To the extent that overt acts were alleged, the district court found that they were acts of obstruction, not acts of wrongful endangerment. Id. Thus, the district court dismissed as time-barred the knowing endangerment object of the Count 1 conspiracy. Id. at 888.

Two weeks after the district court's [**7] first order, dismissing a portion of the indictment, the government obtained a superseding indictment. The new indictment was substantially similar to the original indictment, amending only paragraphs 173-183, which had been the focus of the district court's previous order. In the superseding indictment, the government changed the section heading under which the disputed paragraphs had been listed from "Obstruction of Superfund Clean-Up" to "Knowing Endangerment of EPA Employees and the Libby Community and Obstruction of the EPA's Superfund Clean-Up." It also changed paragraphs 173, 174, 176-80, 182 and 183, by adding at the end of each original paragraph the phrase, "thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby Community." ${ }^{1}$

## 1 Paragraph 175 was changed significantly.

[*751] Defendants then moved to dismiss the "knowing endangerment" object of the superseding indictment, arguing that the government had failed to fix the original indictment because the new indictment alleged no new overt acts, was barred by the previous dismissal "with prejudice," and was time-barred because [**8] the statute of limitations had run. The district court rejected the first two arguments, but agreed with defendants that the new indictment was time-barred. Under the district court's reading, the superseding indictment was not protected by the savings clause of 18 U.S.C. § 3288. Order at 17, United States v. W. R. Grace, 9:05-cr-00007-DWM ("Order Dismissing Indictment") 455 F. Supp. $2 d$ llll3, 2006 U.S. Dist. LEXIS 56647 (Ju(y 27, 2006) (Docket \# 690). The government now appeals that determination.

## 2. Standard of Review

We review de novo a district court's decision to dismiss part of an indictment, United States $v$. Barre-ra-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991), as we review, also de novo, the district court's interpretation of 18 U.S.C. § 3288. United Slates v. Gorman, 314 F. 3 d 1105, 1110 (9th Cir. 2002).

## 3. Analysis

If a district court dismisses an indictment (or portion thereof), the savings clause of 18 U.S.C. § 3288 permits
the government to return a new indictment after the statute of limitations has expired, as long as it is done within six months of the dismissal. The statute reads as follows:

Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute $\left[{ }^{* *} 9\right]$ of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information . . ., which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

The dispute in the instant case stems from the parties divergent interpretations of the final sentence of $\oint$ 3288. This sentence explains that the savings clause does not extend to indictments initially filed outside of the statute of limitations. The government takes the position that this does not bar the return of the new indictment because the original indictment was obtained before the statute of limitations expired. Thus, the government argues, § 3288 permits amendment by a superseding indictment. Defendants disagree, arguing that the govemment failed to allege an overt act for the knowing endangerment object of the conspiracy before the [**10] statute of limitations expired. The district court agreed with defendants and dismissed the knowing endangerment object as time-barred.

Defendants' argument is premised on a conflation of the terms "time-barred" and "not timely filed." The last sentence of $\$ 3288$ refers to indictments that were not timely filed, i.e., indictments that were not filed within the statute of limitations. Here, there is no dispute that the government filed its indictment within the statute of limitations period. The district court dismissed the knowing endangerment object in the original indictment as "time-barred" because it failed to allege an overt act within the statute of limitations, not because the indictment was untimely filed. [*752] The district court erred. If the indictment is filed within six months of the dismissal order, § 3288 does not bar the government from filing a superseding indictment: the savings clause of $\S 3288$ permits amendment when the original was

504 F.3d 745, *; 2007 U.S. App. LEXIS 22435, ${ }^{* *}$; 74 Fed. R. Evid. Serv. (Callaghan) 849; 37 ELR 20244
structurally flawed but timely filed. United States $v$ Clowson, 107 F. 3 d 250 (9th Cir. 1996).

In Clawson, the defendant was indicted for mail fraud on June 10, 1993. Id. at 251. Defendant immediately moved to dismiss the indictment for failure [**11] to allege an overt act within the five-year statute of limitations. Id. The indictment alleged overt acts that occurred before the limitation period began on June 10, 1988, or after defendant's withdrawal from the conspiracy on July 5 , 1988. Id. The district court granted defendant's motion to dismiss the indictment and the government responded by obtaining a First Superseding Indictment, which alleged overt acts occurring in the window between June 10, 1988, and July 5, 1988. Id. Defendant then moved to dismiss the new indictment, arguing that the statute had run before the government obtained the First Superseding Indictment and that $\S 3288$ did not extend to indictments dismissed for failure to comply with the statute of limitations. Id. The district court denied his motion and we affirmed. Id. at 251-52.

Clowson noted that when "[r]ead in its entirety, th[e] last sentence [of § 3288] cuts off the six-month grace period only where the defect -.. whether it's a limitations problem 'or some other' problem -- is not capable of being cured." Id. at 252. In the instant case, the district court held (and defendants now argue) that the defect in the original indictment obtained by the government [**12] is not capable of being cured because the original indictment did not allege an overt act for the knowing endangerment object before the statute of limitations expired. This position, however, is precluded by Clawson.

In Clawson we distinguished between a timely filed, but flawed, indictment, to which the savings clause of $\xi$ 3288 does apply, and an untimely filed indictment, to which it does not.
"[I]f the original indictment was brought after the limitations period ran on all the alleged criminal conduct, allowing reindictment under section 3288 would obliterate the statute of limitations: A defendant could be indicted two years after the statute had run and, when the court dismissed, the prosecution could simply reindict within six months, free from the limitations bar." /d.

For obvious reasons, reindictment is prohibited by $\}$ 3288 in such circumstances. Id.
"The matter is much different where the original indictment is brought within the limitations period, but is dismissed for failure to allege the exact elements of the crime, or some other technical reason. In the latter circumstance, a valid indictment could have been brought in a timely fashion; the six-month grace period merely [**13] allows the govermment to do what it had a right to do in the first place." Id.

The latter circumstance describes the facts of both Clawson and the instant case. In both cases, the government timely indicted defendants for a particular crime, but originally failed to allege a valid overt act. The govemment then obtained superseding indictments charging defendants with the exact same crimes, but adding the necessary overt act allegations. Thus, each defendant was charged "with the exact crime for which he could have been prosecuted had there not been a defect in the indictment. Section 3288 was designed to apply in this situation." Id; see also United States $v$. Charnay, 537 F.2d 341, 354 [*753] (9th Cir. 1976) ("[The] underlying concept of $\oint 3288$ is that if the defendant was indicted within time, then approximately the same facts may be used for the basis of any new indictment [obtained after the statute has run] . . ., if the earlier indictment runs into legal pitfalls.").

When discussing "timeliness," both Clawson and Charnay refer to the time of the original filing of the indictment. They do not consider whether the original indictment included all of the relevant acts or elements necessary $\left[{ }^{* *} 14\right]$ to charge defendants with the crime. As long as the original indictment is filed within the statute of limitations and charges the same crime, based upon approximately the same facts charged in the superseding indictment, $\S 3288$ allows the government to file a superseding indictment within six months. See 18 U.S.C. § 3288;Clawson, 104 F. 3 d at 251-52; Charnay, 537 F.2d at 354 . Here, the parties do not dispute that the original indictment was timely filed. The district court's holding that the indictment was time-barred referred only to its failure to allege the necessary overt acts in the original indictment - a flaw that can be cured through reindictment under § 3288 .

The district court attempted to distinguish Clawson, stating that in Clawson the govermment alleged overt acts in the original indictment, which was filed within the limitations period. This distinction is irrelevant. While the government did allege overt acts before the limitations period expired in Clawson, it failed to allege an overt act sufficient to support the conspiracy charge since the only overt acts alleged occurred outside the
statute of limitations or subsequent to Clawson's withdrawal from the conspiracy. [**15] Thus, the govemment originally failed to allege any relevant overt acts in Clawson, just as in the instant case.

Moreover, Clawson did not turn on the distinction advanced by the district court: as we have explained, $\oint$ 3288 applies when an indictment (though defective) is brought within the limitations period, and the superseding indictment charges defendant with the same exact crime with which he was initially charged, based on approximately the same facts. The only addition in the new indictment considered in Clawson was the inclusion of new overt acts that the government could have used in the original indictment. The fact that the government had timely alleged inapplicable overt acts was wholly extraneous to the Clawson court's decision.

The district court's misapprehension of both Clawson and $\S 3288$ is also clear from its statement that " $[t] 0$ allow the government a six-month grace period in this case would extend the statute of limitations for the improper purpose of affording the prosecution a second opportunity to do what it failed to do in the beginning." Order Dismissing Indictment at 16. Yet this is exactly what $\{3288$ does. It extends the statute of limitations by six months $\left[{ }^{* *} 16\right]$ to allow the prosecution a second opportunity to do what it failed to do in the beginning: namely, file an indictment free of legal defects.

This reading of $\oint 3288$ does not, as the district court suggests, "require a defendant to remain subject to an indefinite threat of prosecution, held open beyond the statute of limitations period, while he and the court wait for the government to finish tinkering with the indictment." Id. What $\$ 3288$ does is twofold: First, it eliminates the incentive for criminal defendants to move for dismissal of an indictment at the end of the statute of limitations, thereby winning dismissal at a time when the government cannot re-indict. And second, it subjects defendants to the threat of prosecution for six months after [*754] the dismissal of the original indictment -not an indefinite threat of prosecution as the district court suggests -- and only if the government has timely filed an indictment charging the exact same crimes based on approximately the same facts.

For the reasons articulated herein, we reverse the district court's dismissal of the knowing endangerment object of Count I in the superseding indictment and reinstate that portion of the count.

## II. [**17] Definition of Asbestos

## 1. Background

We now turn to the question of whether Congress's use of the term "asbestos" to identify a hazardous air
pollutant created ambiguity as to what substance was meant by that term. The parties filed cross motions in limine to exclude evidence that fell outside their respective interpretations of the term. Govt. Mot. in Limine \# 2 Re: Definition of Asbestos (Docket \#462); Defs ${ }^{4}$ Mot. in Limine Re: Definition of Asbestos (Docket \# 474). The district court held that the term "asbestos" has no inherent meaning and therefore its use in the criminal provisions of the Clean Air Act violated the rule of lenity and the Due Process Clause of the Fourteenth Amendment. It interpreted asbestos for purposes of the Clean Air Act's knowing endangerment provision to mean the six minerals covered by EPA's civil regulatory scheme. Order at 2 \& 20, United States v. W. R. Grace, 9:05-cr-00007-DWM, 455 F. Supp. 2d 1122; 2006 U.S. Dist. LEXTS 58285 ("Order Defining Asbestos") (Aug. 8, 2006) (Docket \# 701). That regulation defines the civilly regulated species of asbestos as "the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actino-lite-tremolite." Definitions [**18] for National Emission Standards for Hazardous Air Pollutants ("NESHAPs"), 40 C.F.R. § 61.141 (2007).

The district court imported the civil regulatory definition of "asbestos" into the criminal provisions of the Clean Air Act, and then ruled that evidence of asbestos releases offered at trial would be limited to those relevant to proving releases of the six minerals included in the regulatory definition; evidence of releases of other asbestiform minerals would be excluded. Order Defining Asbestos at 22. This ruling eliminated from trial evidence of releases of $95 \%$ of the contaminants in the Libby vermiculite -- which are asbestiform minerals but fall outside of the six minerals in the civil regulatory definition -- as well as excluding government data that did not differentiate between the six regulated minerals and unregulated asbestiform minerals. The government appeals, asserting that the definition contained in the criminal portion of the statute is the applicable definition.

## 2. Standards of Review

We review de novo the district court's construction of the Clean Air Act, as we do rulings on the admissibility of evidence in which issues of law predominate. See United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000).

## 3. [**19] Analysis

The Clean Air Act's knowing endangerment provision prohibits the knowing and dangerous release into the ambient air of "any hazardous air pollutant listed pursuant to § 7412." 42 U.S.C. § $7413(c)(5)(A) .{ }^{2} \quad$ [*755] Section 7412(b) lists "asbestos," also identified by its Chemical Abstracts Service ("CAS") ${ }^{3}$ Registry number

1332-21-4, as a hazardous air pollutant. 42 U.S.C. $\S$ 7412 (b). Thus, $\S 7412(b)$ identifies asbestos by name and defines it through reference to CAS Registry \# 1332-21-4.

242 U.S.C. $\$ 7413(c)(5)(A)$ reads in relevant part:

Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section $7 \not+12$ of this title . ., and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a tine under Title 18 , or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $\$ 1,000,000$ for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such [**20] person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter $V$ of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

3 The Chemical Abstracts Service Registry, maintained by the American Chemical Society, is an authoritative database of chemical information. The Registry assigns each chemical substance a unique numeric identifier. Searches in the Registry require subscription. However, EPA maintains on its website a free "Substance Registry System" containing CAS Registry information, including the CAS definition of asbestos. http:// www.epa.gov/srs/ (search "asbestos"; fol-
low link associated with 1332-21-4) (last visited Aug. 3, 2007).
The government contends that a statute may have two definitions for one term, one definition civil and one criminal. Further, it argues that the definition of asbestos applicable to the Clean Air Act's criminal knowing endangerment provision covers [**21] the minerals involved in this case. We agree on both points.

The district court found $\S 7412(b)$ 's "one-word definition" ' to be "unsatisfactory" as a matter of law. However, Congress need not define every word in a criminal statute for the statute to pass Constitutional muster. When Congress does not define a term in a statute, we construe that term "according to [its] ordinary, contemporary, common meaning[ ]." United States v. Cabaccang, 332 F.3d 622, 626 (9th Cir. 2003) (en banc) (internal quotation marks omitted). It is well known that asbestos has a common meaning; it is a fibrous, noncombustible compound that can be composed of several substances, typically including magnesium. Or, as defined by the CAS Registry, and incorporated by reference into $\oint 7412(b)$, it is a "grayish non-combustible material" that "consists primarily of impure magnesium silicates." CAS Registry number 1332-21-4, available at http://iaspub.epa.gov/srs/srs_proc_qry.navigate?P_SUB_ $I D=85282$. This definition has been established for decades, as was elucidated in the motions in limine. See Defs' Mot. in Limine Re: Definition of Asbestos n. 4 (Expert Witness Disclosure of Gregory P. Meeker, Appendix A) (May 31, [**22] 2006) (noting that asbestos was first defined in 1920).

## 4 I.e., "1332214 Asbestos"

In addition, defendants had actual notice in this case of the risks from the fibrous content of the asbestiform minerals in their products. Defendants are an industrial chemical company and seven of its top executives. They are all familiar with asbestos. Since at least 1976, defendants have known of the health risks posed by the asbestiform minerals in their products. It is clear that defendants knew or should have known that their mining, milling, and distribution activities risked the release of asbestos into the ambient air. In light of the clear statutory language, including § 7412(b)'s incorporation by reference of the CAS Registry asbestos definition, and [*756] defendants' knowledge of the industrial chemicals field, the district court erred in misdefining "asbestos" as used in the criminal statute and in invoking the rule of lenity. See Muscarello v. United States, 524 U.S. 125. $138.118 \mathrm{~S} . \mathrm{Ct} .1911 .1 \not 11 \mathrm{L}$. Ed. 2d 111 (1998) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.") (alteration in original) (internal quotation marks [**23]
omitted); United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219. 137 L. Ed. $2 d 432$ (1997) (The "rule of lenity[ ] ensures fair warning by so resolving ambiguity in a criminal statute as to apply [the statute] only to conduct clearly covered.").

The district court's conclusion that ambiguity exists simply because of the existence of two oversight structures -- a civil regulatory structure and a criminal enforcement provision -- that use different definitions of the term "asbestos" is erroneous. As we determined in United States v. Hagberg, 207 F.3d 569, 573 (9th Cir. 2000), Congress validly may create multiple enforcement mechanisms that each draw on different definitions for the same term or phrase.

In Hagberg, defendant was indicted for allegedly dumping sewage along a public road in violation of the Clean Water Act, 33 U.S.C. §§ $1319(c)(2), 1345(e)$. Hagberg at 570. Moving to dismiss the indictment, Hagberg argued that his actions did not fit within the statutory definition of the crime because the material he dumped was not "sewage sludge" as defined by the regulations for permitting waste disposal. Id. at 571. Accepting Hagberg's argument, the district court dismissed the indictment. The government appealed. Id. [**24] We reversed because the district court improperly had conflated the regulatory and direct enforcement provisions of the Clean Water Act, and the relevant definition -- supplied by the direct enforcement provision -- covered the material dumped by defendant. Id. at 571-72, 575. We explained that "some terms found in the [direct enforcement provision] are defined differently when used in the context of [the civil permitting] regulations." Id. ut 572 .

Like the Clean Water Act provisions at issue in Hagberg, the Clean Air Act creates multiple enforcement mechanisms: a civil regulatory structure and a direct enforcement mechanism. In the instant case, as in Hagberg, defendants are charged with violating the directly enforceable provision of the statute that pulls its definitions from a separate provision than does the regulatory provision. The civil regulatory system draws its definition of asbestos from 40 C.F.R. § 61.141 , the knowing endangerment provision from 72 U.S.C. $\$ 7412(b)$. See 42 U.S.C. $\$\} 7412(a)(6) ; 7413(c)(5)(4)$. The civil regulatory system regulates major sources of hazardous air pollutants, 42 U.S.C. § $7412(c)-(g)$, and therefore understandably focuses on a subset of asbestiform [**25] minerals deemed to have commercial potential; market forces preclude commercially non-viable species of asbestos from becoming major sources of pollution from asbestos mills and mines and other covered sources. The direct enforcement mechanism created in 42 U.S.C. § 7413 focuses on risks to health. Therefore it provides oversight of release of hazardous pollutants whether or
not they come from major sources of pollution. We defer to Congress's decision to create two enforcement structures and hold the district court's conflation of the two to be error.

In sum, the district court improperly limited the term "asbestos" to the six minerals covered by the civil regulations. Asbestos is adequately defined as a term and need not include mineral-by-mineral classifications [*757] to provide notice of its hazardous nature, particularly to these knowledgeable defendants. Accordingly, we reverse the order limiting evidence to that fitting within the civil regulations.

## III. Mandamus

## 1. Background

The knowing endangerment provision of the Clean Air Act establishes an affirmative defense for hazardous air pollutants released "in accordance with" an applicable National Emissions Standards for Hazardous Air [**26] Pollutants ("NESHAP"). See 42 U.S.C. § 7413(c)(5)(A). In the proceedings before the district court, the government argued that defendants could not avail themselves of this affirmative defense because no NESHAP applied to W. R. Grace's operations in Libby; thus, compliance with an "applicable" NESHAP was impossible. The district court rejected this argument, finding that the regulations created an emissions standard of "no visible emissions" for asbestos. Accordingly, the district court ruled that it would allow defendants to introduce evidence at trial to try to prove their affirmative defense. Because the district court did not exclude any of the government's emissions evidence as a result of this ruling, the govemment cannot appeal the district court's decision. Instead, it now seeks a writ of mandamus to overturn the decision.

## 2. Standard of Review

The writ of mandamus is codified at 28 U.S.C. $\xi$ 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This court has developed a five-factor test for determining whether a writ may $\left[{ }^{* *} 27\right]$ issue. We must consider whether:
(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires.
(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
(3) The district court's order is clearly erroneous as a matter of law.
(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules
(5) The district court's order raises new and important problems, or issues of law of first impression.

Clemens v. U. S. Dist. Ct., 428 F. 3 d 1175, 1177-78 (9th Cir. 2005) (quoting Bauman v. United States Dist. Cl., 557 F. $2 d$ 650, 654-55 (9th Cir. 1977)). Not every factor must be present to warrant mandamus relief, see id. at 1178 , and in this case the only disputed issue is whether the district court made a clear error as a matter of law.

## 3. Analysis

Where, as here, the district court's order involves issues of statutory interpretation, the order is clearly erroneous as a matter of law if the reviewing court is left with "a definite and firm conviction that the district court's interpretation of the statute was incorrect." DeGeorge v. United States Dist. Court, 219 F.3d 930, 936 (9th Cir. 2000) [**28] (citing In re Cement Antitrust Litig., 688 F.2d 1297, 1306 (9th Cir. 1982)); see also United States v. Ye, 436 F.3d 1117. 1123 (9th Cir. 2006). Here, the plain language of the statute makes clear that the affirmative defense is not applicable to defendants' actions.

In relevant part, $\S 7413(c)(5)(A)$ states, "[f]or any air pollutant for which the Administrator has set an emissions standard . . ., a release of such pollutant in accordance with that standard . . . shall [*758] not constitute a violation of this paragraph." The first clause of the affirmative defense makes it inapplicable to Grace's alleged asbestos releases. Quite simply, asbestos is not an "air pollutant for which the Administrator has set an emissions standard." $\$ 7413(c)(5)(A)$ (emphasis added). Rather, the Administrator has set several emissions standards, each of which is source dependent. Some asbestos emissions standards make no reference at all to "visible emissions." See 40 C.F.R. §§ $61.143,61.145, \&$ 61.178. Others include additional procedural requirements, above and beyond the "no visible emissions" requirement. See 40 C.F.R. $\$\{$ 61.142, 61.144, 61.146, 61.149 , \& 61.150. In short, there is simply no trans-categorical [**29] emissions standard for asbestos; neither is there an emissions standard for asbestos releases from mining operations. ${ }^{3}$ Therefore, it is inconceivable that the alleged Grace releases were "in accordance with that standard." $\oint 74 l 3(c)(5)(A)$. The plain language of the statute makes clear that the affirmative
defense simply doesn't apply in this case. The district court's order to the contrary leaves us with a "a definite and firm conviction" that it got the law wrong. DeGeorge, 219 F.3d at 936 . Consequently, we grant the government's petition for writ of mandamus, and hold that W. R. Grace can not avail itself at trial of the affirmative defense articulated in 42 U.S.C. § $7413(c)(5)(A)$.

5 A perusal of the table of contents for 40 C.F.R. § 61 shows that most hazardous pollutants do in fact have a single emissions standard, enumerated in a single code section. See, e.g., $\delta \xi$ $61.22,61.32,61.42,61.52$. Asbestos, however, does not. See §§ 61.142-.151.

## IV. Evidentiary Rulings

## 1. Introduction

As stated above, Counts II-IV of the superseding indictment allege violations of 42 U.S.C. § $7413(c)(5)(A)$, the Clean Air Act's knowing endangerment provision, which creates criminal penalties for a person [**30] who "knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title . . . and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury." Defendants filed motions in limine seeking to exclude evidence related to, or testimony based on, certain studies -- EPA indoor air studies ("Indoor Air studies"), Grace's historic testing of its vermiculite products ("Historic Testing"), a report of the Agency for Toxic Substances and Disease Registry based on a medical screening study of residents of Libby, Montana ("ATSDR Report"), and the results of the screening study published as an article in a peer-reviewed journal ("Peipins Publication"). Ruling that these studies were unreliable, irrelevant, or unduly prejudicial, the district court barred government experts from relying on them in forming opinions regarding the knowing endangerment charges, and, as to the indoor air studies, the ATSDR Report, and the Peipins Publication, excluding the studies, report, and publication themselves for most or all purposes. Order, United States v. W. R. Grace, 9:05-cr-00007-DWM, 755 F. Supp. 2d 1172 (Aug. 21 . 2006) ("Indoor [**31] Air Order"); Order, United States v. W. R. Grace, 455 F. Supp. 2d 1177 (2006) ("Historical Testing Order"); Order, United States v. W. R. Grace, 455 F. Supp. 2d 1181 (2006) ("ATSDR and Peipins Order"). The government appeals.

## 2. Standard of Review

This court reviews de novo the district court's interpretation of the Federal Rules of Evidence. United States v. [*759] Sioux, 362 F.3d 1241, 1244 n. 5 (9th Cir.

504 F. 3 d 745 , *; 2007 U.S. App. LEXIS 22435, **;
74 Fed. R. Evid. Serv. (Callaghan) 849; 37 ELR 20244
2004). In general, this court reviews for abuse of discretion a district court's decision to admit or exclude scientific evidence and expert testimony. United States : Finley, 301 F.3d 1000, 1007 (9th Cir. 2002). "[A] trial court has 'broad discretion' in assessing the relevance and reliability of expert testimony." Id. (quoting United States v. Murillo, 255 F.3d 1169. 1178 (9th Cir. 2001)).

## 3. Relevant Rules

Federal Rule of Evidence 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides that relevant evidence is admissible, except as limited by the Constitution, statutes, or other rules of [**32] evidence. Rule 403 provides a balancing test for the exclusion of relevant evidence on the grounds of prejudice: relevant evidence may be excluded if "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...."' ${ }^{6}$

6 Advisory committee notes from 1972 discuss the meaning of unfair prejudice -- the "undue tendency to suggest decision on an improper basis, commonly . . . an emotional one" -- and observe that the "availability of other means of proof may also be an appropriate factor" of determining when there is unfair prejudice.

Several rules apply specifically to testimony by experts. Under Rule 702, an expert witness may provide opinion testimony if "the testimony is based upon sufficient facts or data" and "is the product of reliable principles and methods," which have been "applied . . . reliably to the facts of the case." The rule "affirms the court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and heipfulness of proffered expert testimony." Advisory Comm. Notes, Rule 702 (2000).

Under Rule 703, the "facts or data . . . upon which an expert bases [**33] an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." However, if the expert relies on facts or data that are otherwise inadmissible, then those facts "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." ${ }^{7}$

7 To the extent that inadmissible evidence is reasonably relied upon by an expert, a limiting instruction typically is needed -- i.e., the evidence is admitted only to help the jury evaluate the expert's evidence. E.g., United States v. 0.59 Acres of Land, 109 F.3d 1493, 1496 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion without a limiting instruction). There is a presumption against disclosure to the jury of inadmissible information used as the basis for expert's opinion. See Advisory [**34] Comm. Notes, Rule 703 (2000).

## 4. Analysis

## A. Indoor Air Releases

## i. Background

On May 31, 2006, Defendants filed a motion in limine to exclude evidence of or derived from indoor asbestos releases. Defendants sought to exclude documents and studies, including EPA's Phase II air sampling charts, as well as expert testimony that relied upon these studies. See [*760] Defs' Mot. in Limine Re: Indoor Air Releases at 4-6 (Docket \#473).

On August 28, 2006, the district court granted defendants' motion "with respect to evidence of or derived from indoor releases offered for the purpose of proving an 'ambient air' release in violation of 42 U.S.C. $\hat{\delta}$ 7413(c)(5)(A)." Indoor Air Order at 11. The district court held that "[i]ndoor sampling performed by EPA in the course of its CERCLA activities, and testimony based upon this sampling, is not relevant [under Fed. $R$. Evid. 402] to whether Defendants committed a release in violation of the Clean Air Act, and is not admissible for the purpose of proving such a release." Id. at 8. The court stated that, under Federal Rules of Evidence 403, "[e]vidence derived from EPA testing and sample collection performed as part of its CERCLA analysis has the potential to be [**35] highly confusing and prejudicial," id. at 10 , and barred the evidence for most purposes related to the Clean Air Act counts. However, the court held that the evidence had probative value with respect to defendants' "knowledge of the dangerousness of the asbestos contaminated vermiculite," id. at 8 , relevant to the government's argument that defendants knowingly "place[d] another person in imminent danger of death or serious bodily injury," 72 U.S.C. § 7413 (c)(5)(A), by releasing vermiculite into the community. In addition, the district court held the evidence relevant to the defrauding object of Count l's conspiracy charge and to the four counts of obstruction of justice in the superseding indictment. The district court thus denied the motion with respect to establishing knowledge of risk for the Clean Air Act charges and with respect to proving

504 F.3d 745, *; 2007 U.S. App. LEXIS 22435, **; 74 Fed. R. Evid. Serv. (Callaghan) 849; 37 ELR 20244
the obstruction and conspiracy counts. The government appeals the exclusion of the Indoor Air studies and expert testimony based upon them with regard to the knowing endangerment counts.

## ii. Analysis

The government argues that EPA's Phase II tests show the propensity of the Libby asbestos to release fibers whenever it was disturbed and regardless [ ${ }^{* * 36]}$ of the form the vermiculite took and therefore should be admitted to form the basis of expert testimony. The government also makes an argument that the Indoor Air studies should themselves be admitted as relevant. However, although the govemment makes a valid argument about the friability of Libby asbestos being the same whether indoors or outdoors, the probative value of the EPA studies is possibly outweighed by the danger of unfair prejudice. First, the studies' overall probative value is low because they largely concem the asbestos releases at various indoor locations in Grace's Libby mining and milling operation. There is some information in the studies regarding the friable character of Libby asbestos, but not much. There is a risk of unfair prejudice because the indoor releases may not reflect the level of releases into the ambient air, and there is some language in the studies regarding asbestos-related diseases in Libby that may mislead or confuse the jury into believing that releases into indoor air proves releases into ambient air. Finally, even if this court disagreed with the district court's Rule 403 balancing, "[a]n appellate court will not reengage in a balancing of [**37] the probative value and prejudicial effect." Rogers v. Raymark Industries, Inc., 922 F.2d 1426, 1430 (9th Cir. 1991). The district court's decision to bar the use of documents and studies derived from indoor air releases for the purpose of proving a release into the ambient air was within its discretion.

It is a separate question, however, whether the district court abused its discretion [*761] in excluding expert testimony based on documents and studies derived from indoor air releases. The district court did not conduct an inquiry under Rule $702^{\prime}$ or $703^{\text {" }}$ in its August 28th order. Rule 703 provides, "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." (Emphasis added.) The government persuasively argues that the proper remedy for the problems associated with the indoor air studies is to prevent an expert from disclosing the prejudicial facts instead of preventing the expert from relying on them altogether. Allowing expert testimony based on the EPA studies "will assist the trier of fact to understand the evidence [**38] or to determine a fact in issue" under Rule 702 because the studies may show the propensity of the
asbestos-contaminated vermiculite to release asbestos fibers into the ambient air. While the specific asbestos concentration levels discussed in the studies are not relevant because the studies largely measured indoor air releases and gathered data under conditions different from the ambient air releases relevant to the statute, the government's experts should be permitted to opine generally about the friability of Libby asbestos based in part on the data in the studies. The data from the indoor sampling is relevant to the propensity of Libby asbestos to release fibers upon disturbance. Based on these data, an expert could testify about friability and whether a release of asbestos would occur if asbestos-contaminated vermiculite were exposed or disturbed. Because the district court did not inquire into whether the data provided by the indoor air tests is of the type reasonably relied upon by experts in the field, see Fed. R. Evid. 703, or whether the data fits under Rule 702, we remand so that the district court can conduct these inquiries in the first instance.

8 Fed. R. Evid. 702 provides, [**39] "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."
9 Fed. R. Evid. 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

## B. W.R. Grace's Historic Product Testing

## i. Background

On May 31, 2006, defendants filed a motion in 1imine to exclude expert opinions regarding Grace's historical, nonambient air product $\left[{ }^{* *} 40\right]$ and commercial testing. Defendants sought to exclude the testimony of Dr. Richard Lemen, ${ }^{13}$ Dr. Vemon Rose, "Paul Peronard, ${ }^{12}$ Dr. Aubrey Miller, ${ }^{13}$ Dr. Chris Weis, ${ }^{4}$ and other government witnesses who might "attempt to [*762] draw unsupportable correlations between Grace's historical
product and commercial tests and expected ambient air exposures from disturbances of vermiculite materials found in the town of Libby." Defs' Mot. in Limine Re: Historic Testing at 4 (Docket \# 496). On August 29, 2006, the district court granted defendants' motion to exclude expert testimony based on historic testing offered to prove a release in violation of 42 U.S.C. $\oint$ 7413 (c)(5)(A). Historic Testing Order 455 F. Supp. 2d at 1181 . The district court denied defendants' motion with respect to expert testimony based on historic testing offered for the purpose of showing defendants' knowledge of the dangerousness of the asbestos contaminated vermiculite. Id.

10 Docket \# 287.
11 Docket \# 283.
12 Docket \# 281 .
13 Docket \# 279.
14 Docket \# 286.

## ii. Analysis

Rule 702 authorizes expert testimony that "will assist the trier of fact" when the testimony "is based upon sufficient facts or data," the testimony is produced through "reliable principles [**4i] and methods," and the expert witness "has applied the principles and methods reliably to the facts of the case." Generally, an inquiry under Rule 702 examines the expert's testimony as a whole. The 702 inquiry typically does not examine the reliability or relevance of particular data sets that underlie the expert testimony, although this approach does no harm where the expert testifies on only one study or where no combination or addition of data could make the data in question a proper, reliable basis for making a given claim. In contrast to Rule 702's holistic focus on an expert's testimony, Rule 703 governs the inquiry into the reliability of particular data underlying expert testimony. Fed. R. Evid. 703; see also Claar v. Burlington Northern R. Co., 29 F. 3 d 499, 501 (9th Cir. 1994).

Here, the district court excluded the historic testing data under Rule 702. This document-based approach creates the problem that one cannot know fully whether or in what ways other information sources are meant to, in combination with the challenged data sources, form the premise for the expert testimony. Each document must be dispositive under the district court's approach, a requirement we do not $[* * 42]$ impose under Rule 702 . On remand, the district court shall conduct the Rule 702 analysis in light of the expert's reasoning and methodology as a whole.

Faced with this new 702 analysis, defendants presumably will argue, as they do on appeal, that the historic testing evidence fails the "fit" test under Daubert $v$. Merrell Dow Pharms.., 509 U.S. 579, 113 S. Ct. 2786,

125 L. Ed. 2d 469 (1993). "In response, the government argues that its experts do not plan to rely on the historic testing data to estimate the fiber concentrations from the charged releases, but only to opine generally on the hazardous characteristics ${ }^{\text {16 }}$ of Libby asbestos contaminated vermiculite. This limited use of the study to inform experts' opinions is permissible, because the propensity of Libby asbestos to release fibers fits the release element of the knowing endangerment provision. The district court did not consider this propensity-to-release inquiry, thus abusing its discretion by excluding this evidence under 702 .

15 This phrasing of the argument improperly focuses the 702 inquiry on a docu-ment-by-document approach that we disapproved supra.
16 I.e., the propensity of Libby asbestos to break down and release fibers into the ambient air.

Defendants [ ${ }^{* *} 43$ ] make two additional, ultimately unsupportable arguments. First, they argue that the testimony's exclusion under Rule 702 was proper because the [*763] government's experts "do not need" the evidence on historic air releases to testify about the friability of Libby asbestos. This argument misconceives Rule 702's inquiry, which focuses on fitmess, relevance, and reliability, not on whether an expert potentially has other evidence on which to base an opinion. Second, defendants argue that the district court properly excluded the testimony under Rule 403 in addition to Rule 702. Contrary to defendants' assertion, however, the district court did not rely on Rule 403 in its historic testing order but discussed the admissibility of expert testimony only under Rule 702. Moreover, an expert reasonably may rely on inadmissible evidence in forming an opinion or delivering testimony. See Fed. R. Evid. 703.

The question remains whether data concerning indoor air quality are of the type reasonably relied on by other experts in the field. See Fed. R. Evid. 703. Although it appears that the district court never conducted this 703 inquiry, the second step of the Rule 702 analysis -- that the study was "the [ ${ }^{* *} 44$ ] product of reliable principles and methods" -- presumably answers this question in the affirmative. See Rule 702; see also Claar, 29 F. 3 d at 501 ("Rule 703 merely relaxes, for experts, the requirement that witnesses have personal knowledge of the matter to which they testify," not whether the requirements of 702 are properly met). Although not stated explicitly, the order implicitly found the historic testing reliable in finding it admissible under 702 to show knowledge. Historic Testing Order 455 F. Supp. $2 d$ at 1/79. Thus, the historic testing is admissible for purposes of expert opinion formation and testimony regarding
the propensity of Libby vermiculite to release asbestos as relevant to 42 U.S.C. § $7413(c)(5)(A)$. Accordingly, we reverse the district court order excluding such testimony.
C. Medical Screening Study: ATSDR and Peipins Publication

## i. Background

In 2000-2001, the Agency for Toxic Substances and Disease Registry ("ATSDR") conducted a medical screening study in Libby (the "ATSDR Report") to detect pleural abnormalities in Libby residents and to inform priority-setting in EPA's asbestos clean-up operation. The study entailed interviewing and medically testing individuals who had lived, worked, [**45] attended school, or participated in other activities in Libby for at least six months before 1990. Questions were asked to identify individuals who had accessed potential "exposure pathways" to asbestos and vermiculite prior to December 31, 1990. For example, "pathways" included employment at W. R. Grace, living with W. R. Grace workers, using vermiculite for gardening, and engaging in recreational activities in certain locations known to contain vermiculite. Information about other basic demographic variables and risk factors was also gathered, e.g., age, sex, smoking status, history of pulmonary disease and various other self-reported health conditions.

ATSDR published an initial report of the study's findings in February 2001. The complete results of the study (the "Peipins Publication") were published in November 2003 in Environmental Medicine, a peer-reviewed journal. The Peipins Publication analysis used regression modeling to estimate the risk of respiratory abnormalities for each of the exposure pathways while controlling for all other pathways and other established and suggested risk factors.

The study showed that certain factors -- including cxposure to particular pathways [**46] -- were associated with respiratory illness and abnormalities. The factors most strongly associated with abnormalities [*764] were: being a former W. R. Grace employee, bcing older, having had household contact with a former W. R. Grace worker, and being male. (The study also demonstrated "a statistically significant increase in the prevalence of pleural abnormalities with an increasing number of exposure pathways." While "participants reporting more pathways might be expected to have more cumulative exposure than would those reporting fewer pathways," this was not data gathered by the study; the study identified avenues for exposure but did not quantify the duration or intensity of individuals' exposures.

Both the interim ATSDR Report and the final Peipins Publication noted that the study had no control group and "no directly comparable Montana or U.S.
population studies [were] available." The researchers were able to compare the data gathered with studies of other groups with substantive work-related asbestos exposure. The levels of pleural abnormalities were higher in Libby than in studies of other groups, but the study did not engage in any direct quantitative comparison. ${ }^{17}$

17 The results [**47] of the ATSDR Report were also compared with "control groups or general populations found in other studies." That comparison showed that the levels of pleural abnormalities were also higher in Libby for those who claimed "no apparent exposure" to particular pathways than subjects in other studies. This supported the study's conclusion that it was unlikely that there were individuals in Libby who had not been exposed to some degree.
On May 31, 2006, defendants filed a motion in limine "to exclude expert evidence relating to the ATSDR Medical Testing Program." Defs' Mot. in Limine Re: ATSDR (Docket \#500,502). The district court characterized the motion as one to exclude "any evidence or expert testimony relating to" the medical screening study conducted in Libby by the Agency for Toxic Substances and Disease Registry. ATSDR Order 455 F. Supp. 2d 1181 at 1183. The government did not object to the court's characterization of defendants' motion. On August 3I, 2006, the district court granted defendants' motion. The court ruled that the ATSDR Report and Peipins Publication, and any expert testimony based thereon, were excluded under Rules 403 and 702 for any purpose relating to the Clean Air Act knowing endangerment [**48] counts. Id. at ll95.

## ii. Analysis

The district court acted within its discretion in excluding the ATSDR Report and Peipins Publication themselves under Rule 403 for purposes of the knowing endangerment counts. There are limits to the probative value ${ }^{18}$ of the particular correlations the ATSDR Report revealed and potentially prejudicial aspects to the data. Moreover, the government failed to contest the district court's undue prejudice conclusion. Because Rule 403 requires the district court to balance the probative value and the prejudicial effects of a piece of evidence, failure to raise and argue prejudice [*765] generally waives the argument. See United States v. Wilson, 966 F.2d 243, 245-46 (7th Cir. 1992).

18 The study demonstrated an association between negative health outcomes and an individual's unquantified exposure to vermiculite via particular "pathways" prior to the statutory period. The existence of association -- and not causation -- goes to the probative value of the evidence.

The reported findings did not indicate that all exposure pathways were significantly associated with lung abnormalities (for example, gardening with vermiculite is not one of the factors mentioned as one being [**49] associated with such abnormalities). Because the data were gathered before the statutory period, it is questionable how reliable a basis they provide for drawing conclusions about the extent of the dangers posed by ambient releases during the statutory period, i.e., concentration or duration of releases. However, this is more an issue for the expert than the court.

However, in excluding this evidence from informing expert opinion and testimony, the district court erred. The expert is, in the first instance, the judge of what resources would help him to form an opinion, and he can filter out as irrelevant prejudicial information. The trial judge is to assure the reliability of evidence by vetting under Rule 703 the bases underlying the expert's testimony and by examining under Rule 702 the expert's methodology. Here, however, the trial judge misapplied Rule 702 and replaced inappropriately the Rule 703 analysis with one under Rule 403.

To begin, the district court concluded that the ATSDR medical screening program and resulting analyses did not establish a causal link between exposure to Libby's vermiculite and the development of asbes-tos-related disease. The ATSDR Report acknowledged [**50] repeatedly that the testing program was not designed as an epidemiological study to show causality. Notably, there was no internal control group and the participants were self-selected, rather than randomly selected. In light of this, the district court concluded that the data could not provide experts with a reliable basis for opining as to causality (i.e., the danger posed by the releases from Libby vermiculite).

Nonetheless, one of the main objectives of the ATSDR Report was to examine the association between pleural and interstitial abnormalities and participants' exposure histories .- measured in broad terms by the participants' overall contact with exposure pathways. As the district court acknowledged, the govermment's experts did not claim that they intended to use the study to show causation, but rather indicated that they would rely on the evidence to show that there were some associations or correlations between exposure to vermiculite in Libby and pleural abnormalities.

The district court took the view that the jury would be unlikely to distinguish between evidence of an association and evidence of causation and therefore would likely be misled, and would place undue reliance [**51] on the evidence. In this respect, the court substantially underestimated the capacity of jury instructions to dis-
tinguish these relationships, and the potential efficacy of a limiting instruction.

Further, the fact that a study is associational -- rather than an epidemiological study intended to show causation -- does not bar it from being used to inform an expert's opinion about the dangers of asbestos releases, assuming the study is "of the type typically relied upon" by experts in the field. Fed. R. Evid. 703. Of course, the expert's opinion testimony must satisfy the requirements of Rule 702--but that requires consideration of the overall sufficiency of the underlying facts and data, and the reliability of the methods, as well as the fit of the methods to the facts of the case. Fed. R. Evid. 702.

Here, the district court failed to consider the Rule 702 requirements with regard to causation. Instead, as with the historical testing, the court conducted a docu-ment-by-document Rule 702 analysis that deconstructed the experts' testimony in a manner not contemplated by Rule 702. Moreover, the study, which was published in a peer-reviewed journal and relevant to association, is adequate [**52] under 702. The study's failure to establish causation goes to the weight it should be accorded, but does not mean that an expert could not rely on it in forming an opinion.

Nor did the district court consider the possibility of expert reliance on the ATSDR Report without disclosure of the [*766] study itself to the jury, as provided for by Rule 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."). In fact, the district court generally failed to conduct a 703 analysis, such as considering whether this study was "of the type" relied upon by experts in the field, or whether the ATSDR Report's "probative value . . . substantially outweighs [its] prejudicial effect." Fed. R. Evid. 703.

Instead, the district court excluded expert testimony regarding the ATSDR Report under Rule 403. This ruling improperly replaced 703 balancing with 403 balancing, cf. Fed. R. Evid. 703 (providing balancing test applicable to expert testimony), and the exclusion of the ATSDR Report and Peipins Publication as bases for expert testimony [**53] or opinion formation was error. While Rule 403 supplies a basis for holding the underlying ATSDR Report inadmissible, it does not contemplate barring an expert from relying on it. Cf. Fed. R. Evid. 403. The exclusion of the ATSDR Report and the Peipins Publication from expert consideration and testimony was error, and thus we reverse that part of the ATSDR Order.

## V. Motion to Strike

In its reply brief to this court, the government submitted six documents not included in the record be-low--two excerpts of the federal register (addenda 1 and 3), a report of the National Research Council (addendum 2), published scientific articles (addenda 5 and 6 ), and search results presumably from the CAS Registry (addendum 4). Defendants moved to strike four of the documents (addenda $2,4,5$, and 6) on the grounds that they were not part of the record below, were misleading, and, by virtue of their submission in the reply brief, were presented without giving defendants an opportunity to respond.

In general, we consider only the record that was before the district court. We have made exceptions to this general rule in three situations: (1) to "correct inadvertent omissions from the record," (2) to "take [**54] judicial notice," and (3) to "exercise inherent authority . . . in extraordinary cases." Lowry v. Barnhart, 329 F. 3 d 1019, 1024 (9th Cir. 2003). Considerations of institutional expertise and notice support our limitation of these exceptions to "unusual circumstances." $1 d$.

The search results in addendum item 4 fit none of these exceptions. Addendum items 2,5 , and 6 fit within the second exception--we have discretion to take judicial notice under Rule 201 of the existence and content of published articles. See Bell Allantic Corp. v. Twombly, U.S. , n.13, 127 S. Ct. 1955, 1973 n.l3, 167 L. Ed. $2 d 929$ (2007); United States v. Rutgard, 116 F.3d 1270, 1278 (9th Cir. 1997). However, as we have stated before, the appropriate manner to supplement the record
on appeal is "by motion or formal request so that the court and opposing counsel are properly apprised of the status of the documents in question." Lowry, 329 F. 3 d at 1025. The [**55] government failed to so move, and thus we grant defendants' motion to strike. However, due to the reversal and remand on certain issues, our ruling here does not preclude application to the district court for inclusion in the district court's record for whatever use is appropriate.

## CONCLUSION

We reverse the order dismissing the knowing endangerment object of Count $I$ of the superseding indictment. We reverse [*767] the order adopting the regulatory definition of asbestos used for civil regulation and direct that the definition in the criminal statute, i.e., the definition provided in 42 U.S.C. $\S 7 \neq 12(b)$, applies. We grant the government's request for a writ of mandate. We affirm the exclusion of the indoor air studies, the ATSDR Report, and the Peipins Publication themselves. However we reverse their exclusion -- and the exclusion of the historic testing -- as bases underlying an expert's opinion or testimony. Finally, we grant defendants' motion to strike the documents included with the government's reply brief to this court.

[^4]
## EXHIBIT "3"

LEXSEE 377 U.S. 360
BAGGETT ET AL. v. BULLITT ET AL.
No. 220

## SUPREME COURT OF THE UNITED STATES

377 U.S. 360; 84 S. Ct. 1316; 12 L. Ed. 2d 377; 1964 U.S. LEXIS 1140

## March 24, 1964, Argued <br> June 1, 1964, Decided

## PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

DISPOSITION: 215 F.Supp. 439, reversed.

## SUMMARY:

The present class action was instituted in the United States District Court for the Western District of Washington by personnel of the University of Washington for a declaration that (1) a 1931 Washington statute requiring teachers to swear a loyalty oath as a condition of their employment, and (2) a 1955 Washington statute containing oath requirements applicable to all state employees, were invalid. A three-judge District Court denied relief, ruling (1) as to the 1955 oath and underlying statutory provisions, that there was no infringement upon any First and Fourteenth Amendment freedoms and that the statutes were not unduly vague, and (2) as to the 1931 oath, that adjudication was not proper in the absence of proceedings in the state courts which might resolve or avoid the constitutional issue. (2/5 F Supp 439.)

On direct appeal, the United States Supreme Court reversed. In an opinion by White, J., expressing the views of seven members of the Court, it was held that all the Washington statutes attacked in the complaint were invalid on the ground of vagueness, and that there were no circumstances supporting the lower court's abstention from decision.

Clark, J., joined by Harlan, J., dissented, expressing the view that the 1955 Act was not invalid on the ground of vagueness, and that as regards the 1931 Act, the state
courts should have been afforded an opportunity to interpret the state law.

## LAWYERS' EDITION HEADNOTES:

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[***LEdHN1]
    STATUTES §17
    vagueness --
    Headnote:[1]
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A law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.
[***LEdHN2]

## STATUTES §17

vagueness -- requirement of loyalty oath. --
Headnote:[2]
Unconstitutional vagueness invalidates a state statute which, as a condition of employment, requires every teacher and other state employee to swear that he is not a subversive person--such person being not only one who himself commits specified acts but also one who abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional govemment --and that he will not knowingly become or remain a member of a subversive organization, such organization being defined as one which engages in or assists activities intended to alter or overthrow the government by force or violence or which has as a purpose the commission of such acts.

## [***LEdHN3]

APPEAL § 727
construction of state statute -- binding on United States Supreme Court --

Headnote:[3]
The United States Supreme Court will accept the construction given by the highest state court to a statute requiring state employees to sign a loyalty oath, that the affiant's knowledge of activities of others is to be read into every provision of the statute.

> [***LEdHN4]

## STATUTES § 17

vagueness -- loyalty oath --
Headnote:[4]
The due process clause of the Fourteenth Amendment is offended, because of vagueness, by a statute which requires every teacher to swear an oath exacting a promise that the affiant will, by precept and example, promote respect for the flag and the institutions of the United States and the state, and promote undivided allegiance to the Government of the United States.

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[***LEdHN5]
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## STATUTES § 17

vagueness -- constitutional rights --
Headnote:[5]
The vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affimatively guaranteed by the Federal Constitution.
[***LEdHN6]

CONSTITUTIOINAL LAW $\$ 927$
freedom of speech -- loyalty oath --
Headnote:[6]
Freedom of speech is violated by a state statute which requires every teacher to swear a loyalty oath, where he, with a conscientious regard for the solemnity of an oath and sensitive to the perils posed by the oath's indefinite language, can avoid the risk of loss of employment, and perhaps profession, only by restricting his conduct to that which is unquestionably safe.
[***LEdHN7]
STATUTES §18

## penal -- vagueness --

## Headnote:[7]

The invalidity, on the ground of vagueness, of state statutes requiring, subject to perjury penalties, public servants to swear a loyalty oath, is not cured (1) by the expectation that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions, and (2) by the fact that the vagaries of the statute are contained in a promise of future conduct, the breach of which would not support a conviction for perjury.

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[***LEdHN8]
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    STATUTES §I8
    penal -- vagueness --
    
## Headnote:[8]

A state may not require a public servant to choose between subscribing to an unduly vague and broad loyalty oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where the free dissemination of ideas may be endangered; it is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be reaily no rule or standard at all.
[ ${ }^{* * * \text { LEdHN9] }}$
COURTS $\$ 757$
abstention doctrine --
Headnote:[9]
The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law, but rather involves a discretionary exercise of a court's equity powers; ascertainment of whether there exists the special circumstances prerequisite to application of the doctrine must be made on a case-to-case basis.

## [***LEdHN10]

COURTS $\$ 757.5$
federal -- duty to await state court decision --
Headnote:[10]
Special circumstances prerequisite to a federal court's submitting to the state courts questions of construing a state loyalty oath statute attacked as unconstitutional on the ground of vagueness do not exist where (1)
a construction of the oath provisions, in the light of the vagueness challenge, would not avoid or fundamentally alter the constitutional issue raised in the litigation, (2) the challenged oath is open not to one or a few interpretations but to an indefinite number, (3) construction of the oath requirements in the state courts, without reference to particularized situations, would very likely pose other constitutional issues for decision, and (4) remitting the litigants to the state courts would further protract proceedings already pending for almost two years.

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[***LEdHNII]
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## SEDITION AND SUBVERSIVE ACTIVITIES §1

## state power --

Headnote:[11]
A state has the power to take proper measures safeguarding the public service from disloyal conduct.
[***LEdHN12]
OFFICERS §5
qualification --

## Headnote:[12]

The fact that a person is not compelled to hold public office cannot be an excuse for barring him from office by state-imposed criteria forbidden by the Federal Constitution.

## SYLLABUS

This class action was brought by members of the faculty, staff, and students of the University of Washington for a judgment declaring unconstitutional 1931 and 1955 state statutes requiring the taking of oaths, one for teachers and the other for all state employees, including teachers, as a condition of employment. The 1931 oath requires teachers to swear, by precept and example, to promote respect for the flag and the institutions of the United States and the State of Washington, reverence for law and order and undivided allegiance to the Government of the United States. The 1955 oath for state employees, which incorporates provisions of the state Subversive Activities Act, requires the affiant to swear that he is not a "subversive person": that he does not commit, or advise, teach, abet or advocate another to commit or aid in the commission of any act intended to overthrow or alter, or assist in the overthrow or alteration, of the constitutional form of government by revolution, force or violence. "Subversive organization" and "foreign subversive organization" are defined in similar terms and the Communist Party is declared a subversive organization. A three-judge District Court held that the 1955 statute and oath were not unduly vague and did not
violate the First and Fourteenth Amendments, and it abstained from ruling on the 1931 oath until it was considered by the state courts. Held:

1. The provisions of the 1955 statute and the 1931 Act violate due process since they, as well as the oaths based thereon, are unduly vague, uncertain and broad. Cramp v. Board of Public Instruction, 368 U.S. 278, followed. Pp. 361-372.
2. A State cannot require an employee to take an unduly vague oath containing a promise of future conduct at the risk of prosecution for perjury or loss of employment, particularly where the exercise of First Amendment freedoms may thereby be deterred. Pp. 373-374.
3. Federal courts do not automatically abstain when faced with a doubtful issue of state law, since abstention involves a discretionary exercise of equity power. Pp. 375-379.
(a) There are no special circumstances warranting application of the doctrine here. P. 375.
(b) Construction of the 1931 oath cannot eliminate the vagueness from its terms, and would probably raise other constitutional issues. P. 378.
(c) Abstention leads to piecemeal adjudication and protracted delays, a costly result where First Amendment freedoms may be inhibited. Pp. 378-379.

COUNSEL: Arval A. Morris and Kenneth A. MacDonald argued the cause and filed a brief for appellants.

Herbert H. Fuller, Deputy Attorney General of Washington, argued the cause for appellees. With him on the brief were John J. O'Connell, Attorney General of Washington, and Dean A. Floyd, Assistant Attorney General.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

## OPINION BY: WHITE

## OPINION

[*361] [***379] [**1317] MR. JUSTICE WHITE delivered the opinion of the Court.

Appellants, approximately 64 in number, are members of the faculty, staff and student body of the University of Washington who brought this class action asking for a judgment declaring unconstitutional two Washington statutes requiring the execution of two different oaths by state employees and for an injunction against the enforcement of these statutes by appellees, the President of
the University, members of the Washington State Board of Regents and the State Attomey General.

The statutes under attack are Chapter 377, Laws of 1955, and Chapter 103, Laws of 1931, both of which require employees of the State of Washington to take the oaths prescribed in the statutes as a condition of their employment. The 1931 legislation applies only to teachers, who, upon applying for a license to teach or renewing an existing contract; are required to subscribe to the following:
"I solemnly swear (or affirm) that I will support the constitution and laws of the United States of [*362] America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." Wash. Laws 1931, c. 103.

The oath requirements of the [ ${ }^{* * * 380]} 1955$ Act, Wash. Laws 1955, c. 377, applicable to all state employees, incorporate various provisions of the Washington Subversive Activities Act of 1951, which provides generally that "no subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." Wash. Rev. Code § 9.81.060. The term "subversive person" is defined as follows:
"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state [**1318] of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." Wash. Rev. Code § 9.81.010 (5).

The Act goes on to define at similar length and in similar terms "subversive organization" and "foreign subversive organization" and to declare the Communist Party a subversive [*363] organization and membership therein a subversive activity.'

1 "'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activi-
ties intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence." Wash. Rev. Code $\{9.81 .010$ (2).
"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." Wash. Rev. Code $\$ 9.81 .010$ (3).
"COMMUNIST PARTY DECLARED A SUBVERSIVE ORGANIZATION.
"The communist party is a subversive organization within the purview of chapter 9.81 and membership in the communist party is a subversive activity thereunder." Wash. Rev. Code § 9.81.083.

On May 28, 1962, some four months after this Court's dismissal of the appeal in Nostrand v. Little, 368 U.S. 436 , also a challenge to the 1955 oath, ${ }^{2}$ the University [*364] President, acting pursuant to directions of the [***381] Board of Regents, issued a memorandum to all University employees notifying them that they would be required to take an oath. Oath Form A ${ }^{3}$ requires all teaching personnel [*365] to swear [**1319] to the oath of allegiance set out above, to aver that they have read, are familiar with and understand the provisions defining "subversive person" in the Subversive Activities Act of 1951 and to disclaim being a subversive person and membership in the Communist Party or any other subversive or foreign subversive organization. Oath Form B + requires other state employees to subscribe to all of the [***382] above provisions except the 1931 oath. Both forms provide that the oath and [*366] statements pertinent thereto are made subject to the penalties of perjury.

2 Although the 1931 Act has not been the subject of previous challenge, an attack upon the 1955 loyalty statute was instituted by two of the
appellants in the present case, Professors Howard Nostrand and Max Savelle, who brought a declaratory judgment action in the Superior Court of the State of Washington asking that Chapter 377, Laws of 1955, be declared unconstitutional and that its enforcement be enjoined. The Washington Supreme Court held that one section was unconstitutional but severable from the rest of the Act, whose validity was upheld. Nostrand $v$. Balmer, 53 Wash. $2 d 460,335$ P. $2 d 10$. On appeal to this Court the decision of the Washington court was vacated and the case remanded for a determination of whether employees who refused to sign the oath would be afforded a hearing at which they could explain or defend the reasons for their refusal. Nostrand v. Little, 362 U.S. 474. The Washington Supreme Court held upon remand that since Professors Nostrand and Savelle were tenured professors the terms of their contracts and rules promulgated by the Board of Regents entitled them to a hearing. Nostrand $\nu$. Little, 58 Wash. 2d 111, 361 P. 2d 551. This Court dismissed a further appeal, Nostrand $v$. Little, 368 U.S. 436. The issue we find dispositive of the case at bar was not presented to this Court in the above proceedings.
3 "Oath Form A
"STATE OF WASHINGTON
"Statement and Oath for Teaching Faculty
of the University of Washington
"l, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;
" 1 further certify that 1 have read the provisions of $R C W$ 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083, which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that 1 am not a subversive person as therein defined; and
" 1 do solemnly swear (or affirm) that 1 am not a member of the Communist party or knowingly of any other subversive organization.
"I understand that this statement and oath are made subject to the penalties of perjury.
(SIGNATURE)
........? ?.......
(TITLE AND DEPARTMENT)
"Subscribed and swom (or affirmed) to before me this ........ day of ............., 19....

## NOTARY PUBLIC IN AND FOR THE

 STATE OF WASHINGTON,RESIDING AT
"(To be executed in duplicate, one copy to be retained by individual.)
"NOTE: Those desiring to affirm may strike the words 'swear' and 'swom to' and substitute 'affirm' and 'affirmed,' respectively."

## 4 "Oath Form B

"STATE OF WASHINGTON
"Statement and Oath for Staff of the University of WashingtonOther Than Teaching Faculty
"I certify that I have read the provisions of $R C W$ 9.81.010 (2), (3), and (5); RCW 9.81.060; $R C W$ 9.81.070; and $R C W 9.81 .083$ which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and
"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.
"I understand that this statement and oath are made subject to the penalties of perjury.
(SIGNATURE)
(TITLE AND DEPARTMENT OR OFFICE)
"Subscribed and sworn (or affirmed) to before me this ........... day of $\qquad$ 19....

NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON,

## RESIDING AT

$\qquad$
"(To be executed in duplicate, one copy to be retained by individual.)
"NOTE: Those desiring to affirm may strike the words 'swear' and 'sworn to' and substitute 'affirm' and 'affirmed,' respectively,"
Pursuant to 28 U. S. C. §§ 2281, 2284, a three-judge District Court was convened and a trial was had. That court determined that the 1955 oath and underlying statutory provisions did not infringe upon any First and Fourteenth Amendinent freedoms and were not unduly vague. In respect to the claim that the 1931 oath was unconstitutionally vague on its face, the court held that although the challenge raised a substantial constitutional issue, adjudication was not proper in the absence of proceedings in the state courts which might resolve or avoid the constitutional issue. The action was dismissed. 215 F.Supp. 439 . We noted probable jurisdiction because of the public importance of this type of legislation and the recurring serious constitutional questions which it presents. 375 U.S. 808 . We reverse.

## 1.

Appellants contend in this Court that the oath requirements and the statutory provisions on which they are based are invalid on their face because their language is unduly vague, uncertain and broad. We agree with this $\left[{ }^{* *} 1320\right]$ contention and therefore, without reaching the numerous other contentions pressed upon us, confine our considerations to that particular question.

5 Since the ground we find dispositive immediately affects the professors and other state employees required to take the oath, and the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel, we have no occasion to pass on the standing of the students to bring this suit.
[***LEdHR1] [1]In Cramp v. Board of Public Instruction, 368 U.S. 278 , the Court invalidated an oath requiring teachers and other employees of the State to swear that they had never lent their "aid, support, advice, counsel or influence to the Communist Party" because the oath was lacking in [*367] "terms susceptible of objective measurement" and failed to inform as to what the State commanded or forbade. The statute therefore fell within the compass of those decisions of the Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. Connally $v$. General Construction Co., 269 U.S. 385; Lanzetta v. New Jersey, 306 U.S. $45 I$; Joseph Burstyn, Inc., v. Wil-
son, 343 U.S. 495; United States v. Cardiff, 344 U.S. 174; Champlin Refining Co.v. Corporation Comm'n of Oklahoma, 286 U.S. 210.
[***LEdHR2] [2]The oath required by the 1955 statute suffers from similar infirmities. A teacher must swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force or violence. A subversive organization is defined as one which [***383] engages in or assists activities intended to alter or overthrow the Govemment by force or violence or which has as a purpose the commission of such acts. The Communist Party is declared in the statute to be a subversive organization, that is, it is presumed that the Party does and will engage in activities intended to overthrow the Government. ${ }^{\text {s }}$ Persons required to swear they understand [*368] this oath may quite reasonably conclude that any person who aids the Communist Party or teaches or advises known members of the Party is a subversive person because such teaching or advice may now or at some future date aid the activities of the Party. Teaching and advising are clearly acts, and one cannot confidently assert that his counsel, aid, influence or support which adds to the resources, rights and knowledge of the Communist Party or its members does not aid the Party in its activities, activities which the statute tells us are all in furtherance of the stated purpose of overthrowing the Govemment by revolution, force, or violence. The questions put by the Court in Cramp may with equal force be asked here. Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist [**1321] Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party? The susceptibility of the statutory language to require forswearing of an undefined variety of "guiltless knowing behavior" is what the Court condemned in Cramp. This statute, like the one at issue in Cramp, is unconstitutionally vague. ${ }^{7}$

6 The drafters of the 1951 Subversive Activities Act stated to the Washington Legislature that "the [Communist Party] dovetailed, nation-wide program is designed to . . create unrest and civil strife, and impede the normal processes of state and national government, all to the end of weakening and ultimately destroying the United States as a constitutional republic and thereby facilitating the avowed Soviet purpose of substitut-
ing here a totalitarian dictatorship." First Report of the Joint Legislative Fact-Finding Committee on Un-American Activities in Washington State, 1948, p. IV.
7 The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in Gerende v. Board of Supervisors, 341 U.S. 56 , is without merit. It was forcefully argued in Gerende that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged "tin the attempt to overthrow the government by force or violence,' and that he is not knowingly a member of an organization engaged in such an attempt." Id., at $56-57$ (emphasis in original). The Court said: "At the bar of this Court the Attomey General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is Affirmed." ld., at 57.
[*369] [***LEdHR3] [3]The Washington statute suffers from additional difficulties on vagueness grounds. A person is subversive not only if he himself commits the specified acts but if he abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional government. The Washington [***384] Supreme Court has said that knowledge is to be read into every provision and we accept this construction. Nostrand v. Balmer, 53 Wash. 2d 460, 483-484, 335 P. 2d 10, 24; Nostrand v. Little, 58 Wash. 2d 111 . 123-124, 361 P. $2 d$ 55l, 559. But what is it that the Washington professor must "know"? Must he know that his aid or teaching will be used by another and that the person aided has the requisite guilty intent or is it sufficient that he know that his aid or teaching would or might be useful to others in the commission of acts intended to overthrow the Government? Is it subversive activity, for example, to attend and participate in interna-
tional conventions of mathematicians and exchange views with scholars from Communist countries? What about the editor of a scholarly journal who analyzes and criticizes the manuscripts of Communist scholars submitted for publication? Is selecting outstanding scholars from Communist countries as visiting professors and advising, teaching, or consulting with them at the University of Washington a subversive activity if such scholars are known to be Communists, or regardless of their affiliations, regularly teach students [*370] who are members of the Communist Party, which by statutory definition is subversive and dedicated to the overthrow of the Govemment?

The Washington oath goes beyond overthrow or alteration by force or violence. It extends to alteration by "revolution" which, unless wholly redundant and its ordinary meaning distorted, includes any rapid or fundamental change. Would, therefore, any organization or any person supporting, advocating or teaching peaceful but far-reaching constitutional amendments be engaged in subversive activity? Could one support the repeal of the Twenty-second Amendment or participation by this country in a world government? ${ }^{\text {s }}$

8 It is also argued that $\S 2$ of the Smith Act, 18 U. S. C. § 2385, upheld over a vagueness challenge in Dennis v. United States, 341 U.S. 494, proscribes the same activity in the same language as the Washington statute. This argument is founded on a misreading of $\S 2$ and Dennis $\nu$. United States, supra.

That section provides:
"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the govermment of any State . . . by force or violence...."

The convictions under this provision were sustained in Dennis, supra, on the construction that the statute means "teaching and advocacy of action for the accomplishment of [overthrowing or destroying organized government] by language reasonably and ordinarily calculated to incite persons to such action ... as speedily as circumstances would permit." Id., at 5/l-5/2. In connection with the vagueness attack, it was noted that "this is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. . . " Id, at 502.

In reversing convictions under this section in Yates v. United States. 354 U.S. 298, the Court made quite clear exactly what all the above terms do and do not proscribe: "The Smith Act reaches only advocacy of action for the overthrow of government by force and violence." [d., at 324.
[*371] II.
[**1322] [***LEdHR4] [4]We also conclude that the 1931 oath offends due process because of vagueness. The oath exacts a promise that the affiant will, by precept and example, promote respect for the flag and the institutions of the United States and the State of Washington. The range of activities which are or might be deemed [ ${ }^{* * *} 385$ ] inconsistent with the required promise is very wide indeed. The teacher who refused to salute the flag or advocated refusal because of religious beliefs might well be accused of breaching his promise. Cf. West Virginia State Board of Education v. Barnette, 319 U.S. 624. Even criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath. And what are "institutions" for the purposes of this oath? Is it every "practice, law, custom, etc., which is a material and persistent element in the life or culture of an organized social group" or every "established society or corporation," every "establishment, esp[ecially] one of a public character"? " The oath may prevent a professor from criticizing his state judicial system or the Supreme Court or the institution of judicial review. Or it might be deemed to proscribe advocating the abolition, for example, of the Civil Rights Commission, the House Committee on Un-American Activities, or foreign aid.

## 9 Webster's New Int. Dictionary (2d ed.), at

 1288.It is likewise difficult to ascertain what might be done without transgressing the promise to "promote ... undivided allegiance to the government of the United States." It would not be unreasonable for the se-rious-minded oathtaker to conclude that he should dispense with lectures voicing far-reaching criticism of any old or new policy followed by the Government of the United [*372] States. He could find it questionable under this language to ally himself with any interest group dedicated to opposing any current public policy or law of the Federal Government, for if he did, he might well be accused of placing loyalty to the group above allegiance to the United States.

Indulging every presumption of a narrow construction of the provisions of the 1931 oath, consistent, however, with a proper respect for the English language, we cannot say that this oath provides an ascertainable stan-
dard of conduct or that it does not require more than a State may command under the guarantees [**1323] of the First and Fourteenth Amendments.
[***LEdHR5] [5] [***LEdHR6] [6]As in Cramp v. Board of Public Instruction, "the vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." 368 U.S. 278, 287. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker -- teachers and public servants -- to "steer far wider of the unlawful zone," Speiser v. Randall, 357 U.S. 513, 526, than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not [***386] be so inhibited. ${ }^{10}$ [*373] Smith v. California, 361 U.S. 147; Stromberg $v$. California, 283 U.S. 359, 369. See also Herndonv. Lowry, 301 U.S. 242; Thornhill v. Alabama, 310 U.S. 88; and Winters v. New York, 333 U.S. 507.

10 "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." Stromberg $v$. California, 283 U.S. 359, 369. "Statutes restrictive of or purporting to place limits to those [First Amendinent] freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb . . . and . . . the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." United States v. Congress of Industrial Organizations, 335 U.S. 106, 141-142 (Rutledge, J., concurring).

## III.

The State labels as wholly fanciful the suggested possible coverage of the two oaths. It may well be correct, but the contention only emphasizes the difficulties
with the two statutes; for if the oaths do not reach some or any of the behavior suggested, what specific conduct do the oaths cover? Where does fanciful possibility end and intended coverage begin?
[***LEdHR7] [7]It will not do to say that a prosecutor's sense of faimess and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltiess behavior nevertheless remains. "It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human." Cramp, supra, at 286-287. Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Nor should we encourage the casual taking of oaths by upholding the discharge or exclusion from public employment [*374] of those with a conscientious and scrupulous regard for such undertakings.
[***LEdHR8] [8]It is further argued, however, that, notwithstanding the uncertainties [**1324] of the 1931 oath and the statute on which it is based, the oath does not offend due process because the vagaries are contained in a promise of future conduct, the breach of which would not support a conviction for perjury. Without the criminal sanctions, it is said, one need not fear taking this oath, regardless of whether he understands it and can comply with its mandate, however understood. This contention ignores not only the effect of the oath on those who will not solemnly swear unless they can do so honestly and without prevarication and reservation, but also its effect on those who believe the written law means what it says. Oath Form A contains both oaths, and expressly requires that the signer [***387] "understand that this statement and oath are made subject to the penalties of perjury." Moreover, Wash. Rev. Code § 9.72 .030 provides that "every person who, whether orally or in writing . . . shall knowingly swear falsely concerning any matter whatsoever" commits perjury in the second degree. Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of a prosecution cannot be gainsaid. The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where "the free dissemination of ideas may be the loser." Smith v. California, 361 U.S. 147, 151. "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." Champlin Refg. Co. v. Corporation

Comm'n of Oklahoma, 286 U.S. 210, 243; cf. Small Co. v. American Refg. Co., 267 U.S. 233.

## [*375] IV.

We are asked not to examine the 1931 oath statute because, although on the books for over three decades, it has never been interpreted by the Washington courts. The argument is that ever since Railroad Comm'n $\nu$. Pullman Co., 312 U.S. 496, the Court on many occasions has ordered abstention where state tribunais were thought to be more appropriate for resolution of complex or unsettled questions of local law. A. F. L. v. Watson, 327 U.S. 582; Spector Motor Service v. McLaughlin, 323 U.S. IOI; Harrison v. NAACP, 360 U.S. I67. Because this Court ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented, Fox v. Washington, 236 U.S. 273; Poulos v. New Hampshire, 345 U.S. 395, an interpretation of the 1931 oath in the Washington courts in light of the vagueness attack may eliminate the necessity of deciding this issue.
[ ${ }^{* * *}$ LEdHR9] [9] [***LEdHR10] [10]We are not persuaded. The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the "special circumstances," Propper v. Clark, 337 U.S. 472, prerequisite to its application must be made on a case-by-case basis. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500; NAACP v. Bennett, 360 U.S. 471. "Those special circumstances [***388] are not present here. We doubt, in the first place, [**1325] that a construction of the oath provisions, in light of the vagueness challenge, would [*376] avoid or fundamentally alter the constitutional issue raised in this litigation. See Chicago v, Atchison, T. \& S. F. R. Co., 357 U.S. 77. In the bulk of abstention cases in this Court, ${ }^{12}$ including those few cases where vagueness was at issue, ${ }^{13}$ the unsettled issue of state law principally [*377] concerned the applicability [ ${ }^{* * * 389]}$ of [**1326] the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation. Here the [*378] uncertain issue of state law does not turn upon a choice between one or several alternative meanings of a state statute. The challenged oath is not open to one or a few interpretations, but to an indefinite number. There is no uncertainty that the oath applies to the appellants and the issue they raise is not whether the oath permits them to engage in certain definable activities. Rather their complaint is that they, about 64 in number, cannot understand the required promise, cannot define the range of activi-
ties in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms. In these circumstances it is difficult to see how an abstract construction of the challenged terms, such as precept, example, allegiance, institutions, and the like, in a declaratory judgment action could eliminate the vagueness from these terms. It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this.

11 "When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication before a United States District Court, reference to the state courts for construction of the statute should not automatically be made." NAACP v. Bennett, 360 U.S. 471. See also United States v. Livingston, 179 F.Supp. 9, 12-13 (D. C. E. D. S. C.), affd, Livingston v. United States, 364 U.S. 281: "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." Shelton v. McKinley, 174 F.Supp. 351 (D. C. E. D. Ark.) (abstention inappropriate where there are no substantial problems of statutory construction and delay would prejudice constitutional rights); All American Airways v. Village of Cedarhurst, 201 F. $2 d 273$ (C. A. 2 d Cir.); Sterling Drug v. Anderson, 127 F.Supp. 511, 513 (D. C. E. D. Tenn.).
12 See, e. g., Railroad Comm'n of Texas $v$. Pullman Co., 312 U.S. 496; Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168; Spector Motor Service, Inc., v. McLaughlin, 323 U.S. 101; Alabama State Federation of Labor v. McAdory, 325 U.S. 450; American Federation of Labor v. Watson, 327 U.S. 582; Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368; Shipman v. DuPre, 339 U.S. 32I; Albertson v. Millard, 345 U.S. 242; Leiter Minerals, Inc., v. United States, 352 U.S. 220; Government \& Civic Employees Organizing Committee, C. I. O., v. Windsor, 353 U.S. 364; City of Meridian v. Southern Bell Tel. \& Tel. Co., 358 U.S. 639.
13 In Musserv. Utah, 333 U.S. 95, the appellants were convicted of committing "acts injurious to public morals." The vagueness challenge to the statute, either as applied or on its face, was raised for the first time in oral argument before this Court, and the Court vacated the conviction
and remanded for a determination of whether the conviction for urging persons to commit polygamy rested solely on this broad-challenged provision. In Albertson v. Millard, 345 U.S. 242, the Communist Party of the State of Michigan and its secretary sought to enjoin on several constitutional grounds the application to them of a state statute, five days after its passage, requiring registration, under pain of criminal penalties, of "any organization which is substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites, or which . . acts to further, the world communist movement ${ }^{\prime \prime}$ and of members of such an organization. They argued that the definitions were vague and failed to inform them if a local Communist organization and its members were required to register. The lower court took judicial notice of the fact that the Communist Party of the United States, with whom the local party was associated, was a part of the world Communist movement dominated by the Soviet Union, and held the statute constitutional in all other respects. This Court vacated the judgment and declined to pass on the appellants' constitutional claims until the Michigan courts, in a suit already pending, construed the statutory terms and determined if they required the local Party and its secretary, without more, to register. The approach was that the constitutional claims, including the one founded on vagueness, would be wholly eliminated if the statute, as construed by the state court, did not require all local Communist organizations without substantial ties to a foreign country and their members to register. Stated differently, the question was whether this statute applied to these plaintiffs, a question to be authoritatively answered in the state courts.

In Harrison v. NAACP, 360 U.S. 167, the NAACP and the NAACP Legal Defense and Education Fund sought a declaratory judgment and injunction on several constitutional grounds in respect to numerous recently enacted state statutes. The lower court enjoined the implementation of three statutes, including one provision on vagueness grounds, and ordered abstention as to two others, finding them ambiguous. This Court ordered abstention as to all the statutes, finding that they were all susceptible of constructions that would limit or eliminate their effect on the litigative and legal activities of the NAACP and construction might thereby eliminate the necessity for passing on the many constitutional questions raised. The vagueness issue, for example, would not require adjudication if the state courts found
that the challenged provisions did not restrict the activities of the NAACP or require the NAACP to register. Unlike the instant case, the necessity for deciding the federal constitutional issues in the above and other abstention cases turned on whether the restrictions or requirements of an uncertain or unclear state statute were imposed on the persons bringing the action or on their activities as defined in the complaint.

Other considerations also militate against abstention here. Construction of this oath in the state court, abstractly and without reference to concrete, particularized situations so necessary to bring into focus the impact of the terms on constitutionally protected rights of speech and association, Ashwander $v$. Tennessee Valley Authority, 297 U.S. 288, 341 (Brandeis, J., concurring), would not only hold little hope of eliminating the issue of vagueness but also would very likely pose other constitutional issues for decision, a result not serving the abstention-justifying end of avoiding constitutional adjudication.

We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, England v. Louisiana State Board of Medical Examiners, 375 U.S. $+1 l$, thereby delaying ultimate adjudication on the merits [*379] for an undue length of time, England, supra; Spector, supra; Government \& Civic Employees Organizing Committee v. Windsor, 353 U.S. 364 , ${ }^{14}$ a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms. Indeed the 1955 subversive person oath has been under continuous constitutional attack since at least 1957, Nostrand v. Balmer, 53 Wash. 2d $\ddagger 60,463,335$ P. 2d l0, 12, and is now before this Court for the third time. Remitting these litigants to the state courts for a construction of the 1931 oath would further protract these proceedings, [***390] already $\left[{ }^{* *} 1327\right]$ pending for almost two years, with only the likelihood that the case, perhaps years later, will return to the three-judge District Court and perhaps this Court for a decision on the identical issue herein decided. See Chicago v. Atchison, T. \& S. F. R. Co., 357 U.S. 77, 84; Public Utilities Comm'n of Ohio v. United Fuel Co., 317 U.S. $456 .{ }^{15}$ Meanwhile, where the vagueness of the statute deters constitutionally protected conduct, "the free dissemination of ideas may be the loser." Smith v. California, 361 U.S. 147, 151.

14 See Clark, Federal Procedural Reform and States' Rights, 40 Tex. L. Rev. 211 (1961); Note, 73 Harv. L. Rev. 1358, 1363 (1960).
15 "Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a
substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible." 317 U.S. 456, at 463.

## V.

[***LEdHR1I] [11] [***LEdHR12] [12]As in Cramp v. Board of Public Instruction, supra, we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct. [*380] But measures which purport to define disloyalty must allow public servants to know what is and is not disloyal. "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." Torcaso v. Watkins, 367 U.S. 488 , 495-496.

Reversed.

## DISSENT BY: CLARK

## DISSENT

MR. JUSTICE CLARK, whom MR. JUSTICE HARLAN joins, dissenting.

The Court strikes down, as unconstitutionally vague, two Acts of the State of Washington. The first, the Act of 1955 , requires every state employee to swear or affirm that he is not a "subversive person" as therein defined. The second, the Act of 1931, which requires that another oath be taken by teachers, is declared void without the benefit of an opinion of either a state or federal court. I dissent as to both, the first on the merits, and the latter, because the Court refuses to afford the State an opportunity to interpret its own law.
1.

The Court says that the Act of 1955 is void on its face because it is "unduly vague, uncertain and broad." The Court points out that the oath requires a teacher to "swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of govermment by revolution, force or violence." The Court further finds that the Act declares the Communist Party to be a subversive organization.

From these premises, the Court then reasons that under the 1955 Act "any person who aids the Communist Party [*381] or teaches or advises known members of the Party is a subversive person" because "at some future [***391] date" such teaching may aid the activities of the Party. This reasoning continues with the assertion that "one cannot confidently assert that his counsel, aid, influence or support which adds to the resources, rights and knowledge of the Communist Party or its members does not aid the Party . . . in furtherance of the stated purpose of overthrowing the Government by revolution, force, or violence." The Court then interrogates itself: Does the statute reach "endorsement or support for Communist candidates [**1328] for office? . . . a lawyer who represents the Communist Party or its members? . . . [defense of the] constitutional rights of the Communist Party or its members ... [or support of] any cause which is likewise supported by Communists or the Communist Party?" Apparently concluding that the answers to these questions are unclear, the Court then declares the Act void, citing Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). Let us take up this reasoning in reverse order.

First, Cramp is not apposite. The majority has failed to recognize that the statute in Cramp required an oath of much broader scope than the one in the instant case: Cramp involved an oath "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party . . . ." That oath was replete with defects not present in the Washington oath. As MR. JUSTICE STEWART pointed out in Cramp;
"The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement." At 286.
[*382] These factors which caused the Court to find the Cramp oath unconstitutionally vague are clearly not present in the Washington oath. Washington's oath proscribes only the commission of an act of overthrow or alteration of the constitutional form of government by revolution, force or violence; or advising, teaching, abetting or advocating by any means another person to commit or aid in the commission of any act intended to overthrow or alter or to assist the overthrow or alteration of the constitutional form of government by revolution, force or violence. The defects noted by the Court when it passed on the Cramp oath have been cured in the Washington statute.

It is strange that the Court should find the language of this statute so profoundly vague when in 1951 it had
no such trouble with the identical language presented by another oath in Gerende $v$. Board of Supervisors of Elections, 341 U.S. 56. There, the constitutionality of Maryland's Ober Law, written in language identical to Washington's 1955 Act, was affirmed by a unanimous Court against the same attack of vagueness. It is unfortunate that Gerende is overruled so quickly. 'Other state [***392] laws have been copied from the Maryland Act -- just as Washington's 1955 Act was -- primarily because of our approval of it, and now this Court would declare them void. Such action cannot command the dignity and respect due to the judicial process. It is, of course, absurd to say that, under the words of the Washington Act, [*383] a professor risks violation when he teaches German, English, history or any other subject included in the curriculum for a college degree, to a class in which a Communist Party member might sit. To so interpret the language of the Act is to extract more sunbeams from cucumbers than did Gulliver's mad scientist. And to conjure up such ridiculous questions, the answers to which we all know or should know are in the negative, is to build up a whimsical and farcical straw man which is not only grim but Grimm.

* It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in Gerende, but a review of the record in that case conclusively demonstrates to the contrary. Further, while the Gerende opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague.
In [ $\left.{ }^{* *} 1329\right]$ addition to the Ober Law the Court has also found that other statutes using similar language were not vague. An unavoidable example is the Smith Act which we upheld against an attack based on vagueness in the landmark case of Dennis $v$. United States, 341 U.S. 494 (1951). The critical language of the Smith Act is again in the same words as the 1955 Washington Act.
"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States ...." 18 U. S. C. § 2385. (Emphasis supplied.)

The opinion of the Court in Dennis uses this language in discussing the vagueness claim:
"We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness We think [the statute] well serves to indicate to those
who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go -- a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand." At 515-516.
[*384] It appears to me from the statutory language that Washington's 1955 Act is much more clear than the Smith Act. Still the Court strikes it down. Where does this leave the constitutionality of the Smith Act?

## 11.

A.ppellants make other claims. They say that the 1955 Act violates their rights of association and free speech as guaranteed by the First and Fourteenth Amendments. But in light of Konigsberg v. State Bar of California, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961); Adler v. Board of Education, 342 U.S. 485 (1952); Garner v. Board of Public Works, 341 U.S. 716 (1951); and American Communications Assn. v. Douds, 339 U.S. 382 (1950), this claim is frivolous. Likewise in view of the decision of Washington's highest court that tenured employees would be entitled to a hearing, Nostrand v. Little, 58 Wash. 2d 111, 131, 361 P. 2d 55l, 563, the due process claim is without foundation. This conclusion would also apply to those employees without tenure, since they would be entitled to a hearing under Washington's [***393] Civil Service Act, Rev. Code Wash. § 41.04 et seq. and its Administrative Procedure Act, Rev. Code Wash. § 34.04.010 et seq.
111.

The Supreme Court of Washington has never construed the oath of allegiance required by the 1931 Act. I
agree with the District Court that Washington's highest court should be afforded an opportunity to do so. As the District Court said:
"The granting or withholding of equitable or declaratory relief in federal court suits which seek to limit or control state action is committed to the sound discretion of the court. Accordingly, in the absence [ ${ }^{* 385]}$ of a concrete factual showing that any plaintiff or any member of the classes of state employees here represented has suffered actual injury by reason of the application of the oath of allegiance statute (Chapter 103, Laws of 1931) this court will decline to render a declaratory judgment as to the constitutionality of that statute in advance of an authoritative construction by the Washington Supreme Court." 215 F.Supp. $439,755$.

For these reasons, I dissent.

## REFERENCES

Annotation References:

1. Indefiniteness of language as affecting validity of criminal legislation. 96 L ed $374,97 \mathrm{~L}$ ed 203 . See also 70 L ed 322 and 83 L ed 893.
2. Validity of governmental requirement of oath of allegiance or loyalty. 18 ALR2d 268 , 97 L ed 226.
3. The United States Supreme Court and the right of freedom of speech and press. 93 L ed 1151, 2 L ed 2 d 1706, 11 L ed 2d 1116.
4. Discretion of federal court to remit relevant state issues to state court in which no action is pending. 94 L ed 879, 3 L ed 2d 1827, 8 ALR2d 1228.

## DECLARATION OF SERVICE BY OVERNIGHT COURIER

## Case Name: Sheriff Clay Parker, et al. v. State of California, et al.

No.: F062490
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: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On February 22, 2012, I served the attached JOINT APPENDIX, VOLUME V, Pages JA001193-JA001477 by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight, addressed as follows:

Carl Dawson Michel, Esq.
Clinton Barnwell Monfort. Esq.
Michel and Associates, PC
180 East Ocean Blvd., Ste. 200
Long Beach, CA 90802
(Attorneys for Respondents)
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 February 22, 2012, at San Francisco, California.


SA2011101434


[^0]:    Responses To Plaintilfs' Specially Prepared Interrogatories, Set One

[^1]:    Responses To Plaintiffs' Specially Prepared Interogatones, Set One

[^2]:    Response To Plantiffs' Request For Admissions, Set One
    (10CECG02116)

[^3]:    Response To Plaintiffs' Request For Admissions, Set One

[^4]:    AFFIRMED in part, REVERSED in part, and REMANDED.

    WRIT OF MANDAMUS GRANTED on one issue.

