

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.

Case No. F062490

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

**JOINT APPENDIX
VOLUME VIII
Pages JA001967-JA002262**

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of Justice*

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There are no even-numbered page between JA002879 and JA003423 in the Joint Appendix. This gap was created by a production error at the numbering stage. Rather than print blank pages with these numbers, they have been omitted.

EXHIBIT “I”

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE *ex rel*
RANDY RAYBURN;
JOHN (JANE) DOES NOS. 1-13,
AUSTIN RAY, and
FLANEUR LLC D/B/A MELROSE,
Plaintiffs,

v.

ROBERT E. COOPER, JR.,
TENNESSEE ATTORNEY GENERAL,

Defendant.

Civil No. 09-1284-1

CONSOLIDATED MEMORANDUM OF LAW
OF DEFENDANT ATTORNEY GENERAL COOPER
IN OPPOSITION TO PLAINTIFFS MOTIONS
FOR PARTIAL SUMMARY JUDGMENT
AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR
JUDGMENT ON THE PLEADINGS AND/OR FOR SUMMARY JUDGMENT

Defendant Robert E. Cooper, Jr., in his official capacity as Attorney General and Reporter for the State of Tennessee, hereby opposes the Plaintiffs' motions for partial summary judgment, in which the Plaintiffs seek a declaratory judgment finding that 2009 Public Chapter 339, authorizing the limited possession of handguns in restaurants that serve alcoholic beverages, is facially invalid.¹ The Attorney General is also seeking a judgment on the pleadings and/or for summary judgment dismissing this case and/or Plaintiffs' specific claims.

Although overall Plaintiffs have asserted a number of novel constitutional, statutory and common law challenges to Chapter 339, the pending motion for summary judgment by Plaintiffs

¹ The Attorney General also relies upon his previously filed Response in Opposition to Plaintiffs' Motion for Injunctive Relief and the record in this case, including the Affidavit of Attorney General Investigator Trey King,

Randy Rayburn and John (Jane) Does Nos. 1-13 (the “Rayburn Plaintiffs”) is limited to allegations that Chapter 339 on its face: (1) is unconstitutionally vague, (2) is an unconstitutional delegation of police powers, and (3) is preempted by virtue of Tennessee’s OSHA “general duty” clause. The pending motion for summary judgment by Intervenor Plaintiffs Austin Ray and Flaneur LLC, d/b/a Melrose (the “Melrose Plaintiffs”) asserts that Chapter 339 on its face violates due process of law.

As set forth herein, there is no jurisdiction for this Court of equity to address Plaintiffs’ claims regarding the validity of a criminal law. Further, the various Plaintiffs lack standing and have not asserted a justiciable issue. Necessary parties, the appropriate District Attorneys General with authority to enforce Chapter 339, have not been joined. Moreover, courts will find that a statute, which does not implicate constitutionally protected First Amendment rights, is facially unconstitutional only if there are no situations in which the statute could be applied in a constitutional manner. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). Plaintiffs have not alleged and cannot show that there are no situations in which Chapter 339 may be applied in a constitutional manner.

This challenge to the statute’s constitutionality does not give the Court a license to second-guess the General Assembly’s policy judgments or to impart the Court’s own personal views onto the statutory text. *See Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005); *State v. Goodman*, 90 S.W.3d 557, 565 (Tenn. 2002). Plaintiffs’ policy arguments expressing disagreement with the law should be directed to the General Assembly. This Court may not review the statute’s wisdom, expediency, reasonableness, or desirability, as these matters are entrusted to the electorate, not the courts. *See, e.g., State ex rel. Robinson v. Lindsay*, 103 Tenn. 625, 640, 53 S.W. 950, 954 (1899); *Henley v. State*, 98 Tenn. 665, 679-82, 41 S.W. 352, 354-55

(1897).

All Plaintiffs' claims are without legal merit and as a matter of law should be dismissed.

LAW & FACTS

Plaintiff Rayburn is the proprietor of restaurants, bars, and nightclubs within Tennessee, which are allowed to sell alcoholic beverages. (Rayburn Second Amended Complaint, ¶s 59 & 63). Plaintiffs John (Jane) Does Nos. 1-9 are adult Tennesseans who work in unspecified restaurants or bars in this state. (Rayburn Second Amended Complaint, ¶s 60 & 64). Plaintiffs John (Jane) Does Nos. 10-13 are adult Tennesseans who may lawfully carry concealed firearms because they hold Tennessee handgun carry permits issued under Tenn. Code Ann. § 39-17-1351. (Rayburn Second Amended Complaint, ¶s 61 & 65). Intervenor Plaintiffs Austin Ray and Flaneur LLC operate the Melrose, a restaurant which is allowed to sell alcoholic beverages within Tennessee. (Melrose Complaint, ¶s 2 & 3). As a matter of law, these plaintiffs are seeking a declaration that the provisions of 2009 Tenn. Pub. Acts 339 (Chapter 339), to be codified at Tenn. Code Ann. §§ 39-17-1305 (c), are unconstitutional and otherwise unlawful.

In its latest session, the General Assembly enacted Public Chapter 339, which states, in relevant part:

SECTION 1. Tennessee Code Annotated, Section 39-17-1305(c), is amended by adding the following language as a new, appropriately designated subdivision:²

(3)

(A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and serves alcoholic beverages, wine or beer,

² Tenn. Code Ann. § 39-17-1305 prohibits the carrying of firearms into establishments where alcohol is served. The statute exempts certain classes of persons, including active duty military personnel from its application.

(B) As used in this subdivision (c)(3), “restaurant” means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

As shown by the plain language of the statute, Chapter 339 is not a blanket authorization for any person to bring firearms into restaurants under any circumstance. Such authorization extends to the holders of handgun carry permits only. Furthermore, permit holders may bring their firearms into a restaurant only if they do not consume any alcohol while they are on the premises.³ Chapter 339 allows proprietors to prohibit the carrying of firearms into their establishments if they choose to do so.⁴ Furthermore, there is nothing in Chapter 339 that requires restaurant proprietors take any affirmative steps to enforce the law.⁵ In fact, Plaintiff Rayburn has posted that no weapons are permitted in his establishments that serve alcoholic beverages. (Affidavit of Attorney General Investigator Trey King, ¶s 3, 4, & 9).

Permit holders who carry their firearms into restaurants where the owners have decided to prohibit the possession of firearms are subject to criminal prosecution for having violated Tenn. Code Ann. § 39-17-1359. Such an offense is punishable by up to a \$500 fine. Tenn. Code Ann. § 39-17-1358(b). In addition, any permit holder who violates Tenn. Code Ann. § 39-17-

³ Tenn. Code Ann. § 39-17-1321 prohibits possession of a handgun “while under the influence of alcohol or any controlled substance.”

⁴ Tenn. Code Ann. § 39-17-1359 (Individuals, corporations and businesses may prohibit the carrying of firearms on property they own, operate, manage, or control by posting signs that satisfy the requirements of the statute.)

⁵ Likewise, there was nothing in the language of Tenn. Code Ann. § 39-17-1305, prior to the enactment of Chapter 339, to require restaurant owners to take any affirmative steps action to enforce its provisions.

1359 is subject to having his carry permit suspended or revoked. Tenn. Code Ann. § 39-17-1352(a)(6).

Reading Chapter 339 together with the rest of Tenn. Code Ann. § 39-17-1305 and Tenn. Code Ann. §§ 39-17-1351, 1352 and 1359, leads to the conclusion that the legislature intends to vest business owners with control over their private property and the ability to decide whether to permit handgun carry permit holders to bring firearms into their restaurants serving alcohol. With the enactment of Chapter 339, individual business owners are free to decide, based on the wants and desires of their particular customers and other business considerations, whether to allow handgun carry permit holders to bring firearms into their private property. At the same time, Chapter 339 has effectively placed restaurants that serve alcohol on the same footing as other restaurants in deciding whether to allow handgun carry permit holders to bring firearms into their businesses.

Many restaurants that serve alcoholic beverages (including, but not limited to, Plaintiff Rayburn's restaurants, Tootsies Orchid Lounge, B.B. Kings, Cadillac Ranch, Coyote Ugly, Buffalo Billiards, Fuel Bar & Nightclub, Nashville Crossroads, Second Fiddle, and The Stage) have exercised their private property rights under Tenn. Code Ann. § 39-17-1359 and have posted that no weapons are allowed. (*See, e.g.*, Affidavit of Investigator Trey King, ¶s 12, 14, 15, 16, 17, 19, 20, 21, and 22). Furthermore, the Wildhorse Saloon and the Red Door Saloon, establishments which the Plaintiffs noted were once cited by the Alcoholic Beverage Commission for not meeting minimum food service requirements, have posted that no weapons are allowed. (*Compare* Affidavit of Investigator Trey King, ¶s 7 & 18, to Affidavit of Christopher W. Smith (Plaintiffs' Exhibit G), ¶ 2, Exhibits 1 - 5).

The one other establishment, Graham Central Station, which is specified in the Amended

Affidavit of Plaintiff John Doe No. 10, ¶14, as a place where the affiant expresses uncertainty about whether he can carry his firearm, is only open four (4) nights per week and does not qualify as a “restaurant” under Chapter 339. (Affidavit of Investigator Trey King, ¶ 23). The Hollywood Disco, an establishment which the Plaintiffs noted was once cited by the Alcoholic Beverage Commission for not meeting minimum food service requirements, states on its website that it is only open four (4) nights per week and could not qualify as a “restaurant” under Chapter 339. (*Compare* Affidavit of Investigator Trey King, ¶ 6, to Affidavit of Christopher W. Smith (Plaintiffs’ Exhibit G), ¶ 2, Exhibit 6).

ARGUMENT

I. PLAINTIFFS HAVE FAILED (A) TO PRESENT A JUSTICIABLE ISSUE OR (B) TO DEMONSTRATE STANDING TO BRING THIS ACTION.

A. Justiciable Issue Required - Although a party seeking declaratory relief is not required to show an actual injury, a plaintiff must still present a live case or controversy. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837-38 (Tenn. 2008). Tenn. Code Ann. § 29-14-102 does not authorize courts to render advisory opinions and the case must present a real, as opposed to a theoretical, issue. *Mills v. Shelby County Election Comm.*, 218 S.W.3d 33 (Tenn. App. 2006).

In *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. App. 1980), the court identified the limits of judicial authority under the Declaratory Judgments Act, Tenn. Code Ann. §§ 29-14-101 through 29-14-113. It said:

For a controversy to be justiciable a real question rather than a theoretical one must be presented and a real legally protectable interest must be at stake on the part of the plaintiff. . . . If the controversy depends on a future or contingent event or involves a theoretical or hypothetical state of facts, the controversy is not

justiciable under the Declaratory Judgments Act. . . . The Declaratory Judgments Act does not give the courts jurisdiction to render advisory opinions to assist parties or to allay their fears as to what may occur in the future.

Id., at 891-92. (Internal citations omitted).

B. Parties' Standing Required - The doctrine of standing and its elements were summarized in in *ACLU of Tennessee, Inc., et al. v. Riley C. Darnell, et al.*, 195 S.W.3d 612, 619-20 (Tenn. 2006)(affirmed this Court's dismissal of an action due to lack of standing by the plaintiffs seeking to challenge placement of a proposed constitutional amendment on the November, 2006 ballot) :

Courts employ the doctrine of standing to determine whether a particular litigant is entitled to have a court decide the merits of a dispute or of particular issues. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976) (holding that courts use the standing doctrine to decide whether a particular plaintiff is "properly situated to prosecute the action."); *City of Brentwood v. Metropolitan Bd. of Zoning Appeals, et al.*, 149 S.W.3d 49, 55 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. Sept. 13, 2004). Grounded upon "concern about the proper— and properly limited— role of the courts in a democratic society, *Warth*, 422 U.S. at 498, the doctrine of standing precludes courts from adjudicating an action at the instance of one whose rights have not been invaded or infringed. *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001), *perm. app. denied* (Tenn. April 30, 2001). The doctrine of standing restricts [t]he exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, . . . to litigants who can show injury in fact resulting from the action which they seek to have the court adjudicate. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* 454 U.S. 464, 473 (1982). Without limitations such as standing . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. *Warth*, 422 U.S. at 500; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 333, 126 S. Ct. 1854, 1856 (2006) (explaining that standing enforces the constitutional case-or-controversy requirement that is "crucial in maintaining the tripartite allocation of power set forth in the Constitution).

To establish standing, a plaintiff must show three indispensable elements by the same degree of evidence as other matters on which the plaintiff bears the burden of proof. *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 767 (Tenn. Ct. App. 2002), *perm. app. denied* (Tenn. Sept. 9, 2002). First, a plaintiff must show a distinct and

palpable injury: conjectural or hypothetical injuries are not sufficient. *City of Brentwood*, 149 S.W.3d at 55-56; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing also may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens. *Mayhew*, 46 S.W.3d at 767. Were such injuries sufficient to confer standing, the State would be required to defend against a profusion of lawsuits from taxpayers, and a purpose of the standing doctrine would be frustrated. *See Parks v. Alexander*, 608 S.W.2d 881, 885 (Tenn Ct. App. 1980) (stating that one purpose of standing is to protect the State from a "profusion of lawsuits).

The second essential element of standing is a causal connection between the claimed injury and the challenged conduct. *Mayhew*, 46 S.W.3d at 767. A plaintiff may satisfy this element by establishing the existence of a fairly traceable connection between the alleged injury in fact and the defendant's challenged conduct. *DaimlerChrysler Corp.*, 547 U.S. at 554, 126 S. Ct. at 1861. The third and final element necessary to establish standing is a showing that the alleged injury is capable of being redressed by a favorable decision of the court. *Petty*, 91 S.W.3d at 767; *DaimlerChrysler Corp.*, 547 U.S. at 554, 126 S.Ct. at 1861.

C. No Justiciable Issue Is Presented Nor Is Standing Established -

Plaintiffs have failed to present a justiciable controversy. Plaintiffs lack standing to bring this action as they have failed to demonstrate distinct and palpable injury from the enactment of Chapter 339. The entire controversy depends upon future or contingent events, hypothetical situations and theoretical, as opposed to actual, legal issues. Chapter 339's amendments to the current law only allow a limited exemption for a person permitted to lawfully carry firearms to do so in certain restaurants that are allowed to serve alcoholic beverages provided that person is not consuming any alcoholic beverages.

Business owners are not required to allow handguns on premises and may post appropriate signage that handguns are prohibited – therefore negating any hypothetical injury from implementation of Chapter 339. Tenn. Code Ann. § 39-17-1359 expressly authorizes individuals, corporations, and business entities to prohibit the possession of guns on their premises merely by posting a sign giving notice of the prohibition at the door. The business

owners and employees lack standing to challenge the alleged delegation of authority to businesses to prohibit weapons from being carried onto their private property. If they believe this delegation is unlawful, they may choose not to post any prohibition of weapons.

The plaintiff business owners and employees do not have standing to challenge the alleged vagueness of Chapter 339. “One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.” *Parker v. Levy*, 417 U.S. 733, 756 (1974), quoted in *Village of Hoffman Estates*, 455 U.S. at 495. The plaintiff business owners/operators assert that their establishments are clearly “restaurants” within the definition in Chapter 339. (Affidavit of John Randall Rayburn , ¶s 5 & 6, Melrose Complaint, ¶ 2).

Plaintiffs Rayburn and John (Jane) Does have only alleged conjectural or hypothetical injuries that speculatively may arise from the mere presence of a person lawfully permitted to carry a weapon into a restaurant, who is not consuming alcoholic beverages and does not otherwise use his weapon in an unlawful manner. Chapter 339 does not authorize the use of weapons for criminal purposes. To the extent that the mere presence of an armed gun carry permit holder may hypothetically create some danger or risk to the public safety and welfare, the interest in addressing this risk is shared in common with all other citizens.

The plaintiff restaurant operators and employees hypothesize that they may be charged with aiding and abetting a criminal offense if they serve an alcoholic beverage to a customer who unbeknownst to them is carrying a weapon. The owners and employees assert that there is no way to detect who is carrying a concealed weapon in an establishment selling alcoholic beverages. (See Affidavit of Jane Doe No. 1, ¶ s 17-19; Affidavit of John Randall Rayburn, ¶s 23 & 25). Tennessee’s criminal responsibility law regarding aiding and abetting, Tenn. Code Ann § 39-11-402, provides :

A person is criminally responsible for an offense committed by the conduct of another, if:

- (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
- (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or
- (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

In the situation where a restaurant operator or server of alcoholic beverages does not reasonably know that a patron is carrying a concealed weapon, a charge of aiding and abetting is not appropriate.

The handgun carry permit holders have based their claim of vagueness upon hypothetical situations. They claim that if they go into an establishment that serves alcoholic beverages; that has either not posted or has improperly posted signs stating that the possession of firearms is prohibited; that regularly serves meals; that has an adequate and sanitary dining room and a qualified staff to prepare and serve meals; that serves at least one meal per day on five (5) days per week; and holds itself out to the public as a restaurant; but if, unbeknownst to the permit holder, the establishment derives less than half of its revenues from the sale of food, and therefore cannot show that selling food is its principal business, the permit holder might then be subject to arrest and possible prosecution for violating Tenn. Code Ann. § 39-17-1305.⁶

⁶ The handgun carry permit holders' case becomes even more speculative when the discretion of the district attorneys general is added to the case. District attorneys general possess broad discretion in deciding whether to prosecute or to decline to bring criminal charges. The exercise of that discretion is subject to judicial review only in a narrow set of circumstances. See, e.g., *State v. Housler*, 193 S.W.3d 476 (Tenn. 2006); *State v. Harris*, 33 S.W.3d

The fact that Plaintiffs do not need court intervention to obtain the relief they are seeking provides more evidence of their failure to present a justiciable controversy. Plaintiffs John (Jane) Does Nos. 10-13, the gun carry permit holders, are not required to carry their weapons in any particular locations and may avoid any alleged injury by continuing to carry as they have under the old law. The gun carry permit holders allege that they desire to carry their weapons into restaurants that sell alcoholic beverages. They do not allege that there are not establishments that sell alcoholic beverages that qualify as “restaurants” under Chapter 339. The relief these Plaintiffs are requesting from this Court, the invalidation of Chapter 339’s limited exception, does not remedy these Plaintiffs’ hypothetical harm, but rather, completely removes their ability to lawfully carry into all “restaurants” that sell alcoholic beverages.

Although the John (Jane) Does Nos. 10-13, the gun carry permit holders, claim that they plan on carrying their handguns into alcohol serving establishments, they do not assert any intention to carry weapons into any establishment that has posted that weapons are prohibited on that private property. Accordingly, these Plaintiffs are not injured by an alleged unlawful delegation of police power under the posting provisions in Tenn. Code Ann. § 39-17-1359, and lack standing to challenge this provision.

II. IT WOULD NOT BE AN APPROPRIATE EXERCISE OF JUDICIAL POWER FOR THE COURT TO HEAR THIS MATTER.

A. Chancery courts lack the authority to provide declaratory relief in criminal matters, not involving property rights. Subject matter jurisdiction is the authority of a court to

767 (Tenn. 2000); *State v. Head*, 971 S.W.2d 49 (Tenn. Crim. App. 1997); *State v. Gilliam*, 901 S.W.2d 385 (Tenn.

adjudicate matters brought before it. Such authority is conferred either by the constitution or statutes. *Haley v. University of Tennessee*, 188 S.W.3d 518 (Tenn. 2006). Courts are not permitted to exercise jurisdictional powers that have not been directly conferred or do not arise by necessary implication. *Osborn v. Marr*, 127 S.W.3d 737 (Tenn. 2004).

The authority of courts to issue declaratory judgments is conferred by statute. Tenn. Code Ann. § 29-14-102(a) states:

Courts of record within their respective jurisdictions have the

[REDACTED]

not relief is or could be claimed.

The plain language of the statute indicates that courts do not have unlimited authority to issue declaratory judgments. The power extends to matters within their respective jurisdictions only. In *Zirkle v. City of Kingston*, 217 Tenn. 210, 225, 396 S.W.2d 356, 363 (1965), the Court held that chancery courts may entertain an action for declaratory relief only if the court could have entertained an original action based upon the same subject matter.

Plaintiffs are challenging the constitutionality of a criminal statute. A chancery court

Under the plain meaning of the statute, chancery courts have no authority to hear criminal cases as original actions. Chancery courts therefore have no authority to entertain actions for declaratory relief in criminal matters.⁸

Clinton Books, Inc. v. City of Memphis, 197 S.W.3d 749 (Tenn. 2006), is instructive with respect to the reasons supporting the foregoing rule. In discussing the reasons that prohibit chancery courts from enjoining criminal prosecutions, the Court said:

The longstanding rule in Tennessee is that state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute that is alleged to be unconstitutional. . . . A lawsuit seeking injunctive relief due to an allegedly invalid criminal statute asks the chancery court, rather than the court that will enforce the criminal law, to enjoin the officers of the state from prosecuting persons who are conducting a business made unlawful by a criminal statute until the chancery court can determine its validity. . . . Permitting a court of equity to interfere with the administration of this state's criminal laws, which that court is without jurisdiction to enforce, would cause confusion in the preservation of peace and order and the enforcement of the State's general police power.

Id. at 752 (Internal citations omitted).

Plaintiffs are challenging the constitutionality of a criminal statute. In Davidson County, the Criminal Courts are charged with their administration and enforcement. A chancellor's declaratory ruling on a criminal statute could cause interference with a criminal judge's ability to administer and enforce the criminal laws.⁹

Plaintiffs cannot rely upon *Clinton Books*, *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000), or *Davis-Kidd Booksellers, Inc. v. McWherter*, *supra*, to

⁸ There is an exception to the general rule. In *Clinton Books*, the Court noted that a chancery court may enjoin the enforcement of a criminal statute if the Supreme Court has ruled that the statute is unconstitutional. That exception is not applicable because the Supreme Court has made no such ruling in this case. *Clinton Books*, 197 S.W.3d at 753.

⁹ Declaratory judgments, when issued, have the same effect as other judgments or decrees, Tenn. Code Ann. § 29-14-102(c), and would be likely to cause confusion in the enforcement of the criminal laws.

argue that the court may grant declaratory relief notwithstanding the Court's holding in *Zirkle*. *Clinton Books* involved a constitutional challenge to a criminal statute that was originally brought in the Chancery Court of Shelby County. In that case, the Court disposed of the appeal by remanding the case to the Chancery Court for a hearing on the merits of the petition for declaratory judgment. That action, however, does not mean that the Court overruled its holding in *Zirkle*. The Court did not address or expressly overrule *Zirkle* in any of those cases.

To the contrary, the Court's reasoning in *Clinton Books* indicates that the holding in *Zirkle* is still viable. In *Clinton Books*, plaintiffs argued that, based on the holdings in *Davis Kidd* and *Planned Parenthood of Middle Tennessee*, chancery courts had the authority to enjoin criminal prosecutions. In *Clinton Books*, the Court rejected the argument, stating:

The plaintiffs in these cases sought injunctive and declaratory relief challenging the constitutionality of statutes that provided for the imposition of criminal penalties if violated. In both cases, this Court addressed the constitutionality of statutes without addressing the trial court's jurisdiction to grant injunctive relief. . . . We have recognized that 'stare decisis only applies with reference to decisions directly upon the point in controversy.' . . . Accordingly, the omission of any discussion of the trial court's jurisdiction in *Planned Parenthood* and *Davis-Kidd* should not be interpreted as altering the general rule prohibiting state equity courts from enjoining enforcement of a criminal statute.

197 S.W.3d at 752-53. (Internal citations omitted).

That reasoning applies to the issue of whether chancellors now have the authority to issue declaratory relief in cases involving constitutional challenges to criminal statutes. Just as the authority of chancellors to enjoin enforcement of criminal statutes was not addressed in *Planned Parenthood of Middle Tennessee* or *Davis-Kidd*, neither was the authority of a chancellor to provide declaratory relief in a case involving a constitutional challenge to a criminal statute. Therefore, the omission of any such discussion in *Clinton Books* ought not be construed as altering or overruling the rule set forth in *Zirkle*, which provided that chancery courts do not

have the authority to issue declaratory judgments in cases where they lack the authority to entertain a case as an original action.

This court does not have the authority to hear and decide criminal cases as original actions. Based on the holding in *Zirkle*, it does not have the authority to issue a declaratory judgments in a case involving a constitutional challenge to a criminal statute and the Attorney General submits that the Complaint ought to be dismissed.

B. The complaint ought to be dismissed because Plaintiff handgun carry permit holders have an adequate remedy at law. In *Clinton Books*, the Court recognized that the denial of injunctive relief did not leave the plaintiffs without a remedy. It noted that if criminal charges were brought, the plaintiffs would have a sufficient remedy. It said:

Furthermore, the issue of the validity of the statute is not so complex that it cannot be resolved by a court with criminal jurisdiction if raised as a defense in a criminal action brought against the plaintiffs or their employees If the law is as plaintiffs claim, the statute will be held invalid, and the criminal court will dismiss the prosecution. If the statute is valid and applicable under the circumstances, the plaintiffs' employees will be properly convicted if the evidence establishes beyond a reasonable doubt that the plaintiffs' employees violated the statute.

197 S.W.3d at 754. (Internal citations omitted).

The carry permit holders are in this same position. If someone takes a firearm into an establishment that does not, in fact, meet the definition of a restaurant as set forth in Tenn. Code Ann. § 39-17-1305(c), and if he is arrested and prosecuted for violating Tenn. Code Ann. § 39-17-1305, that person could raise vagueness as a defense. If the criminal court finds that the statute is unconstitutional as applied to the defendant, the charges will be dismissed. On the other hand, if the court finds that the statute is constitutional, as applied, then the case will proceed to a verdict.

III. THE APPROPRIATE DISTRICT ATTORNEYS GENERAL ARE NECESSARY PARTIES.

Plaintiffs have failed to join necessary and/or indispensable parties, the appropriate District Attorneys General, who are the persons with authority to enforce the law in question. Tenn. Code Ann. § 29-14-107(a) specifies that when declaratory relief is sought, *all persons* shall be made parties who have or claim *any interest* which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. The Declaratory Judgments Act has been held to impose stricter requirements than those imposed generally by Tenn. R. Civ. P. 19.01 and 19.02, as joinder of persons having an affected interest is clearly required by Tenn. Code Ann. § 29-14-107(a). *Huntsville Utility District v. General Trust*, 839 S.W.2d 397, 403 (Tenn. App. 1982), *perm. app. denied* (In declaratory judgment action in which the State Attorney General was named as a party regarding the alleged unconstitutionality of a state statute, utility customers and utility bond holders were also found to have an interest and to be necessary parties). The non-joinder of necessary parties is fatal on the question of justiciability, which in a suit for declaratory judgment, is a necessary condition of judicial relief. *Wright v. Nashville Gas & Heating Co.*, 183 Tenn. 594, 598, 194 S.W.2d 459, 461 (1946).

The challenged law provides that violations of that part are punishable by fine and, for certain offenses, by imprisonment and/or a fine. The Tennessee Attorney General has no authority to enforce Chapter 339 (or the statute it amends) and no authority to prevent others from doing so. With limited exceptions not relevant here, the Attorney General and Reporter has no authority to prosecute anyone for violating a criminal statute. *See generally* Tenn. Code Ann. § 8-6-109; Tenn. Const. Art. VI, § 5. Similarly, he has no authority to interfere in any way with the exercise of prosecutorial discretion by the district attorneys general. *State v. Superior Oil*,

875 S.W.2d 658, 659-61 (Tenn. 1994). Thus, if this Court were to issue an order in this case involving only the Tennessee Attorney General, such an order would not bind the appropriate District Attorneys General who have the power to enforce Chapter 339

Without the inclusion of the District Attorney General as necessary interested parties, there presently is not a justiciable issue over which this Court has subject matter jurisdiction, and there is a realistic prospect of duplicative litigation regarding the validity of the Act. *See generally* Tenn. R. Civ. P. 12.02(1), (2), (3), and (7).

IV. TENN. CODE ANN. § 39-17-1305, AS AMENDED BY CHAPTER 339, IS NOT UNCONSTITUTIONALLY VAGUE.

Tenn. Code Ann. § 39-17-1305, as amended by Chapter 339, sufficiently describes the conduct that it prohibits. Chapter 339 is permissive, not prohibitive, and therefore is not subject to attack on grounds of vagueness. In general, the carrying of firearms into establishments that serve alcohol remains unlawful. Violations are still punishable as Class A misdemeanors. Chapter 339 simply permits a narrow class of persons to engage in conduct that would otherwise be forbidden under Tenn. Code Ann. § 39-17-1305. Chapter 339 provides more than minimal guidance for the exception to the general prohibition. Permit holders are not required to carry firearms into restaurants that serve alcohol. If they have any doubts about whether carrying a firearm into a particular establishment would violate Tenn. Code Ann. § 39-17-1305, permit holders can take reasonable steps to determine whether the establishment is, in fact, a restaurant, and, if still in doubt, they can always choose to enter the premises unarmed.

One of the requirements of due process is proper notice of what the law prohibits. A law is unconstitutionally vague if it fails to adequately describe the forbidden conduct. The test is whether the law provides sufficient notice of what is forbidden so that reasonable people of

ordinary intelligence are not left to guess about what the law requires. *City of Knoxville v. Entertainment Resources, LLC.*, 166 S.W.3d 650, 655 (Tenn. 2005); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993).

Under Tennessee law, determining whether a statute is unconstitutionally vague is a two step process. Courts first determine whether a statute is unconstitutionally vague in a general sense and, if not, whether it is vague as applied. *State v. Burkhardt*, 58 S.W.3d 694, 699 (Tenn. 2001). A statute is unconstitutionally vague in the general sense only if it is shown to be vague in all possible applications. *Id.* If a statute is not vague in the general sense, the court may proceed to determine whether the statute is vague as applied. There are no as applied challenges pending. None of the Plaintiffs allege that they have been threatened with any enforcement action in regard to carrying a weapon into a particular establishment. Should an as applied challenge arise it may appropriately be addressed upon a proper factual record in a court with jurisdiction over criminal matters.

Determining whether a statute is vague in the general sense is analogous to deciding whether a statute is facially invalid. When a facial challenge to a legislative act is presented to the court, it is “the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid. The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . .” *United States v. Salerno*, 481 U.S. 739, 745 (1987). *See also Lynch v. City of Jellico*, 205 S.W.3d at 390 (quoting *Davis-Kidd Booksellers, Inc v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)). The presumption that a law is constitutional operates with greater force when a facial challenge is made. *Gallaher v. Elam*, 104 S.W. 3d at 455, 459 (Tenn. 2003). When such a facial challenge is successful, the law in question is held

unenforceable under all circumstances, not simply in the specific application to the party in the suit. *Salerno* at 745. Accordingly, the facial challenger must demonstrate that the law cannot be constitutionally applied to anyone. 1 Lawrence H. Tribe, *American Constitutional Law* § 3-31, at 611 (3d ed.2000).

In this case, Plaintiffs have facially challenged Chapter 339 on grounds that it is unconstitutionally vague in a general sense. To prevail, they must show that the statute is vague no matter how it is applied.¹⁰ Plaintiffs cannot do so because Chapter 339 can be applied in situations where it will be plainly understood. The statute defines restaurant in a manner that is readily understood by people of ordinary intelligence. To be a restaurant within the meaning of Chapter 339, the establishment must hold itself out to the public as being engaged in that business. People of ordinary intelligence will understand that to hold itself out to the public as a restaurant, a business will advertise itself as such through various types of advertisements. In fact, in most situations permit holders will be able to recognize that an establishment is a restaurant based on its advertising and appearance.¹¹ For example, there does not appear to be any dispute that establishments such as O'Charley's, Applebee's, Chili's, Long Horn Steak,

¹⁰ Courts are reluctant to grant facial challenges for three reasons, which are applicable in this case. First, facial challenges rely on conjecture and thus may result in "premature interpretation of statutes on the basis of factually barebones records." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. at ----, 128 S.Ct. at 1191 (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). Second, facial challenges "run contrary to the fundamental principle of judicial restraint" by encouraging the courts to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. at ----, 128 S.Ct. at 1191; see also *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). Third, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. at ----, 128 S.Ct. at 1191; see also *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)).

¹¹ The rest of the definition provides guidance to enable a reasonable person to understand what the law requires. Under the definition, a restaurant must have a kitchen, dining room and cooking staff. Further, the establishment must serve at least one meal per day for at least five (5) days per week. All of these items are readily ascertainable by simply asking an employee of the business or from personal observation.

Logan's Roadhouse, Outback, P.F. Changs, to name a few, are "restaurants" within Chapter 339. Although the John Doe handgun carry plaintiffs numbers 10, 12, 13 claim that they plan on carrying their handgun into alcohol-serving establishments, they do not assert that they intend to carry into any establishment that has posted that weapons are prohibited. Although these John Doe plaintiffs allege they need protection from Chapter 339 going into effect, they do not allege any requirement in Chapter 339 that these permit holders alter their prior practice and carry into any establishment that serves alcoholic beverages. John Doe Plaintiffs Nos. 10, 12, and 13 do not specify any prohibition against inquiring of an establishment if it qualifies as a "restaurant" under Chapter 339. The only establishments specifically named by John Doe Plaintiff No. 10 as ones where he does not know if he can take a firearm are Tootsies and Graham Central Station. (Amended Affidavit of John Doe No. 10, Rayburn Plaintiffs' Exhibit A, ¶14). However, Tootsies has posted no weapons allowed and Graham Central Station is only open four (4) days a week and therefore does not qualify as a restaurant under Chapter 339.

The definition of restaurant in Chapter 339 is almost identical to the definition that is used in the alcoholic beverage laws, except for the required number of days of operation per week. *See*, Tenn. Code Ann. § 57-4-102 (27)(A). As a matter of public record, it appears that the Alcoholic Beverage Commission has issued over 2200 liquor by the drink licenses to establishments classified as "restaurants." A review of the affidavit of Shari Danielle Elks, Executive Director of the Tennessee Alcoholic Beverage Commission, shows that in the last five years, only an average range of 10 to 20 businesses per year have been issued citations for failing to meet the minimum standards for food service volume. Once a citation has been settled by consent judgment or otherwise, there is no presumption that the establishment continues to be in violation of the food service requirements. An establishment must certify on their applications

(including renewal applications) with the Alcoholic Beverage Commission, that the establishment meets the requirements for a license, including the minimum food service requirements (, i.e., that the service of food is their principal business). (See certified copy of Alcoholic Beverage Commission application for liquor by the drink license for establishments classified as “restaurants”). To the extent pending enforcement actions, wherein establishments have been cited for failing to meet the minimum food service requirements, are relevant, these are matters of public record.

Any ambiguity that might exist in the statute would be cured by the application of the rule of lenity. If a penal statute contains an unresolved ambiguity, courts will limit the statute’s reach to the persons or circumstances clearly described by the statute. *State v. Horton*, 880 S.W.2d 732, 734-35 (Tenn. Crim. App. 1994). If a court were to determine that the statute is vague in its application to a particular fact situation, the rule of lenity would prevent an unconstitutional prosecution.

Although the plaintiff gun carry permit holders (John Does Nos. 10-13) complain that Chapter 339 renders Tenn. Code Ann. §39-17-1305 unconstitutionally vague because they cannot know with certainty whether the serving of meals is the “principal business” of restaurants where they intend to carry their weapons, their concern may be misplaced. Under Tennessee’s criminal code, “[i]f the definition of an offense within . . . [Title 39] does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state” for the offense. Tenn. Code Ann. § 39-11-301(c). The statute at issue here, Tenn. Code Ann. § 39-17-1305, does not “plainly dispense with a mental element.” Thus, Plaintiffs’ fears are unfounded because they as a practical matter would not be prosecuted for bringing a gun into an establishment serving alcoholic beverages where it was not legal if they

were merely mistaken as to whether the “principal business” of the establishment was the serving of meals within the meaning of Chapter 339. A prosecution under section 1305 would likely entail, at the very least, proof that plaintiffs were “reckless” with regard to the status of the establishment, in other words, that they “consciously disregarded a substantial and unjustifiable risk” that the establishment did not qualify as a “restaurant” under the exemption described in Chapter 339. Tenn. Code Ann. § 39-11-302(c).

To the extent that Plaintiffs are correct that Tenn. Code Ann § 39-11-202 (b)(2) requires that an exception to a criminal prohibition must be proven by a preponderance of the evidence by the person asserting it, permit holders should tailor their conduct and only carry in establishments in which they are confident they can prove the exception. Nothing in Chapter 339 requires a gun carry permit holder to take a weapon into any establishment that sells alcoholic beverages. Personal observation, common sense, and inquiry of the operators of establishment may be used to reasonably evaluate whether an establishment is a “restaurant” within Chapter 339. There is no constitutional prohibition against a permit holder inquiring of the operators of an establishment if the establishment meets the definition of “restaurant” in Chapter 339.¹² If a gun permit holder is not satisfied that he can establish by a preponderance of the evidence that a particular establishment is within the exception in Chapter 339, he should not carry on that premises. Many establishments are obviously “restaurants”, such as O’Charley’s, Applebee’s, and Chili’s, even without having to inquire of the establishment’s operators. An act is not unconstitutionally vague when its provisions provide minimal guidelines, even though the statute’s application in a particular instance may prove difficult. *State v. Smith*, 48 S.W.3d at 165-66 (Drug-Free School Zone act, which provides enhanced penalties for drug sales within

¹² In fact, some restaurants have taken it upon themselves to give notice to the patrons that if they have questions concerning the why or whether guns are prohibited in their establishment, then the patron should make an inquiry with management. (Investigator King Affidavit, ¶ 20)

1,000 feet of a school, is not unconstitutionally vague due to the alleged difficulty in measuring the requisite distance from school's property, and even though at trial the State presented testimony of a city engineer statute using map overlays and a scale).

Despite the speculative possibility that the statute might be subject to successful challenges in a specific fact situation, that mere possibility does not render the statute facially unconstitutional. Furthermore, any such challenge is more appropriately mounted in the context of actual prosecutions of permit holders who have been charged with violating Tenn. Code Ann. § 39-17-1305.¹³

A statute is also unconstitutionally vague if it places too much discretion in the hands of law enforcement. A law is deemed to be vague if the language is so unclear as to leave the issue of whether it has been violated to the subjective judgment of the officers who enforce it. *Davis-Kidd*. In this case, the law provides sufficient guidance to law enforcement officers and properly limits their discretion and, therefore, ought to be upheld. The term restaurant, as defined in chapter 339 encompasses the term as commonly understood by the public at large. Police officers are not left free to define the term based on the day to day decisions that they make on the streets. Hypothetically officers might apply the term in an ambiguous manner in some cases. However, those matters can be properly addressed in the context of live criminal

¹³ Plaintiffs' argument that the statute is vague rests on the use of the phrase "and the serving of such meals shall be the principal business conducted." Statutes are to be read as a whole and the language is to be construed according to its plain and ordinary meaning. *State v. Alford*, 970 S.W.2d 944 (Tenn. 1998). In situations where an otherwise statute may contain some ambiguous word or phrases, courts apply the doctrine of "noscitur a sociis." That doctrine permits courts to ascertain the meaning of doubtful words by reference to other words and phrases associated with them and to limit and subordinate specific words and phrases to harmonize them with the purpose of the statute. *Sallee v. Barrett*, 171 S.W.3d 822 (Tenn. 2005). Application of that doctrine to the disputed phrase indicates that the intent of the legislature was to define the term restaurant in a manner that is commonly understood by the general public and not to give the term an overly technical meaning.

prosecutions where a due process claim can be raised as a defense.¹⁴

First Amendment rights are not impeded by the application of Chapter 339. Plaintiffs reference the overbreadth doctrine as authority supporting the invalidation of Chapter 339. The doctrine of overbreadth has only been sparingly applied when the chilling effect of First Amendment rights is both real and substantial. The overbreadth must be real and substantial in relation to the State's plainly legitimate sweep before the law should be invalidated on its face as impermissibly impinging on First Amendment freedoms, and if an ambiguous term has created a constitutional problem which may be solved by construction, courts have a duty to do so. *See, e.g., New York v. Ferber*, 458 U.S. 747, 770 (1982). The cases applying the overbreath doctrine cited by Plaintiffs are ones in which First Amendment violations were asserted. Plaintiffs have not cited any cases in which the overbreath doctrine has been applied in regard to one's ability to carry a weapon, especially into establishments that serve alcoholic beverages.

Plaintiffs have cited some statements that have been made by individual members of the General Assembly and argues that the statements are further proof that Chapter 339 is vague. Such assertions are without merit. When a statute is clear on its face, statements of individual members of the legislature are not relevant. Legislative intent and the meaning of the statute are to be determined from the text. *Saturn Corp. v. Johnson*, 197 S.W.3d 273 (Tenn. App. 2006). The language of Chapter 339 is clear and unambiguous and the court ought to disregard any extraneous statements about the meaning of Chapter 339 which were made by individual members of the legislature.

Finally, Plaintiffs cite Op. Tenn. Att'y Gen. 00-020 apparently for the proposition that the

¹⁴ Plaintiffs also argue that Chapter 339 ought to be invalidated because it puts permit holders, restaurant owners and other patrons in legal jeopardy. That argument is without substance. By its terms, Tenn. Code Ann. § 39-17-1305 punishes only persons who unlawfully carry firearms into establishments that serve alcohol. It does not punish the owners of such establishments or unarmed patrons of those establishments.

Attorney General has already conceded that Chapter 339 is unconstitutionally vague. The opinion is inapplicable and stands for no such proposition. That advisory opinion arose in a different context. The proposed statute that was the subject of the opinion was prohibitive in nature. Chapter 339, on the other hand, is permissive. In addition, the opinion does not concede that the language at issue was unconstitutionally vague. Rather, the Attorney General concluded that the statute might or could be subject to attack. Furthermore, the proposed legislation under review was a proposed new statutory scheme. Chapter 339 is an addition to an existing statute and tracks the preexisting language in the alcoholic beverage commission laws. Any ambiguities that might arise by reading Chapter 339 in isolation can be resolved by reading it in light of the rest of the statute and other related laws.

V. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT CHAPTER 339 IS FUNDAMENTALLY ARBITRARY OR IRRATIONAL IN VIOLATION OF SUBSTANTIVE DUE PROCESS.

The substantive due process provisions of the Tennessee Constitution, Art. I, § 8, are synonymous with the Due Process Clause of the 14th Amendment of the United States Constitution. *See, e.g., Gallaher v. Elam*, 104 S.W. 3d 455, 463 (Tenn. 2003); *Riggs v. Burson*, 941 S.W. 2d 44, 51 (Tenn. 1997), *cert. denied*, 522 U.S. 982 (1997) “[U]nless a fundamental right is implicated, a statute comports with substantive due process if it bears ‘a reasonable relation to a proper legislative purpose’ and is ‘neither arbitrary nor discriminatory.’” *Gallaher* 104 S.W. 3d at 463, *quoting Riggs*, 941 S.W. 2d at 51, *quoting Newton v. Cox*, 878 S.W. 2d 105, 110 (Tenn. 1994), *cert denied*, 513 U.S. 869 (1994). No provision of the state or federal constitutions imposes a duty upon the government to criminalize the possession of firearms in any particular place or circumstance. Similarly, no provision of either constitution guarantees to

plaintiffs or any other citizen a right to be free from the presence of firearms in any particular place or circumstance. The statute thus comports with substantive due process if a reasonably conceivable rational basis exists to support it.

The burden is on Plaintiffs to demonstrate that there is no conceivable rational basis for Chapter 339 and that the law is so arbitrary or irrational that it fails to serve any governmental objective:

The courts do not use *Tenn. Const. art. I, § 8* to inquire into the motives of a legislative body or to scrutinize the wisdom of a challenged statute or ordinance. *Braunfeld v. Brown*, 366 U.S. at 608, 81 S.Ct. at 1148; *Fritts v. Wallace*, 723 S.W.2d 948, 949-50 (Tenn.1987); *Brumley v. Town of Greeneville*, 38 Tenn.App. 322, 326, 274 S.W.2d 12, 14 (1954). Our inquiry is more limited. Unless a fundamental right is involved, our task is to review the statute or ordinance to determine whether it bears a reasonable relation to a proper legislative purpose and whether it is neither arbitrary nor discriminatory. *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn.1994); *Neece v. City of Johnson City*, 767 S.W.2d 638, 639 (Tenn.1989). Thus, it is not our prerogative to superimpose our personal opinions concerning the propriety of [the legislative enactment].

[T]he only inquiry remaining is whether [the law] is arbitrary and unreasonable. . . . The fact that other [governmental bodies] may have enacted different [laws] has no bearing on our inquiry.

The courts presume that ordinances enacted in accordance with a . . . government's police power are valid and constitutional. *Rivergate Wine & Liquors, Inc. v. City of Goodlettsville*, 647 S.W.2d at 634. Thus, persons challenging [a law] on substantive due process grounds have the burden of proving that the ordinance is not reasonably related to a valid governmental purpose. *Rivergate Wine & Liquors, Inc. v. City of Goodlettsville*, 647 S.W.2d at 634; *Fritts v. Wallace*, 723 S.W.2d at 950.

Martin v. Beer Board for City of Dixon, 908 S.W.2d 941, 955-56 (Tenn. App. 1995) (rejected substantive due process claim challenging local ordinance prohibiting sale of beer on Sundays).

Chapter 339 is supported by a rational basis. In *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009), the court rejected a substantive due process challenge to an Oklahoma law requiring businesses to allow weapons to be stored in vehicles parked on-premises. The court

stated:

“[The courts] need not decide the long-running debate as to whether allowing individuals to carry firearms enhance or diminish the overall safety of the community. The very fact that this question is so hotly debated, however, is evidence enough that a rational basis exists for the Amendments [allowing weapons to be stored in vehicles at businesses]. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (noting that if a regulation is fairly debatable, the legislative judgment must control).

Ramsey Winch, Inc. v. Henry, 555 F.3d 1199, 1210 (10th Cir. 2009). “In addition to the [law’s] purpose of increasing safety, one could argue that the Amendments are simply meant to expand (or secure) the Second Amendment Right to Bear Arms.” *Id.*, citing *PruneYard*, 447 U.S. 74, 81 (1980) (noting that State may exercise its police powers to adopt individual liberties more expansive than those conferred by the Federal Constitution).

The legislative history indicates that the main purposes for Chapter 339 were to allow law-abiding citizens to bear arms and to engage in self-defense. The legislature felt the current prohibitions in the law at restaurants that serve alcoholic beverages infringed upon these interests. Because the Plaintiffs have failed to demonstrate that there is no reasonably conceivable basis for Chapter 339, their substantive due process claim must fail.

VI. CHAPTER 339 DOES NOT IMPEDE AN EMPLOYER’S ABILITY TO PROVIDE A SAFE WORKPLACE AND IS NOT PREEMPTED BY THE OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA).

In *Ramsey Winch*, the plaintiffs also argued that the Oklahoma statute was preempted by OSHA. The district court agreed and issued an injunction against enforcement of the statute. The district court found that gun-related workplace violence was a recognized hazard and held that the Oklahoma statute was in conflict with the federally imposed duty of employers to provide a safe workplace.

The Tenth Circuit rejected the plaintiffs' argument, reversed the district court and vacated the injunction. It noted that the district court's findings concerning guns and workplace violence were unfounded and based on speculation. *Ramsey Winch*, 555 F. 3d at 1207.¹⁵

The court also found that, in enacting OSHA, Congress did not intend to interfere with the exercise of state police powers. *Id.* It stated that the law was not intended to impose a comprehensive set of standards to govern workplace safety. In concluding that the district court decision interfered with Oklahoma's proper exercise of its police power and therefore ought to be reversed, the Tenth Circuit said:

Here, the Amendments conflict with no OSHA standard. Moreover, the Oklahoma Court of Criminal Appeals defined the Amendments as "public crimes" of general applicability "concern[ing] protection of the community as a whole rather than individual citizens. . . . Thus, while the Amendments may "have a 'direct and substantial effect' on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public." The district court's decision interferes with Oklahoma's police powers, . . . and essentially promulgates a court-made safety standard which OSHA has explicitly refrained from implementing on its own.

Id., at 1207-08. (internal cites omitted).

Chapter 339, unlike the Oklahoma law, does not require restaurant owners to take any action with respect to the carrying of firearms by carry permit holders. There is nothing in Chapter 339 that requires business owners to admit armed carry permit holders into their establishments and to provide them with service. To the contrary, owners of such businesses remain free to prohibit the firearms on their premises if they believe that doing so will provide a safer working environment for their employees or for any other reason. Plaintiffs' OSHA claim

¹⁵ The court also noted that OSHA had given no indication that employers should prohibit firearms in locked cars in parking lots and had declined to issue standards related to violence in the workplace. The court also found that in declining to issue such standards, OSHA stated that it intended to rely instead on other federal, state and local law enforcement agencies to handle violence in the workplace.

should therefore be rejected.

VII. ALLOWING RESTAURANT OWNERS TO DECIDE WHETHER TO ALLOW HANDGUN CARRY PERMIT HOLDERS TO CARRY FIREARMS INTO THEIR ESTABLISHMENTS, IS NOT AN UNLAWFUL DELEGATION OF AUTHORITY.

Article II, § 3 of the Tennessee Constitution prohibits the General Assembly from delegating its authority to make law. However, the General Assembly “can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.” *Gamble v. State*, 333 S.W.2d 816, 821 (Tenn.1960). Public Chapter 339 established that the law allows properly permitted persons to carry a firearm into a restaurant as defined in that same chapter. Tenn. Code Ann. § 39-17-1359 also *lawfully* gives to property owners – not just restaurant owners – the discretion to determine whether or not the owner wants to allow handgun carry permit holders to carry firearms onto their property. It is the “state of things,” the wishes of the property owner in exercising his property rights, on which the operation of the law depends.¹⁶

There can be no unlawful delegation unless the matter involves legislative power. The General Assembly may delegate any power that is not legislative in character. *State ex rel. Llewellyn v. Knox Co.*, 54 S.W. 2d 973 (Tenn. 1932). What the General Assembly has done with the enactment of Public Chapter 339 does nothing more than to enable individual owners to set rules governing the use of their private property; no delegation of legislative authority has been made. Therefore, there has been no unconstitutional delegation of legislative authority.

Plaintiffs rely on *American Chariot v. City of Memphis*, 164 W.W.3d 600 (Tenn. Ct.

¹⁶ It is important to note that a basic principal of property law that a property owner's right to own, use, and enjoy private property is fundamental. *Massey v. R.W. Graf, Inc.* 277 S.W.3d 902, 908 (Tenn.Ct.App. 2008).

App. 2004) to support their argument that Chapter 339 is an unlawful delegation of police powers to private citizens. (Rayburn Plaintiffs' Second Amended Complaint ¶ 104). In that case, the City of Memphis had enacted an ordinance prohibiting the operators of horse drawn carriages from placing carriage stands on city streets within one hundred feet of a restaurant entrance. The ordinance also contained a provision that allowed operators to place their stands closer to restaurant entrances if they obtained the permission of the restaurant owner. The court held that allowing individual restaurant owners to make such an election was an unconstitutional delegation of legislative authority and struck down the ordinance.

American Chariot is distinguishable. In that case, the election provision in the ordinance permitted private citizens to determine whether a specific use of city owned property, a public thoroughfare, would be detrimental to the public. *American Chariot*, 164 S.W.3d at 605. In this case, the decisions that are made by property owners are limited to matters related to the use of their property only. The Legislature has simply codified in Tenn. Code Ann. § 39-17-1359 long-recognized property rights concerning an owner's right to use and enjoy his property as he deems appropriate.

Davis v. Blount Co. Beer Bd., 621 S.W.2d 149 (Tenn. 1981) is instructive. In *Davis*, the Court upheld an ordinance and the statute which authorized the adoption of the ordinance prohibiting the issuance of a beer license within 300 feet of a residence if the owner of the residence appeared before a beer board and objected, did not unlawfully delegate legislative power to private individuals.

In rejecting the argument that the statute constituted an unlawful delegation of legislative authority, the Court in *Davis* reasoned that upon the passage of the statutory authority, the resident located within the 300 feet of the proposed beer outlet exercised no legislative power;

the resident either formally objected, or chose not to do so. *Davis* at 152. While the effect of an objection is to deny a permit, that “effect is derived from the legislative enactment...not from the residence owner.” *Id.* In reaching its conclusion the court cited a passage from *Myers v. Fortunato*, 110 A. 847, 848 (Del. 1920) which states:

If the existence of the law depends upon the vote or act of the people it is an unconstitutional delegation of legislative power, but if the law is complete in and of itself the fact that it provides for the removal or modification of its prohibition by the act of those most affected thereby, does not make it a delegation of legislative power.

This passage makes clear that there can be no delegation of legislative authority if the law is complete without action of private persons. In this case, the law is complete. Persons or businesses, including restaurants, can prohibit the possession of firearms on their premises because of the existence of the law. Tenn. Code Ann. § 39-17-1359. The fact that individual property owners may decide whether or not to allow firearms on their premises, according to *Davis*, does not make it a delegation of legislative power.

VIII. IF THE COURT FINDS THAT A PORTION OF CHAPTER 339 IS UNCONSTITUTIONALLY VAGUE OR OTHERWISE INVALID, CHAPTER 339 COULD EFFECTIVELY BE ELIDED TO CARRY OUT THE INTENT OF THE GENERAL ASSEMBLY.

Public Chapter 339 makes an addition to the list of exceptions to the general prohibition against the possession of firearms where alcoholic beverages are served. If the court finds that Public Chapter 339 is unconstitutionally vague as enacted, the Attorney General asserts that Chapter 339 could be properly subjected to elision, with the offending provision removed, and the remainder of the statute would be valid and effectively carry out the intent of the General Assembly.

Plaintiffs contend that the new law is constitutionally vague “because the statute’s

definition of a restaurant, ‘the serving of such meals shall be the principal business conducted’ provides no notice or opportunity to know what establishments are, or are not, covered by the statute.” (Rayburn Plaintiffs’ Second Amended Complaint, ¶ 93). The Intervenor also asserts that, Chapter 339 is unconstitutionally vague because “the statute’s definition of a restaurant, ‘the serving of such meals shall be the principal business conducted’ provides no notice or opportunity to know what establishments are, or are not, covered by the statute.” (Melrose Complaint, ¶ 26). The Attorney General asserts that if the alleged offending phrase, “the serving of such meals shall be the principal business conducted,” was elided from the statute, the remainder of the statute would be clear and reflect the intent of the General Assembly.¹⁷

Under the doctrine of elision, a court may “elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective.” *Lowe’s Companies, Inc., v. Cardwell*, 813 S.W.2d 428 (Tenn. 1991). The rule of elision applies “if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable ... provided, of course, that there is enough of the act for a complete law capable of enforcement and fairly answering the object of its passage.” *Id.* at 430, quoting *Davidson County v. Elrod*, 232 S.W.2d 1 (Tenn. 1950).

The inclusion of a severability clause in the statute is evidence of an intent on the part of the legislature to have the valid parts of the statute enforced if other parts are deemed unconstitutional. *Cartlett v. State*, 336 S.W.2d 1 (Tenn. 1960). Although Chapter 339 does itself not contain a severability clause, Tenn. Code Ann. § 39-17-1305 was enacted as part of the 1989 Criminal Code Revision which did contain a general severability clause, *see* 1989 Tenn. Pub. Acts ch. 591, § 120, and the legislature has elsewhere expressed its general intention that

¹⁷ The Attorney General does not concede that Public Chapter 339 is vague as written.

unconstitutional provisions of the Code may be elided in order to give effect to the remainder of the Code, *see* Tenn. Code Ann. § 1-3-110.

The phrase “the serving of such meals shall be the principal business conducted,” is not essential to the definition of restaurant contained in subpart (3)(b) and its elision would not create an incomplete statute. The remainder of the statute, were that provision elided, would still accomplish what the legislature intended, that is, to allow handgun carry permit holders to carry their firearms into restaurants, i.e., facilities that possesses the capability to serve meals, that advertise and hold themselves out to be in the business of serving meals and where such meals are actually served at least once per day, five (5) days per week. Thus, the offending provision could be successfully elided out.

CONCLUSION

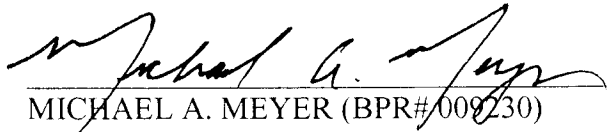
Based on the foregoing, the Plaintiffs’ Motions for Summary Judgment should be denied. Moreover, the Attorney General’s Motion for Judgment on the Pleadings and/or for Summary Judgment should be granted. As a matter of law, this action should be dismissed.

Respectfully submitted,

ROBERT E. COOPER, JR.
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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Memorandum has been delivered by hand, united states mail, postage prepaid, and/or e-mail, to:

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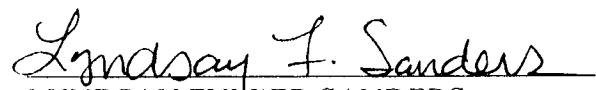
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this 2nd day of October, 2009.


LYNDSAY FULLER SANDERS
Assistant Attorney General

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

6 On December 6, 2010, I served the foregoing document(s) described as
7 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS'**
8 **MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE**
9 **FOR SUMMARY ADJUDICATION / TRIAL**

10 on the interested parties in this action by placing
11 ☐ the original
12 ☒ a true and correct copy

13 thereof enclosed in sealed envelope(s) addressed as follows:

14 Edmund G. Brown, Jr.
15 Attorney General of California
16 Zackery P. Morazzini
17 Supervising Deputy Attorney General
18 Peter A. Krause
19 Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

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

26 (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
27 addressee.
Executed on December 6, 2010, at Long Beach, California.

28 ☒ (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.

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

CLAUDIA AYALA

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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA	) CASE NO. 10CECG02116
12 COUNTY SHERIFF; HERB BAUER)
13 SPORTING GOODS; CALIFORNIA	) DECLARATION OF SEAN A. BRADY
14 RIFLE AND PISTOL ASSOCIATION	) IN SUPPORT OF MOTION FOR
15 FOUNDATION; ABLE'S SPORTING,	) SUMMARY JUDGMENT OR IN THE
16 INC.; RTG SPORTING COLLECTIBLES,	) ALTERNATIVE FOR SUMMARY
17 LLC; AND STEVEN STONECIPHER,	) ADJUDICATION AND TRIAL
18)
19 Plaintiffs and Petitioners,	) Date: January 18, 2011
20 vs.	) Time: 8:30 a.m.
21	) Location: Dept. 402
22 THE STATE OF CALIFORNIA; JERRY	) Judge: Hon. Jeffrey Y. Hamilton
23 BROWN, IN HIS OFFICIAL CAPACITY	) Action Filed: June 17, 2010
24 AS ATTORNEY GENERAL FOR THE)
25 STATE OF CALIFORNIA; THE)
26 CALIFORNIA DEPARTMENT OF)
27 JUSTICE; and DOES 1-25,)
28)
Defendants and Respondents.)

DECLARATION OF SEAN A. BRADY

I, Sean A. Brady, declare as follows:

1. I am an attorney licensed to practice law before the courts of the State of California. I am an associate attorney of the law firm Michel & Associates, P.C.. I am an attorney of record for Plaintiffs in this action and I have personal knowledge of each fact stated in this declaration.

2. Excerpts from the Court Reporter's expedited rough draft of volume two of the deposition transcript of Defendants' lay / expert witness, Blake Graham, are attached as Exhibit "58" to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief, filed concurrently herewith. I was present in the room for portions of the deposition, which was taken on December 2, 2010, and can state that the transcript accurately reflects the testimony provided as to each page of testimony filed with the Court in support of Plaintiffs' motion during those times that Clint Monfort was not present in the room. The parties agreed that the witness is to review his testimony and will identify any changes in the time frame stipulated to on the record between the parties pursuant to the stipulation of the parties.

3. Plaintiffs will lodge copies of the relevant portions of the Court Reporter's final draft of volume two of the deposition transcripts of Defendants' lay / expert witness, Blake Graham, as soon Plaintiffs receive them. Plaintiffs will further lodge certified copies of the relevant portions of volume two of the deposition transcripts of Defendants' lay / expert witness, Blake Graham, once those are received.

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

Dated: December 6, 2010


Sean A. Brady

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

7 **DECLARATION OF SEAN A. BRADY IN SUPPORT OF**
8 **MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE**
9 **FOR SUMMARY ADJUDICATION AND TRIAL**

9 on the interested parties in this action by placing

10 [] the original

[X] a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

11 Edmund G. Brown, Jr.
12 Attorney General of California
13 Zackery P. Morazzini
Supervising Deputy Attorney General
14 Peter A. Krause
Deputy Attorney General (185098)
15 1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

16 — (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
17 processing correspondence for mailing. Under the practice it would be deposited with the
18 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
19 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.

20 — (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of
21 the addressee.

Executed on December 6, 2010, at Long Beach, California.

22 X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of
23 collection and processing correspondence for overnight delivery by UPS/FED-EX. Under
24 the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for
25 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.

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

28 CLAUDIA AYALA

1 C. D. Michel - S.B.N. 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, PC
3 180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802
4 Telephone: 562-216-4444
Facsimile: 562-216-4445
5 Email: cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA	) CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)
12 SPORTING GOODS; CALIFORNIA	) DECLARATION OF CLINTON B.
RIFLE AND PISTOL ASSOCIATION	) MONFORT IN SUPPORT OF MOTION
13 FOUNDATION; ABLE'S SPORTING,	) FOR SUMMARY JUDGMENT OR IN
INC.; RTG SPORTING COLLECTIBLES,	) THE ALTERNATIVE FOR SUMMARY
14 LLC; AND STEVEN STONECIPHER,	) ADJUDICATION AND TRIAL
))
15 Plaintiffs and Petitioners,	) Date: January 18, 2011
)	) Time: 8:30 a.m.
16 vs.	) Location: Dept. 402
)	) Judge: Hon. Jeffrey Y. Hamilton
17 THE STATE OF CALIFORNIA; JERRY)
18 BROWN, IN HIS OFFICIAL CAPACITY	) Action Filed: June 17, 2010
) AS ATTORNEY GENERAL FOR THE)
19 STATE OF CALIFORNIA; THE)
) CALIFORNIA DEPARTMENT OF)
20 JUSTICE; and DOES 1-25,)
))
21 Defendants and Respondents.)
22)

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DECLARATION OF CLINTON B. MONFORT

I, Clinton B. Monfort, declare as follows:

1. I am an attorney licensed to practice law before the courts of the State of California. I am an associate attorney of the law firm Michel & Associates, P.C.. I am an attorney of record for Plaintiffs in this action and I have personal knowledge of each fact stated in this declaration.

2. Following the passage of Assembly Bill 962 (2009) ("AB 962") in October of 2009, our office began to receive inquiries from firearms retailers, including Plaintiffs Herb Bauer Sporting Goods, Able's Sporting, Inc. and RTG Sporting Collectibles, LLC, seeking advice on how to comply with AB 962. For the Court's convenience, a true and correct copy of "Assembly Bill No. 962" and "Complete Bill History" is attached as Exhibit "1" to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief, filed concurrently herewith.

3. On or about December 9, 2009, and again on or about December 15, 2009, our office contacted Counsel for the Department of Justice ("DOJ") Bureau of Firearms via e-mail, seeking clarification of California Penal Code sections 12060, 12061, and 12318 in order to best advise our clients on how to properly comply with the new laws.

4. On or about December 9, 2009, our office contacted Counsel for the DOJ Bureau of Firearms via e-mail, inquiring about whether Defendant DOJ would hold any regulatory meetings regarding the implementation of Assembly Bill 962. Counsel responded that Defendant DOJ had no intentions of holding any regulatory meetings on this issue.

5. On or about December 15, 2009, our office again contacted Counsel for the DOJ Bureau of Firearms via e-mail, seeking clarification for our clients as to the meaning and scope of AB 962, including questions regarding which types of ammunition were regulated by sections 12060, 12061, and 12318. Using ".22 LR" as an example, our office specifically inquired as to whether a particular caliber of ammunition used in both handguns and long guns would be considered "handgun ammunition" under sections 12060, 12061, and 12318. Through a series of responses, Counsel for the DOJ Bureau of Firearms indicated that she "did not know" and "could

1 not say” whether DOJ Field Representatives would consider a certain caliber of ammunition
2 “handgun ammunition,” and that Defendant DOJ was unable to adopt a policy about which types
3 ammunition are handgun ammunition as it would be considered an illegal underground regulation.

4 6. On or about December 16, 2009, our office sent Defendant DOJ a request pursuant
5 to the California Public Records Act, seeking any and all writings and communications relating to
6 the enforcement of AB 962. A true and correct copy of “Public Records Act Request Sent to
7 California Department of Justice Re: Assembly Bill 962, dated December 16, 2009’ ” is attached
8 as Exhibit “6” to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the
9 Alternative Summary Adjudication / Trial Brief, filed concurrently herewith.

10 7. On or about December 30, 2009, DOJ Bureau of Firearms released an
11 “Information Bulletin,” entitled “New and Amended Firearms Laws,” that provided a brief
12 summary of new and amended California firearms laws. The Bulletin’s section on AB 962 set
13 forth the new regulations impacting the transfer of “handgun ammunition,” but failed to clarify
14 what ammunition would be affected by California Penal Code sections 12060, 12061, and 12318.
15 A true and correct copy of Defendant DOJ’s “Information Bulletin from California Department of
16 Justice Re: New and Amended Firearms Laws, dated December 30, 2009” is attached as Exhibit
17 “8” to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative
18 Summary Adjudication / Trial Brief, filed concurrently herewith.

19 8. On or about January 25, 2010, Defendant DOJ responded to our office’s Public
20 Records Act Request for writings and communications relating to the enforcement of AB 962.
21 Enclosed with that response was the series of e-mail communications between Counsel for the
22 DOJ Bureau of Firearms and our office. A true and correct copy of “Defendant DOJ’s Public
23 Records Act Response and Relevant E-mail Enclosures, dated January 25, 2010” is attached as
24 Exhibit “7” to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the
25 Alternative Summary Adjudication / Trial Brief, filed concurrently herewith.

26 9. As a result of our clients continued inquiries about which ammunition would be
27 regulated by AB 962 and Defendant DOJ’s inability to provide any guidance on this issue, our
28 office was unable to advise our clients as to how to comply with the new laws. Our office

1 subsequently received requests from our clients to commence litigation seeking injunctive and
2 declaratory relief to protect them from prosecution for inadvertently violating the new laws.

3 10. On or about June 17, 2010, Plaintiffs filed their Complaint for Declaratory and
4 Injunctive Relief against Defendants the State of California, Jerry Brown, in his official capacity
5 as Attorney General for the State of California, and the California DOJ ("Defendants"),
6 challenging the validity of Penal Code sections 12060, 12061, and 12318.

7 11. Out of professional courtesy, Plaintiff's subsequently granted Defendants' request
8 for an extension to file a responsive pleading until August 2, 2010.

9 12. On or about August 2, 2010, Defendants filed their Answer to [Plaintiffs']
10 Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate.

11 13. Meanwhile, Assemblyman Kevin de León attempted to remove the reference to
12 Penal Code section 12323(a) and replace it with a "list of ammunition calibers" that would be
13 considered "handgun ammunition" under AB 962. On or about August 19, 2010, AB 2358 was
14 amended to clarify AB 962 by including a list of ammunition calibers that would be considered
15 handgun ammunition, but the bill ultimately failed to pass the Senate. For the Court's
16 convenience, true and correct copies of "Assembly Bill No. 2358 (2010) as Amended in Senate
17 August 19, 2010," "Assembly Bill No. 2358 (2010) as Amended in Senate August 30, 2010," and
18 "Complete Bill History, A.B. No. 2358" are attached as Exhibits "2", "3", and "4", respectively, to
19 Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary
20 Adjudication / Trial Brief, filed concurrently herewith.

21 14. Plaintiffs believe that the amendment to AB 2358 to include a list of ammunition
22 calibers was the result of Defendant DOJ's communications with Assemblyman de León's office
23 regarding the merits of this suit and the vagueness of the challenged provisions. Plaintiffs are
24 unable to confirm this, however, as a previous public records request for communications
25 regarding AB 962 and AB 2358 was denied on privilege grounds, and Plaintiffs' expect that a
26 subsequent request for information about DOJ's communications with Assemblyman de León's
27 office will be denied on similar grounds. True and correct copies of "Public Records Act Request
28 Sent to California Department of Justice Re: Assembly Bill 962, dated July 16, 2010" and

1 “California Department of Justice’s Response to Public Records Act, dated August 9, 2010” are
2 attached as Exhibits “9” and “10”, respectively, to Plaintiffs’ Evidence in Support of Motion for
3 Summary Judgment or in the Alternative Summary Adjudication / Trial Brief, filed concurrently
4 herewith.

5 15. Relevant excerpts from the true and correct copy of the Legislative History Report
6 and Analysis Re: Senate Bill 1276 (Hart – 1994) provided to our office in a sworn response to a
7 request for legislative history made upon Legislative Intent Service, Inc., is attached as Exhibit
8 “5” to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative
9 Summary Adjudication / Trial Brief, filed concurrently herewith.

10 16. True and correct copies of the Cover, Table of Contents, and Introduction found on
11 page 6 of Barnes, Cartridges of the World: A Complete and Illustrated Reference for Over 1500
12 Cartridges (11th ed. 2006) are attached as Exhibit “51” to Plaintiffs’ Evidence in Support of
13 Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief, filed
14 concurrently herewith. Our office has ordered the 12th edition of *Cartridges of the World* and
15 will lodge and serve copies of the corresponding pages in that edition as soon as it is received.

16 17. True and correct copies of selected pages from Chapter 2: Current American Rifle
17 Cartridges and Chapter 3: Obsolete Rifle Cartridges from Barnes, Cartridges of the World: A
18 Complete and Illustrated Reference for Over 1500 Cartridges (11th ed. 2006) are attached as
19 Exhibit “52” to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the
20 Alternative Summary Adjudication / Trial Brief, filed concurrently herewith. Our office has
21 ordered the 12th edition of *Cartridges of the World* and will lodge and serve copies of the
22 corresponding pages of that edition as soon as it is received.

23 18. True and correct copies of selected pages from Chapter 6: Handgun Cartridges of
24 the World from Barnes, Cartridges of the World: A Complete and Illustrated Reference for Over
25 1500 Cartridges (11th ed. 2006) are attached as Exhibit “53” to Plaintiffs’ Evidence in Support of
26 Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief, filed
27 concurrently herewith. Our office has ordered the 12th edition of *Cartridges of the World* and
28 will lodge and serve copies of the corresponding pages in that edition as soon as it is received.

1 19. On or about November 23, 2010, opposing counsel served on our office
2 [Defendants'] Responses to Specially Prepared Interrogatories, Set One. The special
3 interrogatories and the responses relied upon in Plaintiffs' motion are set forth below:

4 Plaintiffs' Special Interrogatory No. 5 asked Defendants to "[l]ist all types of ammunition
5 DEFENDANTS consider 'handgun ammunition' for purposes of California Penal Code section
6 12060, 12061, and 12318. Defendants responded with a list of "calibers" Defendants consider
7 "handgun ammunition" for purposes of the statutes. This list reads: ".45, 9mm, 10mm, .40, .357,
8 .38, .44, .380, .454, .25, .32."

9 Plaintiffs' Special Interrogatory No. 6 asked Defendants to "[f]or each type of ammunition
10 YOU list as 'handgun ammunition' in response to Special Interrogatory No. 5, please IDENTIFY
11 any and all PERSONS who have knowledge of the facts upon which YOU base YOUR response
12 to Special Interrogatory No. 5." Defendants responded that "[t]here is a common understanding
13 among those individuals and businesses who might be subject to section 12060, 12061, and 12318
14 of the Penal Code, as well as among those who might enforce them, that the calibers identified in
15 the State's response to Interrogatory No. 5 are used principally in pistols and revolvers." This
16 response notwithstanding, Defendants listed Special Agent Supervisor Blake Graham as a person
17 "with knowledge of the facts underlying the State's response."

18 Plaintiffs' Special Interrogatory No. 7 asked Defendants to "[f]or each type of ammunition
19 YOU list as 'handgun ammunition' in response to Special Interrogatory No. 5, please IDENTIFY
20 any and all DOCUMENTS upon which YOU rely to support YOUR response to Special
21 Interrogatory No. 5." Defendants responded that "[t]here is common understanding among those
22 individuals and businesses who might be subject to section 12060, 12061, and 12318 of the Penal
23 Code, as well as among those who might enforce them, that the calibers identified in the State's
24 response to Interrogatory No. 5 are used principally in pistols and revolvers." This response
25 notwithstanding, Defendants supported their list as follows: "The Department of Justice is
26 required by statute to maintain a record of handgun sales int the state. The sales data is contained
27 on a Dealer Record of Sales spreadsheet that the State will produce The listed calibers are
28

1 also identified in "Cartridges of the World," which Plaintiffs' expert relies upon, on ammunition
2 vendor websites, and online encyclopedias as handgun ammunition calibers."

3 A true and correct copy of [Defendants'] Responses to Specially Prepared Interrogatories,
4 Set One, provided in a verified response to Plaintiffs' Specially Prepared Interrogatories, Set One,
5 served on opposing counsel, Edmund G. Brown, Jr., Zackery P. Morazzini, and Peter A. Krause is
6 attached as Exhibit "54" to Plaintiffs' Evidence in Support of Motion for Summary Judgment or
7 in the Alternative Summary Adjudication / Trial Brief, filed concurrently herewith.

8 20. On November 29, 2010, opposing counsel served on our office an amended
9 response to Special Interrogatory No. 5. Defendants amended their response to include the
10 following: "The California Department of Justice may identify additional calibers of ammunition
11 that fall within the statutory definition of 'handgun ammunition' in regulations to be promulgated
12 at a later date." Defendants did not amend their original list of "handgun ammunition" (i.e., .45,
13 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, .32). A true and correct copy of [Defendants']
14 Amended Response to Specially Prepared Interrogatory No. 5 provided to me in a verified
15 response to Plaintiffs' Specially Prepared Interrogatories, Set One, served on served on opposing
16 counsel, Edmund G. Brown, Jr., Zackery P. Morazzini, and Peter A. Krause is attached as Exhibit
17 "55" to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative
18 Summary Adjudication / Trial Brief, filed concurrently herewith.

19 21. In response to Plaintiffs' request for an admission that Defendant DOJ had not
20 promulgated regulations regarding the definition of "handgun ammunition" for purposes of the
21 Challenged Provisions, Defendants admitted that Defendant DOJ had not. A true and correct
22 copy of [Defendants'] Responses to Request for Admissions, Set One, provided to me in a
23 verified response to Plaintiffs' Request for Admission, Set One, served on opposing counsel,
24 Edmund G. Brown, Jr., Zackery P. Morazzini, and Peter A. Krause is attached as Exhibit "56" to
25 Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary
26 Adjudication / Trial Brief, filed concurrently herewith.

27 22. Excerpts from the court reporter's expedited final draft of volume one of the
28 deposition transcript of Defendants' lay / expert witness, Blake Graham, are attached as Exhibit

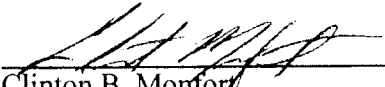
1 “57” to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative
2 Summary Adjudication / Trial Brief, filed concurrently herewith. I attended the deposition, which
3 was taken on December 1, 2010, and can state that the transcript accurately reflects the testimony
4 provided on each page filed with the Court in support of Plaintiffs’ motion. The witness is
5 reviewing the testimony and will identify any changes in the time frame stipulated to on the
6 record between the parties. Pursuant to the stipulation of the parties, Plaintiffs will lodge copies of
7 the relevant portions of volume one of the deposition transcripts of Defendants’ lay / expert
8 witness, Blake Graham, once those are received. True and correct copies of the Exhibits marked
9 as Exhibit “C” and “D” during the deposition of Mr. Graham are filed with the relevant excerpts
10 of Mr. Graham’s testimony in attached as Exhibit “57” to Plaintiffs’ Evidence in Support of
11 Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief

12 23. Excerpts from court reporter’s expedited rough draft of volume two of the
13 deposition transcript of Defendants’ lay / expert witness, Blake Graham, are attached as Exhibit
14 “58” to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative
15 Summary Adjudication / Trial Brief, filed concurrently herewith. I attended the deposition, which
16 was taken on December 2, 2010, and can state that the transcript accurately reflects the testimony
17 provided while I was present during the deposition as to each page of testimony filed with the
18 Court in support of Plaintiffs’ motion. To the extent I was not present in the deposition room for
19 portions of the witness’s testimony, the Declaration of Sean A. Brady filed concurrently herewith
20 authenticates the accuracy of the statements relied upon by Plaintiffs during my absence. The
21 witness is reviewing the testimony and will identify any changes in the time frame stipulated to on
22 the record between the parties pursuant to the stipulation of the parties. Plaintiffs will lodge
23 copies of the relevant portions of the Court Reporter’s final draft of volume two of the deposition
24 transcripts of Defendants’ lay / expert witness, Blake Graham, as soon as they are received.
25 Plaintiffs will further lodge certified copies of the relevant portions of volume two of the
26 deposition transcripts of Defendants’ lay / expert witness, Blake Graham, once those are received.
27 Plaintiffs’ counsel has not yet received a final draft of Volume Two that includes marked exhibits,
28 to the extent any exhibits are referred to in testimony relied upon by Plaintiffs from Volume Two,

1 those exhibits will be lodged with the certified copies of the relevant excerpts of volume two of
2 when they are received.

3 I declare under penalty of perjury under the laws of the State of California that the foregoing
4 is true and correct.

5 Dated: December 6, 2010

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7 Clinton B. Monfort

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1 PROOF OF SERVICE

2 STATE OF CALIFORNIA
3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California.
5 I am over the age eighteen (18) years and am not a party to the within action. My business address
6 is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

8 **DECLARATION OF CLINTON B. MONFORT IN SUPPORT OF MOTION**
9 **FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR**
10 **SUMMARY ADJUDICATION AND TRIAL**

11 on the interested parties in this action by placing

12 [] the original

13 [X] a true and correct copy

14 thereof enclosed in sealed envelope(s) addressed as follows:

15 Edmund G. Brown, Jr.
16 Attorney General of California
17 Zackery P. Morazzini
18 Supervising Deputy Attorney General
19 Peter A. Krause
20 Deputy Attorney General (185098)
21 1300 I Street, Suite 125
22 P.O. Box 944255
23 Sacramento, CA 94244-2550

24 — (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
25 processing correspondence for mailing. Under the practice it would be deposited with the
26 U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach,
27 California, in the ordinary course of business. I am aware that on motion of the party
28 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.

22 X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of
23 collection and processing correspondence for overnight delivery by UPS/FED-EX. Under
24 the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for
25 receipt on the same day in the ordinary course of business. Such envelope was sealed and
26 placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for
27 in accordance with ordinary business practices.

Executed on December 6, 2010, at Long Beach, California.

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

28 
CLAUDIA AYALA

1 C. D. Michel – S.B.N. 144258
Clinton B. Monfort – S.B.N. 255609
2 Sean A. Brady – S.B.N. 262007
MICHEL & ASSOCIATES, PC
3 180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802
4 Telephone: 562-216-4444
5 Facsimile: 562-216-4445
Email: cmichel@michellawyers.com

6
7 Attorneys for Plaintiffs

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF FRESNO**
10

11 SHERIFF CLAY PARKER, TEHAMA) Case No.: 3:09-cv-08011-PCT-PGR
12 COUNTY SHERIFF; HERB BAUER)
SPORTING GOODS; CALIFORNIA RIFLE) **DECLARATION OF STEPHEN**
13 AND PISTOL ASSOCIATION) **HELSLEY IN SUPPORT OF MOTION**
FOUNDATION; ABLE'S SPORTING, INC.;) **FORSUMMARY JUDGMENT OR IN**
14 RTG SPORTING COLLECTIBLES, LLC;) **THE ALTERNATIVE FOR SUMMARY**
15 AND STEVEN STONECIPHER,) **ADJUDICATION AND TRIAL**
)
16)

17 Plaintiffs and Petitioners,

18 vs.

19 THE STATE OF CALIFORNIA; JERRY)
BROWN, IN HIS OFFICIAL CAPACITY AS)
20 ATTORNEY GENERAL FOR THE STATE)
21 OF CALIFORNIA; THE CALIFORNIA)
DEPARTMENT OF JUSTICE; and DOES 1-)
22 25,)
23)

24 Defendants and Respondents.
25)
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27)
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) Date: January 18, 2011
) Time: 8:30 a.m.
) Location: Dept. 402
) Judge: Hon. Jeff Hilton

) Date Action Filed: June 17, 2010

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- 1 co-author a "Mini Manual" on *Custom .45 Automatics*. Since then I have authored
2 at least 50 articles for thirteen other journals. The subject matter ranged from
3 sniper rifles to tactical shotguns to civil war era cartridge conversion revolvers.
- 4 6. I have also reviewed books dealing with the history of ammunition production in
5 England and France. Some examples of the books I have reviewed include
6 *Syteme Lefauchaux* by Chris Curtis and *Paradox* by Roger Lake and David
7 Baker. I have also acted as a researcher for other authors. One example is an
8 article by Silvio Calabi that ran in the November/December 2006 issue of
9 *Shooting Sportsman* magazine. The article "Less is More" is the definitive work
10 on the origin and development of the 28-g shotshell. Additionally, I recently co-
11 authored a book, *Hemingway's Guns*, which was published by Shooting
12 Sportsman Books in October of 2010.
- 13 7. During the 1970s, while employed as a DOJ Field Supervisor in San Diego, I was
14 first qualified in court as a "firearms expert." In 1973, I took the required training
15 to become an NRA Certified Police Firearms Instructor and a California
16 Commission on Peace Officers Standards and Training certified firearms
17 instructor. In addition to being certified as a firearms expert, I am a member of the
18 American Academy of Forensic Sciences and a Technical Adviser to the
19 Association of Firearm and Tool Mark Examiners.
- 20 8. In 1970, I was awarded the Attorney General's Purple Heart Medal upon
21 returning to duty with the Department of Justice after sustaining four gunshot
22 wounds during an undercover heroin investigation. Subsequently, in 1974, I
23 received the Attorney General's Valor Medal for my actions during an undercover
24 cocaine investigation that resulted in a hostage situation and gun-fight.
- 25 9. In 1975, I attended the FBI National Academy in Quantico, Virginia. Included in
26 the required course work was one on firearms. I graduated from the 102nd session
27 of the FBI National Academy with a 4.0 grade point average.
28

1 Maine with a French pinfire shotgun c.1860. For all of these activities, I reloaded
2 my own cartridges. In 2003, I visited the Yuma Proving Grounds with a group of
3 forensic scientists. I was there to have my ammunition tested using Doppler radar
4 and high-speed photography.

5 15. At various times in the past I have conducted seminars on sniper rifles, and in
6 2007 and 2008, I co-taught a workshop on dangerous game rifles and the
7 ammunition for them.

8 16. In 2003, I toured the principal gun making firms in Brescia and Gardone, Italy. In
9 2008, I did the same in Suhl, Germany. In 2005, I toured the Federal Cartridge
10 Company in Anoka, Minnesota to learn how they made ammunition. For the past
11 seven years, I have consulted with California-based gun makers B. Searcy & Co.
12 and John Rigby & Co. Between 2004 and 2007, I also consulted with GaugeMate,
13 Inc. on the design of sub-gauge adapters for shotguns.

14 17. My consulting efforts also involve civil and criminal matters. Most recently, I
15 have been reconstructing the discharge of a pistol in a Central California training
16 school that seriously injured one of the students. During the last decade, I have
17 done fine gun photography and acted as a judge in the Gold Medal Concours
18 d'Elegance of Fine Guns. My photographs of firearms and cartridges have been
19 used for magazine ads and to support articles. Additionally, I inventory firearms
20 collections and provide valuations if requested. The most recent was a 77-gun
21 collection in Montana that I did in June. I recently traveled to Moscow, Russia
22 where I toured an arms manufacturer and firearm museums. I am currently
23 working on an article that examines shotguns and rifles made on the Needham
24 patent of 1852. These firearms use "needle-fire" cartridges – a design that was
25 used by both armies in the Franco-Prussian War of 1870.

26 18. I currently load 60 different types of ammunition. They range from the common
27 (.30-06, .357 S&W Magnum and .30 Carbine) to the obscure (6.5x53.5mm
28 Daudeteau, the .44 Evans and the 10.15x63mmR Serbian). I have the required

1 tools for at least 40 more should I choose to load for them. I have cast my own
2 lead bullets since 1966 and also have experience with bullet swaging. Learning
3 how to load ammunition properly (particularly for the obscure cartridges) requires
4 extensive research. To that end my book collection contains many volumes on
5 cartridge history, fabrication and reloading.

- 6 19. Knowledge acquired during the course of my studies and personal and
7 professional experiences described herein form the basis for my testimony in this
8 matter.

9 **Ammunition/Cartridge History, Distinctions, and Nomenclature**

- 10 20. All modern centerfire and rimfire ammunition for use in rifles and/or handguns
11 consist of the same components: a metal casing that suspends a metal projectile
12 over a charge of powder confined within the metal casing and a primer (or
13 priming charge) to ignite the powder - ("self-contained metallic ammunition"). A
14 true and correct copy of *Principles of Firearms – Definitions – Ammunition*
15 *Components*, <http://rkba.org/guns/principles/definitions/ammunition.html> (last
16 visited December 5, 2010) is filed concurrently herewith as Exhibit "11."
17 21. Self-contained metallic ammunition has been available for almost 160 years.
18 Whether a particular cartridge is used in a handgun (pistol or revolver) or a rifle
19 (or a shorter carbine version) is determined by the needs and desires of the end
20 user. Very large cartridges are generally not used in handguns because of recoil
21 or the weapon's bulk, not because of design or strength limitations. Smaller and
22 relatively less powerful cartridges have been, and continue to be, widely used in
23 both rifles and handguns. This is generally referred to as "cartridge inter-
24 changeability." Thus, a single box of cartridges may be consumed by use in a
25 rifle and a pistol.
26 22. By the 1880s, brass cartridge cases were in their modern form. The French
27 invented smokeless powder circa 1886, which generally replaced black powder as
28

1 the most commonly used propellant in modern self-contained metallic
2 ammunition.

3 23. Numerous cartridges, including, but not limited to, .22 Short, .22 Long Rifle, .30
4 Mauser, .32-20, .32 Smith & Wesson, .38-40, .44-40, .45 Long Colt, and 45-70
5 Government, can be used in identical firearms that were manufactured both in or
6 before 1898 and after 1898, and are commonly used in handguns. True and
7 correct copies of NORM FLAYDERMAN, FLAYDERMAN'S GUIDE TO ANTIQUE
8 AMERICAN FIREARMS 265-66 (7th ed. 1998) (hereafter FLAYDERMAN'S) and
9 Chuck Hawks, *A Brief History of .22 Rimfire Ammunition*, 2005,
10 http://www.chuckhawks.com/history_rimfire_ammo.htm; and page 85 of
11 FLAYDERMAN'S are filed concurrently herewith as Exhibits "12," "17," and "19,"
12 respectively.

13 24. Firearms manufactured in the "black-powder era" can safely use modern
14 smokeless loads if the pressure generated is within its threshold. And the
15 reciprocal is true, a modern firearm can safely use black-powder loads. For
16 example, the .45 Long Colt cartridge has been in almost constant production since
17 1872. A firearm chambered for .45 Long Colt, whether manufactured before or
18 after 1898, can shoot smokeless powder or black powder loads safely.

19 25. After self-contained metallic ammunition is manufactured, if stored correctly, it is
20 likely to still work properly after a century has passed. Accordingly, when
21 ammunition is manufactured, there is no way to know if it will be fired from a
22 rifle or handgun - or will remain unused. For instance, military .30 M1 Carbine
23 cartridges made during World War II or the Korean War may yet be used in a
24 cowboy style revolver in 2015. True and correct copies of Robert Gibson, *A*
25 *Pocket History of the M1 Carbine*, [http://www.fulton-](http://www.fulton-armory.com/M1Carbine.htm)
26 [armory.com/M1Carbine.htm](http://www.fulton-armory.com/M1Carbine.htm); and The Ruger New Model Blackhawk Single-
27 Action Revolver,
28 <http://www.ruger.com/products/newModelBlackhawkBlued/models.html> (last

visited December 5, 2010) are filed concurrently herewith as Exhibits “30” and “31,” respectively.

26. The historical record is quite clear that “cartridge interchange-ability” began almost immediately after “perfection” of the Lefauchaux pinfire metallic cartridge in the early 1850s. The following paragraphs provide a chronology that details when certain cartridges were introduced, the type of firearm they were originally used in, and how their interchangeability was applied in other types of firearms. Paragraphs 27 through 51 provide examples of cartridge interchangeability, though such examples are by no means exhaustive. As this phenomenon has not been confined to the United States, examples from Europe are also included. The chronology is divided into “Obsolete Cartridges”, “Rimfire and Centerfire Cartridges” and “Single-Shot Pistols for all Sizes of Cartridges.” In the paragraphs following that I will explain why when discussing the subject matter of ammunition it is crucial to use the proper terminology to avoid confusion. Then I will explain why I am unable to determine what ammunition is principally for use in a handgun.

Obsolete Cartridges

27. 12mm pinfire: In 1854, Eugene Lefauchaux patented and began producing a six-shot, 12mm pinfire revolver in Paris, France. In 1857, his revolver was adopted by the French military and production was instituted at the French Imperial Arms Factory at St. Etienne. Concurrently, Lefauchaux was producing revolver-carbines and single-shot rifles that used the 12mm cartridge for public sale. Lefauchaux-designed firearms (rifles and handguns) would later be made in both Belgium and Spain. As examples, true and correct copies of Firearms History, Technology & Development: Cartridges: Pinfire Cartridge, <http://firearmshistory.blogspot.com/2010/05/cartridges-pinfire-cartridge.html> (May 4, 2010); Gun & Game Forums – Some of my Antiques, <http://www.gunandgame.com/forums/antique-firearms/103761-some-my->

antiques.html; and an Image of a Lefauchaux Model 1854 are filed concurrently herewith as Exhibits "13," "14," and "15," respectively.

28. .41 Volcanic: In 1855, the Volcanic Repeating Arms Company (later renamed The New Haven Arms Company and then the Winchester Repeating Arms Company) produced a caseless .41 caliber cartridge that was utilized in both a handgun and carbine rifle. As an example, a true and correct copy of an Image & Description of Volcanic Lever Action Pistols and Carbines is filed concurrently herewith as Exhibit "16."

Rimfire and Centerfire Cartridges

29. .22 Short: In 1857, Smith & Wesson introduced their Model No. 1 revolver that was chambered for the .22 rimfire Short cartridge. The .22 Short has been in continuous production since its introduction. It has been used in a range of firearms from gallery rifles to Olympic pistols and in every action-type (pump, single-shot, semiautomatic, lever action, etc.). The .22 Short can also be safely fired in any firearm (handgun or rifle) that is chambered for the .22 Long or .22 Long Rifle. Exhibit "17" is an example of this.

30. .577 Snider: In 1867, the British government adopted their first centerfire cartridge - the .577 Snider. It was used in converted Pattern 1853 muzzle loading percussion rifles. Commercial manufacturers produced "double-barreled" Howdah pistols for dangerous game hunters that utilized this same cartridge. As an example, a true and correct copy of Arms Collectors' Association of the Northern Territory, Inc., *Tiger Tamer: A 12-Bore Howdah Double*, <http://www.acant.org.au/Articles/HowdahRifle.html> is filed concurrently herewith as Exhibit "18."

31. 44-40 Winchester: This was the original cartridge for the Winchester Model 1873 lever-action rifle. By 1878, Colt was using it in their Single Action Army Revolver. Exhibit "19" is an example of this. Both the Winchester and the Colt would later be chambered for the .38-40 Winchester and the .32-20 Winchester

1 cartridges. Later, the Winchester Model 1892 rifle, the Colt Lightning Slide
2 Action rifle and the Marlin Model 1894 rifle and numerous Smith & Wesson
3 revolvers would also be chambered for the same three cartridges. In the 1990s,
4 what is generally described as “cowboy action shooting” became very popular
5 (and has remained so) and resulted in replica firearms (rifles and revolvers) of the
6 weapons previously described in this paragraph (and others) being imported
7 primarily from Italy. As an example, a true and correct copy of What is SASS?,
8 <http://www.sassnet.com/About-What-is-SASS-001A.php> (last visited December
9 5, 2010) is filed concurrently herewith as Exhibit “20.” In addition to .32-20,
10 .38-40 and .44-40, the imports are chambered for .38 Special, .357 Magnum and
11 .45 Long Colt. As an example, a true and correct copy of Uberti 1873 Rifle &
12 Carbine, http://www.uberti.com/firearms/1873_rifle_and_carbine.php (last visited
13 December 5, 2010) is filed concurrently herewith as Exhibit “21.” The .38
14 Special was introduced in 1902 by Smith & Wesson for use in their Military and
15 Police Model revolver. The .357 Magnum was introduced in 1935 and the .45
16 Long Colt c. 1872.

17 32. .45-70 Government: The .45-70 was the US military's primary service cartridge
18 for rifles from 1873 until the Spanish American War. It has been used in bolt-
19 action, single-shot, lever-action and pump-action rifles. Although a large
20 cartridge, the .45-70 has also been used in a number of revolvers. Most recently,
21 .45-70 revolvers have been made by Magnum Research and Super Six Ltd. As an
22 example, a true and correct copy of Gallery of Guns – Item Detail – Magnum
23 Research BFR 45-70,
24 <https://galleryofguns.com/genie/Default.aspx?item=BFR45%2f707> (last visited
25 December 5, 2010) is filed concurrently herewith as Exhibit “22.”

26 33. .22 Long Rifle: This cartridge was likely introduced in 1887 by the Stevens Arms
27 & Tool Co. for use in their single shot rifles. It is quite likely the most popular
28 firearm cartridge in the world. It is estimated that millions of Ruger 10-22 rifles

1 alone have been made for it since 1964. A pistol version of the 10-22 called "The
2 Charger" was also made. The number and variety of firearms that use the .22
3 Long Rifle cartridge are likely incalculable. As examples, true and correct copies
4 of Ruger 10/22 Rifles, <http://www.ruger.com/products/1022/index.html> (last
5 visited December 5, 2010) and Ruger Charger, [http://www.survival-gear-
6 guide.com/Ruger-Charger.html](http://www.survival-gear-guide.com/Ruger-Charger.html) (last visited December 5, 2010) are filed
7 concurrently herewith as Exhibits "23" and "24," respectively. Exhibits "17" and
8 "22" are also examples of this.

9 34. 9mm Luger (9x19mm Parabellum): In 1902, the 9x18mm cartridge was
10 developed for use in the American Eagle Luger pistol and other models. Luger
11 also produced a carbine using the same cartridge. The 9x19mm has been used
12 extensively in submachine guns. Various models of submachine guns have used
13 and use the 9x19mm. It is also used in the Ruger 9mm PC carbine, the Marlin
14 9mm Camp Carbine and Colt AR-15 style rifles with a conducive upper-receiver.
15 As examples, true and correct copies of 9mm Carbines & Grease Guns,
16 <http://www.best9mm.com/carbines/index.html> (last visited December 5, 2010);
17 Marlin Model 9 Camp Carbine Owner's Manual; and an Image & Description of
18 a Luger Carbine, are filed concurrently herewith as Exhibits "25," "26," and
19 "27," respectively.

20 35. 9x23mm Largo: The cartridge was developed in Belgium in 1903. It was
21 subsequently used in handguns made in Belgium (Bergman-Bayard) and Spain
22 (Astra, Llama, Star and Jo-Lo-Ar). In addition to submachine gun use, three bolt-
23 action rifle models were made in Spain (Onena, Destroyer and Ignacio Zubillaga).
24 As an example, a true and correct copy of 9mm Largo Firearms,
25 <http://www.9mmlargo.com/> (last visited December 5, 2010) is filed concurrently
26 herewith as Exhibit "28."

27 36. 45 ACP: Developed for use in the Colt Model 1910 pistol and was later adopted
28 by the US military with the Model 1911 Colt pistol. It is perhaps best known for

1 its relationship to the Thompson Sub Machine Gun (Tommy Gun) and the M3A1
2 (Grease Gun). Harrington & Richardson produced M60 and M65 semi-automatic
3 .45 ACP Reising Guns. The British military used the .45 ACP cartridge in
4 modified No.1 Mark III Short Magazine Lee Enfield rifles to create the DeLisle
5 carbine rifle. Later, Marlin produced the .45 Camp Carbine rifle which utilized
6 this same cartridge. As an example, a true and correct copy of
7 www.notpurfect.com – Neal Pritchett, *Firearms Reviews and Commentary -*
8 *Marlin Camp Gun .45*, <http://www.notpurfect.com/main/campgun.htm> (last
9 visited December 5, 2010) is filed concurrently herewith as Exhibit “29.”

10 37. 30 M1 Carbine: The cartridge and rifle were adopted in 1941. By the end of the
11 war, 6.2 million carbines had been made. In 1963, the Director of Civilian
12 Marksmanship began releasing the carbines for sale to members of the National
13 Rifle Association. Increased consumer interest ultimately saw new manufacturers
14 make carbine rifles that utilized this same cartridge. They included Plainfield,
15 Universal, Iver Johnson and Marlin (M62 Levermatic). Among the handguns
16 using the .30 carbine round was the Ruger Blackhawk revolver that has been
17 produced for approximately 40 years. Exhibits “30” and “31” showcase examples.

18 38. .44 Remington Magnum: In 1955, Smith & Wesson introduced the .44 Remington
19 Magnum cartridge for use in their Model 29 revolver. In 1961, Ruger introduced
20 the Deerstalker .44 Magnum carbine -- about 250,000 of which were produced
21 over the next 25-years. Ruger then introduced the Model 96/44M lever-action
22 rifle c. 1996. Their most current model is the Model 77/44 bolt-action rifle. Lever
23 action carbines have also been made by Rossi (Model 65 SRC), Browning B-92,
24 Marlin (Model 1894) and E. M. F. (Model 1892). One pump-action carbine, the
25 Universal Vulcan 440, was also produced. As an example, a true and correct copy
26 of Jim Hammond, *Shooting with Jim: Ruger 44 Magnum Carbine Product*
27 *Review*, <http://www.shootingwithjim.com/ruger-44-carbine.htm> (last visited
28 December 5, 2010) is filed concurrently herewith as Exhibit “32.”

1 39. 22 Winchester Magnum Rimfire - Introduced in 1960, it quickly became wildly
2 popular and is now a standard chambering in both rifles and handguns. Exhibit
3 "17" is an example of this.

4 40. .256 Winchester Magnum - When introduced in 1960, no firearm was chambered
5 for it. In 1963, Marlin offered their Model 62 Levermatic (a rifle) in .256
6 Winchester Magnum and in 1966, Ruger introduced a single shot pistol called the
7 Hawkeye, also chambered in .256 Winchester Magnum. As an example, a true
8 and correct copy of Chuck Hawks, *The .256 Winchester*, 2004,
9 <http://www.chuckhawks.com/256Win.htm> is filed concurrently herewith as
10 Exhibit "33."

11 41. .221 Remington Fireball: Federal law prohibits conversion of a rifle into a
12 handgun. Thus, existing bolt-action rifle actions couldn't be used to build
13 handguns. To fill this need, in 1963, Remington introduced the XP-100 single-
14 shot, bolt-action pistol that was chambered for the .221 Fireball cartridge. Later
15 they added a magazine fed version that was chambered for .223 Remington, .22-
16 250, 7mm-08 Remington, .250 Savage, .308 Winchester, .350 Remington
17 Magnum and .35 Remington. As an example, a true and correct copy of Glenn
18 Custom - PRICING - Remington XP-100,
19 http://glenncustom.com/pricing_remxp100.html (last visited December 5, 2010) is
20 filed concurrently herewith as Exhibit "34." In 2002, Remington began offering
21 their Model 700 bolt-action rifle in the same .221 Fireball chambering. As an
22 example, a true and correct copy of Bud's Gun Shop - Catalog - Rifles -
23 Remington 700 LV Light Varmint .221 Fireball,
24 http://www.budsgunshop.com/catalog/product_info.php/products_id/96185 (last
25 visited December 5, 2010) is filed concurrently herewith as Exhibit "35."

26 42. .41 Remington Magnum: Smith & Wesson introduced the .41 Remington
27 Magnum cartridge with their Model 57 revolver in 1964. Ruger, and others, make
28 .41 magnum revolvers and Marlin offers the cartridge in their Model 1894 lever-

1 action carbine. As an example, a true and correct copy of Impact Guns – Marlin
2 41 Magnum Model 1894FG 20” Walnut,
3 <http://www.impactguns.com/store/1894FG.html> (last visited December 5, 2010) is
4 filed concurrently herewith as Exhibit “36.”

5 43. .40 Smith & Wesson: This cartridge was the result of work by Winchester and
6 Smith & Wesson c.1989. It is used in a variety of handguns, as well as carbines,
7 including the Beretta Cx4 Storm, the Hi Point 4095, the Kel-Tec SUB-2000, the
8 Olympic Arms K40, (as an example, a true and correct copy of *.40 S&W*
9 *Carbines: We Shoot Hi-Point, Beretta, Olympic Arms*, GUN TESTS, May 2006,
10 http://www.gun-tests.com/issues/18_5/features/5332-1.html is filed concurrently
11 herewith as Exhibit “37”) as well as others such as the Ruger PC4 carbine. DAN
12 SHIDELER, THE GUN DIGEST BOOK OF MODERN GUN VALUES (15th ed. 2009) 433
13 (hereafter GUN DIGEST). And, AR-15 lowers are commonly chambered in .40
14 S&W. The Federal Bureau of Investigation sought AR-15 carbines chambered in
15 .40 S&W as its officially issued carbine. See a true and correct copy of *Colt*
16 *Pattern .40 S&W Caliber Carbines*, FEDERAL BUSINESS OPPORTUNITIES, Aug. 7,
17 2009,
18 [https://www.fbo.gov/index?tab=core&s=opportunity&mode=form&id=6ac219a2](https://www.fbo.gov/index?tab=core&s=opportunity&mode=form&id=6ac219a2e12e8aedc2755b3053e32af1&tabmode=list)
19 [e12e8aedc2755b3053e32af1&tabmode=list](https://www.fbo.gov/index?tab=core&s=opportunity&mode=form&id=6ac219a2e12e8aedc2755b3053e32af1&tabmode=list) filed concurrently herewith as Exhibit
20 “38.”

21 44. 5.7x28mm: This cartridge was developed in the 1990s for dual use (handgun and
22 carbine). It originally could only be used in two firearm models available to
23 civilians: the PS90 semi-automatic carbine rifle and the FN Five-Seven semi-
24 automatic pistol. As an example, a true and correct copy of FNH 5.7x28 Bulk
25 Ammo Advertisement is filed concurrently herewith as Exhibit “39.” Since then,
26 AR-57 uppers chambered for the FN cartridge have been produced, as has a new
27 carbine called the FN PS90. Other companies are expected to produce other
28 models of firearms chambered in this cartridge in the near future.

1 45. .17 HMR and .17 Mach 2: These two rimfire cartridges were introduced in 2002
2 and 2004 respectively. They use the .22 Magnum and .22 Long Rifle cases and
3 smaller diameter bullets. They can (and are) being used in all manner of handguns
4 and rifles, just like .22 rimfire cartridges. As examples, true and correct copies of
5 Chuck Hawks, *The .17 Hornady Magnum Rimfire*, 2007,
6 <http://www.chuckhawks.com/17HMR.htm>; and Excel Arms – New Products –
7 New Models X-22P and X-22R, <http://www.excelarms.com/newproducts.html>
8 (last visited September 6, 2010) are filed concurrently herewith as Exhibits “40”
9 and “41,” respectively.

10 **Single Shot Pistols that Utilize All Ammunition Cartridges**

11 46. Thompson/Center: In 1967, Thompson/Center introduced their Contender pistol
12 (the “T/C”). It is a single-shot, break-action design that utilizes interchangeable
13 barrels to accommodate all cartridge sizes that can be used in rifles. T/Cs have
14 been chambered for cartridges from the diminutive .17 Mach 2 rimfire to those
15 suitable for hunting elephants. The current model of the Contender is the G-2.
16 Their website lists 102 available chamberings. Other barrel makers offer a greater
17 selection. As examples, true and correct copies of About Thompson Center
18 Arms, <http://www.tcarms.com/about> (last visited December 5, 2010); Thompson
19 Center Arms – Caliber Selection – Encore Pistols,
20 http://www.tcarms.com/customShop/chart_encore_pistol.php (last visited
21 December 5, 2010); Match Grade Machine – Chamberings Available,
22 http://www.matchgrademachine.com/chamberings_public.php (last visited
23 December 5, 2010); and John Taffin, *The Custom Pistols of Gary Reeder*, Guns
24 Magazine, March 2001, available at
25 http://findarticles.com/p/articles/mi_m0BQY/is_3_47/ai_70650330/ are filed
26 concurrently herewith as Exhibits “42,” “43,” “44,” and “45,” respectively.
27
28

- 1 47. BF Single Shot: The range of cartridges for use in this pistol is .17 rimfire to .45-
2 70, all of which cartridges can be and are used in various rifles. (GUN DIGEST
3 107.)
- 4 48. Kimber Predator Hunter: The range of cartridges for use in this pistol is .221
5 Fireball to 7mm TCU, all of which cartridges can be and are used in various
6 rifles. (GUN DIGEST 176.)
- 7 49. Magnum Research Lone Eagle: The range of cartridges for use in this pistol is .22
8 Hornet to .444 Marlin, all of which cartridges can be and are used in various
9 rifles. (GUN DIGEST 185.)
- 10 50. Pachmayr Dominator: The range of cartridges for use in this pistol is .22 Hornet
11 to .35 Remington, all of which cartridges can be and are used in various rifles.
12 (GUN DIGEST 196.)
- 13 51. Savage Striker: The range of cartridges for use in this pistol is .22-250, .243
14 Winchester and .308 Winchester, all of which cartridges can be and are used in
15 various rifles. (GUN DIGEST 207.)

16 **Designating ammunition between caliber or cartridge**

- 17 52. For the person who knows little about firearms, the imprecise use of technical
18 terms is predictable. A common error is to assume that "everyone knows"
19 something or that it is "common knowledge." When people refer to ".22s,"
20 "9mms," ".45s," or any other "caliber" of cartridges, and assume they have
21 communicated effectively the specific ammunition cartridge they have in mind,
22 they are usually mistaken.
- 23 53. Cartridges have 'names.' Those originating in Europe are frequently described by
24 their bullet diameter and case length in millimeters (*e.g.*, 9x35mmR (rimed).)
25 England has traditionally described cartridges by bore diameter (*e.g.*, .450
26 Adams). The American approach has been a mixture that includes groove
27 diameter (.308 Winchester), the name of the cartridge designer (.257 Roberts – for
28

1 N.H. Roberts), the company that introduced the cartridge (.44 Remington
2 Magnum) or something fanciful (.22 Cheetah).

3 54. Three terms, in order of specificity, are used to describe a loaded, self-contained
4 metallic cartridge – ammunition, caliber, and its given name(s). “Ammunition” is
5 defined in the Glossary of the Association of Firearms and Tool Mark Examiners
6 as “One or more loaded cartridges consisting of a primed case, propellant, and
7 with one or more projectiles. Also referred to as fixed or live ammunition.” The
8 definition of “caliber” depends on whether it is applied to a firearm or
9 ammunition. When applied to ammunition, the Glossary of the Association of
10 Firearms and Tool Mark Examiners defines it as “[a] numerical term, without the
11 decimal point, included in a cartridge name to indicate the nominal bullet
12 diameter.”

13 55. I have reviewed the “calibers” listed by Defendants in response to Plaintiffs’
14 discovery requests (.454, .45, .44, .40, 10mm, .38, .380, .357, 9mm, .32 and .25).
15 The “caliber” used as part of the name for a cartridge is frequently not an accurate
16 description of the bullet or bore diameter. For instance, according to FRANK C.
17 BARNES, CARTRIDGES OF THE WORLD (Layne Simpson, ed., Gun Digest Books
18 12th ed. 2009), the .454 Casull has a bore diameter of .452. Likewise, the .38
19 Smith & Wesson Special is .357, the .32 Smith & Wesson is .312, the .44
20 Remington Magnum is .429, the 9x18mm (Makarov) is .363, the .218 Bee is .224,
21 the .380 Automatic is .358, the 44 Evans Long is .419, the .32 Protector is .300,
22 etc.

23 56. Also, within each “caliber” there is a wide range of cartridge lengths, bullet
24 weights, velocity, power, applications and true bullet diameters. Paragraphs 57-
25 64 provide some examples. Perhaps the smallest “.22” is the .22 BB (Bulleted
26
27
28

1 Breech) Cap. It was introduced in 1845 for the Flobert parlor (salon) rifles. It is
2 still produced and can be fired in any .22 rimfire rifle or handgun. On the other
3 end of the spectrum is the .220 Swift, which was introduced in 1935 and is
4 usually used for long-range varmint shooting.

5 57. Here is a non-exhaustive list of other “.22s”: .222 Remington, .222 Remington
6 Magnum, .223 Remington, .22 PPC, .225 Winchester, .22-250 Remington, .22
7 Accelerator, .22 Savage High-Power, .22-3000, .22 Hornet, .22 K Hornet, .22
8 Waldog, .22 Dasher, .22 BR Remington, .220 Weatherby Rocket, .22 Cheetah,
9 .22 Newton, .226 JDJ, .224 Weatherby Magnum, .221 Remington Fireball, .22
10 Remington Jet, .22 CB Cap, .22 Short, .22 Long, .22 Long Rifle, .22 Extra Long,
11 .22 Winchester Rimfire (WRF), .22 Winchester Magnum (WMR), .22 Winchester
12 Automatic, .22 Remington Automatic, .22 ILARCO 22 Short Magnum Rimfire
13 and the .22 Rimfire Shotshell.

14 58. The difference between certain .22 caliber cartridges is readily apparent. As an
15 example, a true and correct copy of a photograph I took on November 28, 2010 is
16 attached as Exhibit “48,” the pair of cartridges pictured at the very left are the .22
17 BB Cap and the .220 Swift respectively.

18 59. Nine-millimeter cartridges generally had their origin in Europe where that bore
19 diameter found great favor. The oldest is the 9mm pinfire for the Lefauchaux
20 revolver that dates to the mid-19th Century. The 9x17mm is a popular 9mm
21 cartridge, and is also known as a .380 domestically. The 9mm Mauser (9x57mm)
22 is a big game hunting cartridge. The difference between the 9x17mm and the
23 9x57mm is readily apparent in Exhibit “48” where the middle pair of cartridges
24 pictured are the 9x17mm and the 9x57mm respectively.

25 60. Here is a non-exhaustive list of other 9mm cartridges: 9mm Mauser
26 Revolver, 9x47mmR Swiss, 9x35mmR, 9x40mmR Target, 9mm Knecht Revolver,
27 9mm Nagant Revolver, 9mm Luger, 9x63mm Hessmer, 9x56mm Mannlicher,
28 9x56mm Haenel, 9x62mm Karl Puff, 9mm Browning Long, 9mm Browning

1 Short, 9mm Steyr, 9mm Bergmann Mars, 9mm Borchardt, 9mm Gasser Revolver,
2 9x38mmR Tesching, 9x42mmMB Target, 9x61mmR Hunting, 9x67mmR
3 Hunting, 9x71mm Peterlongo, 9x53.4mmR Mannlicher, 9x17mm, 9x18mm,
4 9x21mm, 9x72mmR Sauer, 9mm Winchester Magnum, 9mm Federal, 9mm
5 Action Express, 9x25 Dillon and 9mm Glisenti.

6 61. The difference between certain 9mm caliber cartridges is readily apparent. As an
7 example, a true and correct copy of a photograph I took on November 28, 2010 is
8 attached as Exhibit "48," the pair of cartridges pictured in the center are the
9 9x17mm and the 9x57mm respectively.

10 62. Forty-five caliber cartridges are most commonly of domestic origin. The first was
11 probably the .45 Long Colt (c.1872) to be soon followed by the .45 Government
12 (.45-70). Sharing the "45 caliber" title is the .458 Winchester Magnum that was
13 introduced in 1965 for dangerous game (elephant and Cape buffalo) hunting.

14 63. Here is a non-exhaustive list of other .45 caliber cartridges: .45 Automatic
15 Short,.45ACP, .45-90, .450 Marlin, .45-50 Peabody, .45 Remington Thompson, .45-
16 60 Winchester, .45-75 Winchester, .45-100 Ballard, .45-125 Winchester, .45-100
17 Van Choate, .45-100 Remington, .45-120 Sharps, .45 Silhouette, .458x1.5"
18 Barnes, .458x2" American, .450 Alaskan, .450 Howell, .450 Watts Magnum, .458
19 Lott, .450 Assegai, .450 Ackley Magnum, .45 Winchester Magnum, .45 Smith &
20 Wesson, .450 Rigby, .450 Adams, .45 Auto Rim, .45 Webley and .450 Nitro
21 Express.

22 64. The difference between certain .45 caliber cartridges is readily apparent. As an
23 example, in Exhibit "48," the pair of cartridges pictured at the very right are the
24 .450 Adams and the .458 Winchester Magnum respectively.

25 **Cannot Determine whether Cartridges Are Principally for Use in Handguns vs. Rifles**

26 65. Virtually all modern, commercially produced self-contained metallic ammunition
27 can be safely used interchangeably in a rifle or a handgun.
28

- 1 66. There is no generally accepted definition of "handgun ammunition," nor any
2 commonly understood delineation between "handgun ammunition" and other
3 ammunition used in the firearms industry, let alone one that allows one to
4 determine whether certain cartridges are "principally for use" in handguns.
- 5 67. Whether a given cartridge is used more often in a handgun than in a rifle may
6 change and fluctuate over time, depending on the changing popularity and usage
7 of different types of firearms which utilize that cartridge, or vice-versa.
- 8 68. Commercial cartridges are sometimes labeled as being for "rifles" or "pistols."
9 For instance, Eley makes .22 Long Rifle 40gr Match Pistol ammunition. Despite
10 the "pistol" designation, it can be safely and effectively used in a rifle. In fact, the
11 name of the cartridge (.22 Long Rifle) adds to the confusion. Conversely,
12 Remington .30-30 Express Core-Lokt Rifle cartridges can be used in a Thompson
13 Contender handgun that is chambered for that cartridge.
- 14 69. That "dual-use" of ammunition is anticipated by the manufacturer (box markings
15 aside) can be seen by the disclaimer on a box of Remington .223 ammunition. It
16 reads "Notice: These Remington cartridges are adapted to and intended for use
17 only in arms in good condition originally chambered and designed for the
18 cartridge." The markings on ammunition boxes are interesting, but are not
19 controlling as to how it can ultimately be used, or as to whether that particular
20 ammunition was intended to be used, or will actually be used, more often in a
21 handgun than in a rifle. Such a determination cannot be made from looking at the
22 packaging nor from consulting any other resource.
- 23 70. While firearms and ammunition literature sometimes make reference to "handgun
24 ammunition" and "rifle ammunition," when referencing some cartridges, I assume
25 the authors never anticipated making the technical distinctions necessitated by CA
26 Penal Code section 12060.
- 27 71. The inclusion of military and law enforcement use of submachine guns in
28 determining whether a certain cartridge is used more often in a handgun could

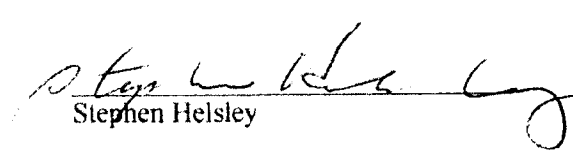
1 have a significant impact, because submachine guns use the same ammunition as
2 many handguns. For instance, the Heckler & Koch MP5 is a popular submachine
3 gun model with both law enforcement and military special operations personnel.
4 It was the submachine gun issued to me by the Department of Justice when I was
5 Assistant Director. The Heckler & Koch MP5 uses the 9mm Luger cartridge. In
6 prior decades, the 9mm Uzi and the .45 ACP Thompson submachine guns were
7 widely used. Such firearms are not "handguns," as they are intended to be fired
8 from the shoulder. From my experience with the Department of Justice, training
9 with submachine guns consumes significant amounts of ammunition, possibly
10 more so than training with handguns chambered for the same cartridge.

11 72. Neither the academic and professional works comprising my library nor my
12 experiences qualifying me as an expert in firearms and ammunition provide me
13 with knowledge as to what cartridges are "principally for use in a handgun."

14 73. Furthermore, I do not know of any sources from which I could determine what
15 cartridges suitable for use in both rifles and handguns are used more often in a
16 handgun than in a long gun.

17 I declare under penalty of perjury under the laws of the State of California that the
18 foregoing is true and correct.

19 Dated: December 6, 2010

20
21 
22 Stephen Helsley
23
24
25
26
27
28

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

7 **DECLARATION OF STEPHEN HELSLEY IN SUPPORT OF MOTION**
8 **FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR**
9 **SUMMARY ADJUDICATION AND TRIAL**

9 on the interested parties in this action by placing

10 [] the original

11 [X] a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

12 Edmund G. Brown, Jr.

Attorney General of California

13 Zackery P. Morazzini

Supervising Deputy Attorney General

14 Peter A. Krause

Deputy Attorney General (185098)

15 1300 I Street, Suite 125

P.O. Box 944255

Sacramento, CA 94244-2550

16 (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
17 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,
18 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
19 date of deposit for mailing an affidavit.

Executed on December 6, 2010, at Long Beach, California.

20 (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
addressee.

21 Executed on December 6, 2010, at Long Beach, California.

22 X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of
23 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
24 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
25 in accordance with ordinary business practices.

Executed on December 6, 2010, at Long Beach, California.

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

28 

CLAUDIA AYALA

DECLARATION OF STEPHEN HELSLEY

JA002038

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
3 180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
4 Telephone: (562) 216-4444
Fax: (562) 216-4445
5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA) CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)
12 SPORTING GOODS; CALIFORNIA RIFLE) **DECLARATION OF BRIAN HALL**
AND PISTOL ASSOCIATION) **IN SUPPORT OF MOTION FOR**
13 FOUNDATION; ABLE'S SPORTING,) **SUMMARY JUDGMENT OR IN THE**
INC.; RTG SPORTING COLLECTIBLES,) **ALTERNATIVE FOR SUMMARY**
14 LLC; AND STEVEN STONECIPHER,) **ADJUDICATION AND TRIAL**

15 Plaintiffs and Petitioners,)
16 vs.)

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

21 Defendants and Respondents.)
22

Date: January 18, 2011
Time: 8:30 a.m.
Location: Dept. 402
Judge: Hon. Jeffrey Y. Hamilton

Action Filed: June 17, 2010

DECLARATION OF BRIAN HALL

I, Brian Hall, declare as follows:

1. I am the Vice President of Chattanooga Shooting Supplies, Inc., a Tennessee corporation that sells and ships a variety of ammunition suitable for use in both handguns and rifles directly to California residents, under the DBA of Natchez Shooters Supplies.

2. As Vice President, I am responsible for determining the policies and operating procedures of Chattanooga Shooting Supplies, Inc. In doing so, I am responsible for ensuring compliance with all applicable laws in the locations from which, and to which, Chattanooga Shooting Supplies, Inc., ships ammunition, including California Penal Code sections 12060, 12061, and 12318.

3. I do not know what ammunition is "handgun ammunition" and thus subject to California Penal Code sections 12060, 12061, and 12318.

4. I do not know what ammunition is principally for use in a handgun. Nor do I know of any source from which I could determine what ammunition suitable for use in both rifles and handguns is principally for use in a handgun, and which is not principally for use in a handgun.

5. I also do not know which ammunition is exempt from California Penal Code sections 12060, 12061, and 12318 as ammunition "designed and intended to be used in 'antique firearms'" manufactured before 1898, because many cartridges of ammunition used in firearms manufactured before 1898 are also used in firearms manufactured after 1898, including cartridges sold by Chattanooga Shooting Supplies, Inc.

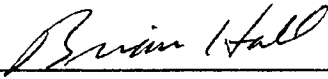
6. Ammunition sales to California usually account for a significant portion of the profit made by Chattanooga Shooting Supplies, Inc. For that reason, I would like to continue selling ammunition to California residents, even if the provisions of California Penal Code sections 12061 and 12318 set to take effect on February 1, 2011 do in fact take effect; but I do not know what ammunition I will be able to ship into California, because I do not know what ammunition is "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318.

///

1 7. Because I do not know what "handgun ammunition" is under California Penal
2 Code sections 12060, 12061, and 12318, and fear that Chattanooga Shooting Supplies, Inc. or I
3 will be prosecuted for unknowingly violating those statutes, it is the current intent of Chattanooga
4 Shooting Supplies, Inc., to cease shipping all ammunition that is suitable for use in both handguns
5 and long guns to non-exempt California customers beginning February 1, 2011 to avoid risking
6 criminal prosecution under California Penal Code section 12318.

7
8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct.

10 Dated: November 30, 2010

11 
12 _____
13 Brian Hall
14 Vice President
15 Chattanooga Shooting Supplies, Inc.
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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF FRESNO

I, Claudia Ayala , am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

**DECLARATION OF BRIAN HALL IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR
SUMMARY ADJUDICATION AND TRIAL**

on the interested parties in this action by placing
☐ the original
☒ a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

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

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
3 180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
4 Telephone: (562) 216-4444
Fax: (562) 216-4445
5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA	)	CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)	
12 SPORTING GOODS; CALIFORNIA RIFLE	)	DECLARATION OF MICHAEL TENNY
AND PISTOL ASSOCIATION	)	IN SUPPORT OF MOTION FOR
13 FOUNDATION; ABLE'S SPORTING,	)	SUMMARY JUDGMENT OR IN THE
INC.; RTG SPORTING COLLECTIBLES,	)	ALTERNATIVE FOR SUMMARY
14 LLC; AND STEVEN STONECIPHER,	)	ADJUDICATION AND TRIAL
)	
15)	
Plaintiffs and Petitioners,	)	Date: January 18, 2011
	)	Time: 8:30 a.m.
16 vs.	)	Location: Dept. 402
	)	Judge: Hon. Jeffrey Y. Hamilton
17 THE STATE OF CALIFORNIA; JERRY)	
18 BROWN, IN HIS OFFICIAL CAPACITY	)	Action Filed: June 17, 2010
AS ATTORNEY GENERAL FOR THE)	:
19 STATE OF CALIFORNIA; THE)	
CALIFORNIA DEPARTMENT OF)	
20 JUSTICE; and DOES 1-25,)	
)	
21)	
Defendants and Respondents.)	
22)	

DECLARATION OF MICHAEL TENNY

I, Michael Tenny, declare as follows:

1. I am the Chief Executive Officer of CTD, Inc. a Texas corporation that sells and ships a variety of ammunition suitable for use in both handguns and rifles directly to California residents.

2. As Chief Executive Officer, I am responsible for determining the policies and operating procedures of CTD, Inc. In doing so, I am responsible for ensuring compliance with all applicable laws in the locations from which, and to which, CTD, Inc. ships ammunition, including California Penal Code sections 12060, 12061, and 12318.

3. I do not know what ammunition is "handgun ammunition" and thus subject to California Penal Code sections 12060, 12061, and 12318.

4. I do not know what ammunition is principally for use in a handgun. Nor do I know of any source from which I could determine what ammunition suitable for use in both rifles and handguns is principally for use in a handgun, and which is not principally for use in a handgun.

5. I also do not know which ammunition is exempt from California Penal Code sections 12060, 12061, and 12318 as ammunition "designed and intended to be used in 'antique firearms'" manufactured before 1898, because many cartridges of ammunition used in firearms manufactured before 1898 are also used in firearms manufactured after 1898, including cartridges sold by CTD, Inc.

6. Ammunition sales to California usually account for a significant portion of the profit made by CTD, Inc. For that reason, I would like to continue selling ammunition to California residents, even if the provisions of California Penal Code sections 12061 and 12318 set to take effect on February 1, 2011 do in fact take effect; but I do not know what ammunition I will be able to ship into California, because I do not know what ammunition is "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318.

///

///


///

7. Because I do not know what "handgun ammunition" is under California Penal Code sections 12060, 12061, and 12318, CTD, Inc. will cease shipping all ammunition to non-exempt California customers beginning January 1, 2011 to avoid risking criminal prosecution under California Penal Code section 12318.

8. CTD, Inc.'s policy to cease shipments of all ammunition to California beginning January 1, 2011, is printed in our most recent sales catalog. A true and accurate copy of a page from the most recent CTD, Inc. sales catalog that includes CTD, Inc.'s new policy is attached hereto as Exhibit "49."

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

Dated: November 30, 2010


Michael Tenny
CEO, CTD, Inc.

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

7 **DECLARATION OF MICHAEL TENNY IN SUPPORT OF MOTION**
8 **FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR**
9 **SUMMARY ADJUDICATION AND TRIAL**

9 on the interested parties in this action by placing

10 ☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

11 Edmund G. Brown, Jr.
12 Attorney General of California
13 Zackery P. Morazzini
Supervising Deputy Attorney General
14 Peter A. Krause
Deputy Attorney General (185098)
15 1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

16 — (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
17 processing correspondence for mailing. Under the practice it would be deposited with the
18 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
19 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.

20 — (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
21 addressee.

Executed on December 6, 2010, at Long Beach, California.

22 X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of
23 collection and processing correspondence for overnight delivery by UPS/FED-EX. Under
24 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
25 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.

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

28 
CLAUDIA AYALA

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
3 180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
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5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA) CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)
12 SPORTING GOODS; CALIFORNIA RIFLE) **DECLARATION OF LARRY W.**
AND PISTOL ASSOCIATION) **POTTERFIELD, CEO MIDWAY ARMS INC.**
13 FOUNDATION; ABLE'S SPORTING,) **(dba MIDWAY USA IN SUPPORT OF**
INC.; RTG SPORTING COLLECTIBLES,) **MOTION FOR SUMMARY JUDGMENT OR**
14 LLC; AND STEVEN STONECIPHER,) **IN THE ALTERNATIVE FOR SUMMARY**
) **ADJUDICATION AND TRIAL**

15 Plaintiffs and Petitioners,)
16)

17 vs.)

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

21 Defendants and Respondents.)
22)
23)
24)
25)
26)
27)
28)

) Date: January 18, 2011
) Time: 8:30 a.m.
) Location: Dept. 402
) Judge: Hon. Jeffrey Y. Hamilton
) Action Filed: June 17, 2010

DECLARATION OF LARRY W. POTTERFIELD

I, Larry W. Potterfield, declare as follows:

1. I am the Chief Executive Officer of Midway Arms, Inc. (dba Midway USA), Inc., a Missouri corporation that sells and ships a variety of ammunition suitable for use in both handguns and rifles directly to California residents.

2. As Chief Executive Officer, I am responsible for determining the policies and operating procedures of Midway Arms, Inc. (dba Midway USA). In doing so, I am responsible for ensuring compliance with all applicable laws in the locations from which, and to which, Midway Arms, Inc. (dba Midway USA), Inc. ships ammunition, including California Penal Code sections 12060, 12061, and 12318.

3. I do not know what ammunition is "handgun ammunition" and thus subject to California Penal Code sections 12060, 12061, and 12318.

4. I do not know what ammunition is principally for use in a handgun. Nor do I know of any source from which I could determine what ammunition suitable for use in both rifles and handguns is principally for use in a handgun, and which is not principally for use in a handgun.

5. I also do not know which ammunition is exempt from California Penal Code sections 12060, 12061, and 12318 as ammunition "designed and intended to be used in 'antique firearms'" manufactured before 1898, because many cartridges of ammunition used in firearms manufactured before 1898 are also used in firearms manufactured after 1898, including cartridges sold by Midway Arms, Inc. (dba Midway USA), Inc.

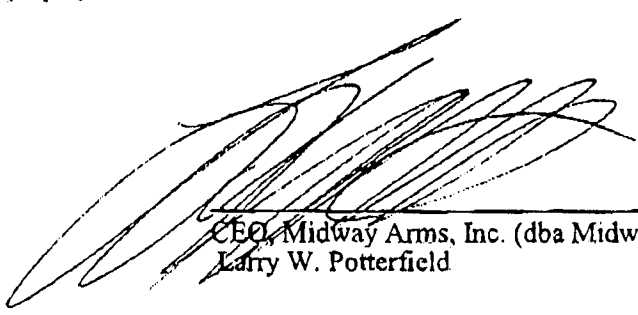
6. Ammunition sales to California usually account for a significant portion of the

1 7. Because I do not know what "handgun ammunition" is under California Penal
2 Code sections 12060, 12061, and 12318, Midway Arms, Inc. (dba Midway USA), Inc. will cease
3 shipping all ammunition to non-exempt California customers beginning February 1, 2011 to avoid
4 risking criminal prosecution under California Penal Code section 12318.

5 8. Midway Arms, Inc.'s (dba Midway USA) new policy to cease shipments of all
6 ammunition to California beginning February 1, 2011, is printed in its most recent sales catalog.
7 A true and accurate copy of a page from the most recent Midway Arms, Inc. (dba Midway USA),
8 Inc. sales catalog that includes Midway Arms, Inc. (dba Midway USA), Inc.'s new policy is
9 attached hereto as Exhibit "50."

10
11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 Dated: November 30, 2010

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16 CEO, Midway Arms, Inc. (dba Midway USA)
17 Larry W. Potterfield
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1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

7 **DECLARATION OF LARRY W. POTTERFIELD, CEO MIDWAY ARMS INC.**
8 **(dba MIDWAY USA IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION AND TRIAL

9 on the interested parties in this action by placing

10 ☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

11 Edmund G. Brown, Jr.
12 Attorney General of California
13 Zackery P. Morazzini
14 Supervising Deputy Attorney General
15 Peter A. Krause
16 Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

17 — (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
18 processing correspondence for mailing. Under the practice it would be deposited with the
19 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.

20 — (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
21 addressee.
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25 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.

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

28 
CLAUDIA AYALA

Attorneys for Plaintiffs/Petitioners

SHERIFF CLAY PARKER, TEHAMA)
COUNTY SHERIFF; HERB BAUER)
SPORTING GOODS; CALIFORNIA RIFLE)
AND PISTOL ASSOCIATION)
FOUNDATION; ABLE'S SPORTING,)
INC.; RTG SPORTING COLLECTIBLES,)
LLC; AND STEVEN STONECIPHER,)
)
Plaintiffs and Petitioners,)
)
vs.)
)
THE STATE OF CALIFORNIA; JERRY)
BROWN, IN HIS OFFICIAL CAPACITY)
AS ATTORNEY GENERAL FOR THE)
STATE OF CALIFORNIA; THE)
CALIFORNIA DEPARTMENT OF)
JUSTICE; and DOES 1-25,)
)
)
)
Defendants and Respondents.)

CASE NO. 10CECG02116

**DECLARATION OF TOM ALLMAN,
MENDOCINO COUNTY SHERIFF-
CORONER IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OR IN THE
ALTERNATIVE FOR SUMMARY
ADJUDICATION AND TRIAL**

Date: January 18, 2011
Time: 8:30 a.m.
Location: Dept. 402
Judge: Hon. Jeff Hamilton

Date Action Filed: June 17, 2010

1 DECLARATION OF TOM ALLMAN

2
3 I, Tom Allman, declare as follows:

4 1. I am the duly elected Sheriff-Coroner for the County of Mendocino, California. I
5 have been a law enforcement officer since 1980. I was originally elected Sheriff-Coroner of
6 Mendocino County in 2006, and have been reelected to that position once. I am a member of both
7 the California Narcotics Officers Association and the California State Sheriffs Association.

8 2. I am responsible for enforcing federal, state, and local laws within the County of
9 Mendocino, California, including Penal Code sections 12060, 12061, and 12318.

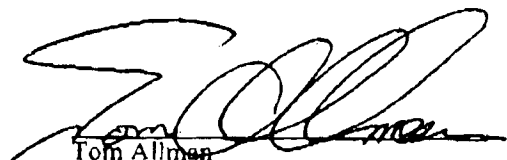
10 3. I am responsible for determining the policies of the Mendocino County Sheriff-
11 Coroner's Department, including a determination of what ammunition is regulated as "handgun
12 ammunition" under California Penal Code sections 12060, 12061, and 12318.

13 4. I do not know what ammunition is "principally for use in" a handgun. I also do not
14 know what ammunition is exempt from these laws as ammunition "designed and intended to be
15 used in 'antique firearms'" manufactured before 1898, because many cartridges of ammunition
16 used in firearms manufactured before 1898 are also used in firearms manufactured after 1898.

17 5. Without any further guidelines as to what ammunition is "handgun ammunition"
18 under Penal Code sections 12060, 12061, and 12318, I am unable to enforce these laws equitably
19 because I do not know what ammunition is "handgun ammunition."

20
21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct.

23 Dated: December 2, 2010

24 
25 Tom Allman
26 Sheriff-Coroner, Mendocino County

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

7 **DECLARATION OF TOM ALLMAN, MENDOCINO COUNTY**
8 **SHERIFF-CORONER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION AND TRIAL

9 on the interested parties in this action by placing

10 [] the original

[X] a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

11 Edmund G. Brown, Jr.
12 Attorney General of California
Zackery P. Morazzini
13 Supervising Deputy Attorney General
Peter A. Krause
14 Deputy Attorney General
1300 I Street, Suite 125
15 P.O. Box 944255
Sacramento, CA 94244-2550

16 — (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
17 processing correspondence for mailing. Under the practice it would be deposited with the
18 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
19 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.

20 — (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
21 addressee.

Executed on December 6, 2010, at Long Beach, California.

22 X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of
23 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
24 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
25 in accordance with ordinary business practices.

Executed on December 6, 2010, at Long Beach, California.

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

28 
CLAUDIA AYALA

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
3 180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
4 Telephone: (562) 216-4444
Fax: (562) 216-4445
5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

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

15 Plaintiffs and Petitioners,)

16 vs.)

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

21 Defendants and Respondents.)
22)
23)
24)
25)
26)
27)
28)

Date: January 18, 2011
Time: 8:30 a.m.
Location: Dept. 402
Judge: Hon. Jeffrey Y. Hamilton

Action Filed: June 17, 2010

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1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

7 **DECLARATION OF STEVEN STONECIPHER IN SUPPORT**
8 **OF MOTION FOR SUMMARY JUDGMENT OR IN THE**
ALTERNATIVE FOR SUMMARY ADJUDICATION AND TRIAL

9 on the interested parties in this action by placing

10 ☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

11 Edmund G. Brown, Jr.
12 Attorney General of California
13 Zackery P. Morazzini
Supervising Deputy Attorney General
14 Peter A. Krause
Deputy Attorney General
15 1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

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18 U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach,
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25 in accordance with ordinary business practices.

Executed on December 6, 2010, at Long Beach, California.

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

28 
CLAUDIA AYALA

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5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA) CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)
12 SPORTING GOODS; CALIFORNIA RIFLE) **DECLARATION OF RAY T. GILES**
AND PISTOL ASSOCIATION) **IN SUPPORT OF MOTION FOR**
13 FOUNDATION; ABLE'S SPORTING,) **SUMMARY JUDGMENT OR IN THE**
INC.; RTG SPORTING COLLECTIBLES,) **ALTERNATIVE FOR SUMMARY**
14 LLC; AND STEVEN STONECIPHER,) **ADJUDICATION AND TRIAL**

15 Plaintiffs and Petitioners,)
16 vs.)

Date: January 18, 2011
Time: 8:30 a.m.
Location: Dept. 402
Judge: Hon. Jeffrey Y. Hamilton

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

Action Filed: June 17, 2010

21 Defendants and Respondents.)
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DECLARATION OF RAY T. GILES

I, Ray T. Giles, declare as follows:

1. I am the owner of RTG Sporting Collectibles, LLC, a Texas limited liability company that sells and ships directly to California residents a variety of ammunition that can be used interchangeably between handguns and rifles, but which are primarily sold as collectibles.

2. As the owner, I am responsible for determining the policies and operating procedures of RTG Sporting Collectibles, LLC. In doing so, I am responsible for ensuring RTG Sporting Collectibles, LLC complies with all applicable federal, state, and local laws, including California Penal Code sections 12060, 12061, and 12318.

3. I do not know what ammunition is "handgun ammunition" and thus subject to California Penal Code sections 12060, 12061, and 12318.

4. I do not know what ammunition is principally for use in a handgun. Nor do I know of any source from which I could determine what ammunition suitable for use in both rifles and handguns is principally for use in a handgun, and which is not principally for use in a handgun.

5. I also do not know which ammunition is exempt from California Penal Code sections 12060, 12061, and 12318 as ammunition "designed and intended to be used in 'antique firearms'" manufactured before 1898, because many cartridges of ammunition used in firearms manufactured before 1898 are also used in firearms manufactured after 1898, including cartridges sold by RTG Sporting Collectibles, LLC.

6. I also do not know whether law enforcement considers the ammunition that RTG Sporting Collectibles, LLC sells to be "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318 since it is collectible ammunition, not intended to be fired.

7. I have reviewed the list of calibers the California Department of Justice provided in response to Plaintiffs' Specially Prepared Interrogatories, Set One as what it considers "handgun ammunition" for purposes of California Penal Code sections 12060, 12061, and 12318. RTG Sporting Collectibles, LLC sells various different types of cartridges in most all of those "calibers." For example, in ".25 caliber," it sells, among others, .25 ACP, .25 Rimfire Long, .25 Rimfire Short, 25-20 Single Shot, 25-20WCF, 25-35, and 250-3000. In ".32 caliber," it sells,

1 among others, .32 S&W, .32 S&W Long, .32 Short Colt, .32 Long Colt, .32 Ideal, .32-30, .32-40,
2 .32-40 Bullard, .32-40 Remington, .32-35 Stevens, .32-44, .32 Remington, .32 Special, .32 WSL,
3 .32 Ballard XL, .32 Short Rimfire, .32 XS Rimfire, and .32 Long Rimfire. In “.38 caliber,” it sells,
4 among others, .38 ACP, .38 Super, .38 Short Rimfire, .38 Long Rimfire, .38 XL Rimfire, .38 XL
5 Ballard, .38-45 Bullard, .38-40 Remington, .38-40 WCF, 38-44 S&W (Target and Gallery), 38-44
6 Special, .38-56, .38-70, .38-90, .38 S&W, .38 S&W Special. In “9mm caliber,” it sells, among
7 others, 9mm Luger, 9mm Mauser, 9mm Rimfire Long Shot and 9mm Rimfire Ball. In “.40
8 caliber,” it sells, among others, .40-50 Sharps (both Straight & Bottle-neck), .40-70 Sharps
9 (Straight & Bottle-neck), .40-90 Sharps (Straight & Bottle-neck), .40-70 WCF, .40-65 WCF, .40-
10 72, .40-82, .40-60 WCF, .40-60 Marlin, .40-75 Bullard, .40-75 WCF, .40-85 Ballard, .40-90
11 Bullard, .40-90 What Cheer, .401 Herters, .401 WSL, .405 WCF, and .40-110. In “.44 caliber,” it
12 sells, among others, .44 Magnum, .44 Colt, .44 S&W Spl, .44 Russian, .44 Remington, .44 M&H,
13 .44 WCF, .44-77, .44-90, .44 Evans, .44 Ballard Long & XL, .44 Henry, .44 Short Rimfire, .44
14 Long Rimfire, .44 XL, .44-60 Sharps/ Creedmoor, .44-95 What Cheer, and .44-100 Rem
15 Creedmoor. In “.45 caliber,” it sells, among others, .45 ACP, .45 AutoRim, .45 Colt, .45 S&W
16 Schofield, .45-70, .45-82, .45-85, .45-90, .45-75, .45 Sharps (4 diff lengths), and .45-125. Some
17 of the cartridges in each “caliber” listed by the Department of Justice are likely used more often in
18 rifles than in handguns, while others are likely used more often in handguns than in rifles.

19 8. RTG Sporting Collectibles, LLC also sells various different types of cartridges that
20 do not fall within any of the “calibers” listed by the Department of Justice. For example, in “.22
21 caliber,” dozens of .22 Rimfire cartridges, .22 Jet, .220 Swift, .219 Zipper, .218 Bee, .222
22 Remington, .222 Remington Magnum, .225 Winchester, and .22 Hornet. In “.30 caliber,” .30
23 Rimfire Short, .30 Rimfire Long, .30 Luger, .30-30, .30-40, .30-‘06, .300 Savage, 30 Remington,
24 .300 H&H, and .30 Mauser. In “.35 caliber,” .35 S&W, .35 WSL, .35 WCF, .351 WSL, .35
25 Whelen, and .35 Newton. In “.41 caliber,” 41 Action Express, 41 Magnum, 41 Colt Short, 41
26 Swiss, and 41 Colt Long. In “.50 caliber,” .50-70, .50-100-450, 50-110, .50 Action Express, 50-
27 115 Bullard, and .50 Meigs. Some of the cartridges within each of these “calibers” excluded from
28

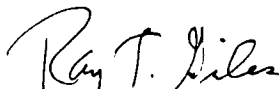
1 the Department of Justice's list are likely used more often in handguns than in rifles, while others
2 are likely used more often in rifles than in handguns.

3 9. Ammunition sales to California usually account for a significant portion of the
4 profit made by RTG Sporting Collectibles, LLC. For that reason, I would like to continue selling
5 ammunition to California residents, even if the provisions of California Penal Code sections
6 12061 and 12318 set to take effect on February 1, 2011 do in fact take effect; but I do not know
7 what ammunition I will be able to ship into California, because I do not know what ammunition is
8 "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318.

9 10. Because I do not know what ammunition is "handgun ammunition" under
10 California Penal Code sections 12060, 12061, and 12318, I fear that I will be prosecuted for
11 unknowingly violating those statutes. For example, I fear prosecution under Penal Code section
12 12318 if I ship to a non-exempt California resident any ammunition that law enforcement deems
13 "handgun ammunition" even though I do not know what ammunition is "handgun ammunition"
14 nor what ammunition law enforcement will consider "handgun ammunition" under these laws.

15
16 I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct.

18
19 Dated: November 30, 2010

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22 _____
23 Ray T. Giles
24 Owner, RTG Sporting Collectibles, LLC
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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On December 6, 2010, I served the foregoing document(s) described as
**DECLARATION OF RAY T. GILES IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE
FOR SUMMARY ADJUDICATION AND TRIAL**

on the interested parties in this action by placing

☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General
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.

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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.

CLAUDIA AYALA

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
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5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA) CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)
12 SPORTING GOODS; CALIFORNIA RIFLE) **DECLARATION OF RANDY WRIGHT**
AND PISTOL ASSOCIATION) **IN SUPPORT OF MOTION FOR**
13 FOUNDATION; ABLE'S SPORTING,) **SUMMARY JUDGMENT OR IN THE**
INC.; RTG SPORTING COLLECTIBLES,) **ALTERNATIVE FOR SUMMARY**
14 LLC; AND STEVEN STONECIPHER,) **ADJUDICATION AND TRIAL**
)
)

15 Plaintiffs and Petitioners,)
16)

17 vs.)

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

21 Defendants and Respondents.)
22)
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Date: January 18, 2011
Time: 8:30 a.m.
Location: Dept. 402
Judge: Hon. Jeffrey Y. Hamilton

Action Filed: June 17, 2010

DECLARATION OF RANDY WRIGHT

I, Randy Wright, declare as follows:

1. I am the President of Able's Sporting, Inc., a Texas corporation that sells and ships a variety of ammunition that can be used interchangeably between handguns and rifles directly to California residents.

2. As President, I am responsible for determining the policies and operating procedures of Able's Sporting, Inc. In doing so, I am responsible for ensuring compliance with all applicable laws in the locations from which, and to which, Able's Sporting, Inc. ships ammunition, including California Penal Code sections 12060, 12061, and 12318.

3. I do not know what ammunition is "handgun ammunition" and thus subject to California Penal Code sections 12060, 12061, and 12318.

4. I do not know what ammunition is principally for use in a handgun. Nor do I know of any source from which I could determine what ammunition suitable for use in both rifles and handguns is principally for use in a handgun, and which is not principally for use in a handgun.

5. I also do not know which ammunition is exempt from California Penal Code sections 12060, 12061, and 12318 as ammunition "designed and intended to be used in 'antique firearms'" manufactured before 1898, because many cartridges of ammunition used in firearms manufactured before 1898 are also used in firearms manufactured after 1898, including cartridges sold by Able's Sporting, Inc.

6. Ammunition sales to California usually account for a significant portion of the profit made by Able's Sporting, Inc. For that reason, I would like to continue selling ammunition to California residents, even if the provisions of California Penal Code sections 12061 and 12318 set to take effect on February 1, 2011 do in fact take effect; but I do not know what ammunition I will be able to ship into California, because I do not know what ammunition is "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318.

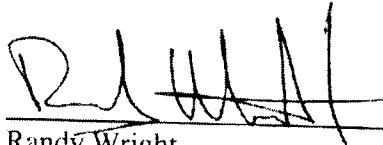
///

///

1 7. Because I do not know what ammunition is "handgun ammunition" under
2 California Penal Code sections 12060, 12061, and 12318, I fear that I will be prosecuted for
3 unknowingly violating those statutes. For example, I fear prosecution under Penal Code section
4 12318 if I ship to a non-exempt California resident any ammunition that law enforcement deems
5 "handgun ammunition" even though I do not know what ammunition is "handgun ammunition"
6 nor what ammunition law enforcement will consider "handgun ammunition" under these laws.
7

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct.
10

11 Dated: November 29, 2010
12



Randy Wright
President, Able's Sporting, Inc.

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF FRESNO

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

**DECLARATION OF RANDY WRIGHT IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT OR IN THE
ALTERNATIVE FOR SUMMARY ADJUDICATION AND TRIAL**

on the interested parties in this action by placing
☐ the original
☒ a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General
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P.O. Box 944255
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Executed on December 6, 2010, at Long Beach, California.

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Executed on December 6, 2010, at Long Beach, California.

☒ (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
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5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA) CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)
12 SPORTING GOODS; CALIFORNIA RIFLE) **DECLARATION OF BARRY BAUER**
AND PISTOL ASSOCIATION) **IN SUPPORT OF MOTION FOR**
13 FOUNDATION; ABLE'S SPORTING,) **SUMMARY JUDGMENT OR IN THE**
INC.; RTG SPORTING COLLECTIBLES,) **ALTERNATIVE FOR SUMMARY**
14 LLC; AND STEVEN STONECIPHER,) **ADJUDICATION AND TRIAL**
)
)

15 Plaintiffs and Petitioners,)
16 vs.)

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

21 Defendants and Respondents.)
22)
23)
24)
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Date: January 18, 2011
Time: 8:30 a.m.
Location: Dept. 402
Judge: Hon. Jeff Hamilton

Date Action Filed: June 17, 2010

DECLARATION OF BARRY BAUER

I, Barry Bauer, declare as follows:

1. I am the President of Herb Bauer's Sporting Goods, Inc., a California corporation located in Fresno County that sells or may sell, among other sporting goods, hundreds of distinct ammunition cartridges that can be used interchangeably between handguns and rifles.

2. As President, I am responsible for determining the policies and operating procedures of Herb Bauer's Sporting Goods, Inc. In doing so, I am responsible for ensuring Herb Bauer's Sporting Goods, Inc. complies with all applicable federal, state, and local laws, including California Penal Code sections 12060, 12061, and 12318.

3. I do not know what ammunition is "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318.

4. I do not know what ammunition is principally for use in a handgun. Nor do I know of any source from which I could determine what ammunition suitable for use in both rifles and handguns is principally for use in a handgun under California Penal Code sections 12060, 12061, and 12318, and which is not principally for use in a handgun.

5. I also do not know which ammunition is exempt from California Penal Code sections 12060, 12061, and 12318 as ammunition "designed and intended to be used in 'antique firearms'" manufactured before 1898, because many cartridges used in firearms manufactured before 1898 are also used in firearms manufactured after 1898, including cartridges sold at Herb Bauer's Sporting Goods.

6. Ammunition sales usually account for a significant portion of the profit made by Herb Bauer's Sporting Goods, Inc. For that reason, I intend to continue selling ammunition, including ammunition suitable for use in both a handgun and rifle, at Herb Bauer's Sporting Goods, even if the provisions of California Penal Code sections 12061 and 12318 set to take effect on February 1, 2011 do in fact take effect.

7. It is costly and burdensome for Herb Bauer's Sporting Goods, Inc. to intake and store records for transfers of ammunition as required by Penal Code section 12061(a)(3).

1 8. Approximately every other year, on average, law enforcement agents from the
2 Bureau of Alcohol, Tobacco, Firearms, and Explosives ("BATFE") conduct unannounced
3 inspections of Herb Bauer's Sporting Goods store to assure that it is in compliance with all
4 applicable federal, state, and local laws.

5 9. Approximately every other year, on average, law enforcement agents from the
6 California Department of Justice, Bureau of Firearms also conduct unannounced inspections of
7 Herb Bauer's Sporting Goods store to assure that it is in compliance with all applicable federal,
8 state, and local laws.

9 10. Local law enforcement officers from both the Fresno Police Department and the
10 Fresno County Sheriff's Department are regularly on the premises of Herb Bauer's Sporting
11 Goods store, virtually every week.

12 11. Because I do not know what ammunition is "handgun ammunition" under
13 California Penal Code sections 12060, 12061, and 12318, I fear that I will be prosecuted for
14 unknowingly violating those statutes and will have my federal firearms license and California
15 firearm dealers permit revoked. For example, I fear prosecution and license revocation if I do not
16 record pursuant to Penal Code section 12061(a)(3) the transfer of ammunition law enforcement
17 deems "handgun ammunition" even though I do not know what ammunition is "handgun
18 ammunition" or what ammunition law enforcement will consider "handgun ammunition" under
19 these laws.

20
21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct.

23
24 Dated: December 6, 2010

25 
26 Barry Bauer
27 President, Herb Bauer's Sporting Goods, Inc.
28

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

7 **DECLARATION OF BARRY BAUER IN SUPPORT OF MOTION**
8 **FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR**
SUMMARY ADJUDICATION AND TRIAL

9 on the interested parties in this action by placing

10 ☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

11 Edmund G. Brown, Jr.

Attorney General of California

12 Zackery P. Morazzini

Supervising Deputy Attorney General

13 Peter A. Krause

Deputy Attorney General (185098)

14 1300 I Street, Suite 125

P.O. Box 944255

15 Sacramento, CA 94244-2550

16 (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
17 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,
18 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
19 date of deposit for mailing an affidavit.

Executed on December 6, 2010, at Long Beach, California.

20 (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
addressee.

21 Executed on December 6, 2010, at Long Beach, California.

22 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
23 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
24 placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for
in accordance with ordinary business practices.

25 Executed on December 6, 2010, at Long Beach, California.

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

28 CLAUDIA AYALA

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
3 180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
4 Telephone: (562) 216-4444
Fax: (562) 216-4445
5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

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

15 Plaintiffs and Petitioners,)
16 vs.)

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

21 Defendants and Respondents.)
22

Date: January 18, 2011
Time: 8:30 a.m.
Location: Dept. 402
Judge: Hon. Jeff Hamilton
Date Action Filed: June 17, 2010

DECLARATION OF CLAY PARKER

I, Clay Parker, declare as follows:

1. I am the duly elected Sheriff for the County of Tehama, California. I have been a law enforcement officer since 1981, and am a graduate of the Federal Bureau of Investigation National Academy. I was originally elected Sheriff of Tehama County in 1998 and have been reelected to that position three times. I am the immediate-past President of the California State Sheriffs' Association, and am a former President of the Western States' Sheriffs' Association.

2. I am responsible for enforcing federal, state, and local laws within the County of Tehama, including Penal Code sections 12060, 12061, and 12318.


3. I am responsible for determining the policies of the Tehama County Sheriff's office, including a determination of what ammunition is regulated as "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318.

4. I do not know what types of ammunition are "principally for use in" a handgun. I also do not know which types of ammunition are exempt from these laws as ammunition "designed and intended to be used in 'antique firearms'" manufactured before 1898, because many types of ammunition used in firearms manufactured before 1898 are also used in firearms manufactured after 1898.

5. Without any further guidelines as to what types of ammunition are "handgun ammunition" under Penal Code sections 12060, 12061, and 12318, I am unable to enforce these laws equitably because I do not know what types of ammunition are "handgun ammunition."

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

Dated: November 24, 2010



Clay Parker
Sheriff, Tehama County

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

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

7 **DECLARATION OF CLAY PARKER, TEHAMA COUNTY SHERIFF**
8 **IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE**
ALTERNATIVE FOR SUMMARY ADJUDICATION AND TRIAL

9 on the interested parties in this action by placing

10 ☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

11 Edmund G. Brown, Jr.
12 Attorney General of California
Zackery P. Morazzini
13 Supervising Deputy Attorney General
Peter A. Krause
14 Deputy Attorney General
1300 I Street, Suite 125
15 P.O. Box 944255
Sacramento, CA 94244-2550

16 — (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
17 processing correspondence for mailing. Under the practice it would be deposited with the
18 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
19 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.

20 — (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
21 addressee.

Executed on December 6, 2010, at Long Beach, California.

22 X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of
23 collection and processing correspondence for overnight delivery by UPS/FED-EX. Under
24 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
25 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.

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

28 CLAUDIA AYALA

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
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6 Attorneys for Plaintiffs/Petitioners

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO

10 SHERIFF CLAY PARKER, TEHAMA	)	CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)	
11 SPORTING GOODS; CALIFORNIA RIFLE	)	NOTICE OF ERRATA RE: PLAINTIFFS'
AND PISTOL ASSOCIATION	)	SEPARATE STATEMENT OF UNDISPUTED
12 FOUNDATION; ABLE'S SPORTING,	)	FACTS IN SUPPORT OF MOTION FOR
INC.; RTG SPORTING COLLECTIBLES,	)	SUMMARY JUDGMENT OR IN THE
13 LLC; AND STEVEN STONECIPHER,	)	ALTERNATIVE SUMMARY
	)	ADJUDICATION / TRIAL BRIEF
14)	
Plaintiffs and Petitioners,	)	Date: January 18, 2011
15	)	Time: 8:30 a.m.
vs.	)	Location: Dept. 402
16	)	Judge: Hon. Jeffrey Y. Hamilton
THE STATE OF CALIFORNIA; JERRY)	
17 BROWN, IN HIS OFFICIAL CAPACITY	)	Action Filed: June 17, 2010
AS ATTORNEY GENERAL FOR THE)	
18 STATE OF CALIFORNIA; THE)	
CALIFORNIA DEPARTMENT OF)	
19 JUSTICE; and DOES 1-25,)	
20)	
Defendants and Respondents.)	
21)	

22
23 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

24 PLEASE TAKE NOTICE that Plaintiffs SHERIFF CLAY PARKER, TEHAMA
25 COUNTY SHERIFF, HERB BAUER SPORTING GOODS, CALIFORNIA RIFLE AND
26 PISTOL ASSOCIATION FOUNDATION, ABLE'S SPORTING, INC., RTG SPORTING
27 COLLECTIBLES, LLC, AND STEVEN STONECIPHER request the Court take notice of the
28 following Errata:

1 1. On December 7, 2010, Plaintiffs filed with the Court its Separate Statement of
2 Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment or in the
3 Alternative for Summary Adjudication / Trial Brief, inadvertently omitting pages 22
4 through 42 and the hearing date and time, which should have read January 18, 2011 and
5 8:30 a.m., respectively.

6 2. Plaintiffs' Undisputed Material Fact Numbers 84 and 203 inadvertently cites to
7 "Graham Deposition Volume Two [Ex. 58 to Plaintiffs' Evidence in Support of Motion
8 for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief] at
9 **34:15-35:13.**" The appropriate citation is "Graham Deposition Volume Two [Ex. 58 to
10 Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative
11 Summary Adjudication / Trial Brief] at **35:15-36:13.**"

12 3. Plaintiffs' Undisputed Material Fact Numbers 90 and 209 inadvertently cites to
13 "Graham Deposition Volume Two [Ex. 58 to Plaintiffs' Evidence in Support of Motion
14 for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief] at
15 **116:19-24.**" The appropriate citation is "Graham Deposition Volume Two [Ex. 58 to
16 Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative
17 Summary Adjudication / Trial Brief] at **118:19-24.**"

18 For the Court's convenience, please find the complete and corrected Separate Statement of
19 Undisputed Facts in Support of Plaintiff's Motion for Summary Judgment or in the Alternative for
20 Summary Adjudication / Trial Brief attached as Exhibit "A".

21 Date: December 21, 2010

MICHEL & ASSOCIATES, P.C.

22

23


24

25

26

27

28



Clinton B. Monfort
Attorney for Plaintiffs

EXHIBIT A

1 C. D. Michel - SBN 144258
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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO

10 SHERIFF CLAY PARKER, TEHAMA)	CASE NO. 10CECG02116
COUNTY SHERIFF; HERB BAUER)	
11 SPORTING GOODS; CALIFORNIA RIFLE)	SEPARATE STATEMENT OF
AND PISTOL ASSOCIATION)	UNDISPUTED FACTS IN SUPPORT OF
12 FOUNDATION; ABLE'S SPORTING,)	PLAINTIFFS' MOTION FOR SUMMARY
INC.; RTG SPORTING COLLECTIBLES,)	JUDGMENT OR IN THE ALTERNATIVE
13 LLC; AND STEVEN STONECIPHER,)	SUMMARY ADJUDICATION / TRIAL
)	BRIEF
14)	
Plaintiffs and Petitioners,)	Date: January 18, 2011
15)	Time: 8:30 a.m.
vs.)	Location: Dept. 97A
16)	Judge: Hon. Jeffrey Y. Hamilton
THE STATE OF CALIFORNIA; JERRY)	
17 BROWN, IN HIS OFFICIAL CAPACITY)	Action Filed: June 17, 2010
AS ATTORNEY GENERAL FOR THE)	
18 STATE OF CALIFORNIA; THE)	
CALIFORNIA DEPARTMENT OF)	
19 JUSTICE; and DOES 1-25,)	
)	
20)	
Defendants and Respondents.)	
21)	

22 Plaintiffs Sheriff Clay Parker, et al. ("Plaintiffs") submit this separate statement of
23 undisputed material facts, together with references to supporting evidence, in support of their
24 Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief against
25 Defendants, the State of California, et al. ("Defendants").
26
27
28

ISSUE NO. 1 – PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE FIRST CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF: DUE PROCESS VAGUENESS – FACIAL – BECAUSE CALIFORNIA PENAL CODE SECTIONS 12060, 12061, AND 12318 PROVIDE NEITHER ADEQUATE NOTICE TO ORDINARY PERSONS NOR SUFFICIENT GUIDELINES TO LAW ENFORCEMENT TO PREVENT ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE LAW

Moving Party's Undisputed Material Facts and Supporting Evidence:	Opposing Party's Response and Supporting Evidence:
<p>1. Assembly Bill 962 passed the Legislature on September 11, 2009, and was approved by Governor Schwarzenegger on October 11, 2009; it added sections 12060, 12061, and 12318 (hereafter referred to collectively as the "Challenged Provisions") to the California Penal Code.</p> <p>[Assembly Bill No. 962 and Complete Bill History (Ex.1 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief).]</p>	
<p>2. There is general confusion as to what ammunition is "principally for use in handguns."</p> <p>[Allman Declaration at 2:13, Bauer Declaration at 2:13, Giles Declaration at 2:12, Hall Declaration at 2:13, Parker Declaration at 2:14, Potterfield Declaration at 2:13, Stonecipher Declaration at 2:10, Tenny Declaration at 1:12, Wright Declaration at 2:13.]</p>	
<p>3. There is confusion among law enforcement officers as to what ammunition is "principally for use in handguns."</p> <p>[Parker Declaration at 2:13, Allman Declaration at 2:13]</p>	
<p>4. Penal Code section 12060 does not rely on a list of ammunition "principally for use in handguns."</p> <p>[Pen. Code, § 12060.]</p>	

1	5. Penal Code section 12061 does not rely on	
2	a list of ammunition “principally for use in	
3	handguns.”	
4	[Pen. Code, § 12061.]	
5	6. Penal Code section 12318 does not rely on	
6	a list of ammunition “principally for use in	
7	handguns.”	
8	[Pen. Code, § 12318.]	
9	7. Penal Code section 12323 does not rely on	
10	a list of ammunition “principally for use in	
11	handguns.”	
12	[Pen. Code, § 12323.]	
13	8. Defendant DOJ has not promulgated	
14	regulations regarding the definition of	
15	“handgun ammunition” for purposes of the	
16	Challenged Provisions.	
17	[Responses to Plaintiffs’ Request for	
18	Admissions, Set One (Ex. 56 to Plaintiffs’	
19	Evidence in Support of Motion for Summary	
20	Judgment or in the Alternative Summary	
21	Adjudication / Trial Brief) at 7:22-24.]	
22	9. Penal Code section 12060 does not confer	
23	authority on the Department of Justice	
24	(“DOJ”) to create a list of ammunition	
25	“principally for use in handguns.”	
26	[Pen. Code, § 12060.]	
27	10. Penal Code section 12061 does not	
28	confer authority on the Department of Justice	
	(“DOJ”) to create a list of ammunition	
	“principally for use in handguns.”	
	[Pen. Code, § 12061.]	
	11. Penal Code section 12318 does not	
	confer authority on the Department of Justice	
	(“DOJ”) to create a list of ammunition	
	“principally for use in handguns.”	
	[Pen. Code, § 12318.]	

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12. Penal Code section 12323 does not confer authority on the Department of Justice (“DOJ”) to create a list of ammunition “principally for use in handguns.” [Pen. Code, § 12323.]	
13. Senate Bill 1276 was a failed measure introduced by Senator Hart in 1994. It attempted to introduce provisions regulating the transfer of “handgun ammunition” substantially similar to those appearing in the Challenged Provisions. [Senate Bill 1276 (1994) as Amended in Senate on May 26, 1994 (Ex. H to Plaintiffs’ Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at p. 4; Legislative History Report and Analysis Re: Senate Bill 1276 (Hart – 1994) (Ex. 5 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at LH009–010.]	

1 14. A Bill Analysis conducted by the Senate
2 Committee on Judiciary for Senate Bill 1276
3 contains a "comment" on Penal Code section
4 12323's definition of "handgun ammunition
5 which reads, in relevant part:

6 "Existing Penal Code section 12323 was
7 added in 1982 and defines handgun
8 ammunition as "ammunition principally for
9 use in pistols and revolvers . . .
10 notwithstanding that the ammunition may
11 also be used in some rifles. . . ." However, it
12 may not be suitable for defining handgun
13 ammunition in general. It may be assumed
14 that many ammunition calibers are suitable
15 for both rifles and handguns. Without
16 additional statutory guidance, it may be very
17 difficult for dealers to determine which
18 ammunition is "handgun ammunition" for
19 purposes of the requirements added to Penal
20 Code section 12076."

21 [Legislative History Report and Analysis Re:
22 Senate Bill 1276 (Hart – 1994) (Ex. 5 to
23 Plaintiffs' Evidence in Support of Motion for
24 Summary Judgment or in the Alternative
25 Summary Adjudication / Trial Brief) at
26 LH010.]

27 15. Senate Bill 1276 (1994) relied on the
28 definition of "handgun ammunition" found at
Penal Code section 12323.

[Senate Bill 1276 (1994) as Amended in
Senate on May 26, 1994 (Ex. H to Plaintiffs'
Request for Judicial Notice in Support of
Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
Brief) at p. 4.]

16. Defendants' expert admitted that he was
asked to opine on what he thought should be
included as "handgun ammunition" in
Assembly Bill 2358's enumerated list of
"handgun ammunition" calibers.

[Graham Deposition Vol. One (Ex. 57 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
102:21-103:17]

1 17. When asked which ammunition he
2 thought should be included in AB 2358's list
3 of "handgun ammunition," Defendants'
expert said he remembered identifying the
following:

4 ".45, .380., .25, .40, .38, .357, possibly .4.54,
and possibly .762, and maybe .223."

5 [Graham Deposition Vol. One (Ex. 57 to
6 Plaintiffs' Evidence in Support of Motion for
7 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
103:18-104:10.]

8
9 18. Counsel for Defendant DOJ has stated
10 that Defendant DOJ will not and cannot adopt
11 a policy as to what ammunition constitutes
"handgun ammunition" for purposes of the
Challenged Provisions.

12 [Public Records Act Request Sent to
California Department of Justice Re:
13 Assembly Bill 962, dated December 16, 2009
(Ex. 6 to Plaintiffs' Evidence in Support of
14 Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
15 Brief); Defendant Department of Justice
Response to Public Records Act and Relevant
16 E-mail Enclosures, dated January 25, 2010
(Ex. 7 to Plaintiffs' Evidence in Support of
17 Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
18 Brief) at AM0002, AM0004, AM0006,
AM0013.]

1 19. On August 19, 2010, then pending
2 Assembly Bill 2358 was amended to include
3 in Penal Code section 12323 the following
4 definition of "handgun ammunition": "any
5 variety of ammunition in the following
6 calibers, notwithstanding that the ammunition
may also be used in some rifles: .22 *rimfire*,
.25, .32, .38, .9mm, .10mm. .40, .41, .44, .45,
5.7x28mm, .223, .357, .454, .5.56x45mm,
7.62x39, 7.63mm, 7.65mm, .50."

7 [Assembly Bill No. 2358 (2010) as Amended
8 in Senate August 19, 2010 (Ex.2 to Plaintiffs'
9 Evidence in Support of Motion for Summary
10 Judgment or in the Alternative Summary
11 Adjudication / Trial Brief, Ex. F to Plaintiffs'
12 Request for Judicial Notice in Support of
13 Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
Brief) at 7:29-8:21; Complete Bill History,
A.B. No. 2358 (Ex. 4 to Plaintiffs' Evidence
in Support of Motion for Summary Judgment
or in the Alternative Summary Adjudication /
Trial Brief).]

14 20. On August 30, 2010, then pending
15 Assembly Bill 2358 was amended to include
16 in Penal Code section 12323 the following
17 definition of "handgun ammunition": " any
18 variety of ammunition in the following
19 calibers, notwithstanding that the ammunition
may also be used in some rifles: .22 *rimfire*,
.25, .32, .38, .9mm, .10mm. .40, .41, .44, .45,
5.7x28mm, .357, .454, .5.56x45mm, 7.63mm,
7.65mm."

20 [Assembly Bill No. 2358 (2010) as Amended
21 in Senate August 30, 2010 (attached as Ex. 3
22 to Plaintiffs' Evidence in Support of Motion
23 for Summary Judgment or in the Alternative
24 Summary Adjudication / Trial Brief, Ex. G to
25 Plaintiffs' Request for Judicial Notice in
26 Support of Motion for Summary Judgment or
in the Alternative Summary Adjudication /
Trial Brief) at 16:11-40; Complete Bill
History, A.B. No. 2358 (attached as Ex.4 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief).]

21. All modern centerfire and rimfire ammunition for use in handguns or rifles consist of the same components: a metal casing that suspends a metal projectile over a charge of powder confined within the metal casing and a primer (or priming charge) to ignite the powder - ("self-contained metallic ammunition").

[Helsley Declaration at ¶ 20.]

22. In order of their specificity, these three terms are used to describe a self-contained metallic cartridge: "ammunition," "caliber," and its given "cartridge name."

[Helsley Declaration at ¶ 54.]

23. "Ammunition" is defined in the Glossary of the Association of Firearms and Tool Mark Examiners as:

"One or more loaded cartridges consisting of a primed case, propellant, and with one or more projectiles. Also referred to as fixed or live ammunition."

[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at Merged Ex. C at p. 2.]

24. The definition of "caliber" depends on whether it is applied to a firearm or to ammunition. When applied to ammunition, the Glossary of the Association of Firearms and Tool Mark Examiners defines it as: "A numerical term, without the decimal point, included in a cartridge name to indicate the nominal bullet diameter."

[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at Merged Ex. C at p. 5.]

1 2 3 4 5	25. It is a more precise description of ammunition to identify it by its specific cartridge name because often the "caliber" in the cartridge's given name does not reflect the actual bore or bullet diameter. [Helsley Declaration at ¶¶ 54-64.]	
6 7 8 9	26. Within any given "caliber," there are usually various "cartridges," some of which may be used more often in a handgun, and some of which may be used more often in a rifle. [Helsley Declaration at ¶¶ 56-64.]	
10 11 12 13	27. Reference to the measurement of a projectile's diameter (i.e., its caliber) is not a particularly precise method of identifying ammunition. [Helsley Declaration at ¶ 55-64.]	
14 15 16	28. Virtually all calibers can be and are fired safely through both handguns and rifles. [Helsley Declaration at ¶ 65.]	
17 18 19	29. Virtually all cartridges can be and are fired safely through both handguns and rifles. [Helsley Declaration at ¶ 65.]	
20 21 22	30. Packaging for ammunition often has no label associating its use with either a handgun or a rifle. [Helsley Declaration at ¶¶ 68-69.]	
23 24 25 26	31. Packaging for ammunition does not identify whether the ammunition it contains is "principally for use in handguns." [Helsley Declaration at ¶ 69.]	

32. In those instances where ammunition manufacturers or vendors label or market a particular cartridge as a “handgun cartridge,” such markings do not identify whether that cartridge, or ammunition of that caliber, is actually “principally used in handguns.”

[Helsley Declaration at ¶¶ 68-69.]

33. Experts cannot form a reliable opinion as to whether a given caliber or cartridge is intended to be or has actually been fired more than fifty percent of the time through a handgun.

[Helsley Declaration at ¶¶ 66, 72-73.]

34. There exists in the firearms industry no commonly understood delineation between “handgun ammunition” and other ammunition that indicates whether certain ammunition is actually fired or intended to be fired more often in handguns than in long-guns.

[Helsley Declaration at ¶¶ 65-70, 72-73.]

35. There exists in the firearms industry no commonly understood definition of “handgun ammunition” that equates with the “principally for use in handguns” language relied on by the Challenged Provisions.

[Helsley Declaration at ¶¶ 65-70.]

36. Defendants assert 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 might enforce them,” as to what ammunition is “used principally in pistols and revolvers.”

[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 6:16-19, 7:8-11.]

37. Defendants identify the following ammunition as “principally for use in handguns” for purposes of the Challenged Provisions: .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, and .32.

[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 5:7-8, 5:21-22; Amended Response to Specially Prepared Interrogatory No. 5 (Ex. 55 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 2:24-3:2.]

38. Defendants assert that the ammunition they deemed “principally for use in handguns” based on their review of handgun sales records in California, written documents, ammunition vendor websites, and online encyclopedias, is “commonly understood” to be “handgun ammunition” for purposes of the Challenged Provisions.

[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:8-20; Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 118:3-11, 142:21-25.]

39. Additional research over time may cause Defendants’ list of ammunition “principally for use in handguns” to change.

[Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 204:21-205:8; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 67:21-68:1, 116:11-18, 118:11-18 9.]

1	40. Regulations promulgated at some date in the future may cause Defendants' list of	
2	ammunition "principally for use in handguns"	
3	to change.	
4	[Amended Response to Specially Prepared	
5	Interrogatory No. 5 (Ex. 55 to Plaintiffs'	
6	Evidence in Support of Motion for Summary	
	Judgment or in the Alternative Summary	
	Adjudication / Trial Brief) at 2:26-3:2.]	
7	41. Defendants' expert admitted that if he	
8	had the opportunity to review sales records	
9	over a larger time frame, his opinion as to	
	what ammunition is "principally for use in a	
	handgun" might have changed.	
10	[Graham Deposition Vol. Two (Ex. 58 to	
11	Plaintiffs' Evidence in Support of Motion for	
12	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at	
	118:11-18.]	
13	42. Defendants' expert admits he may have	
14	left cartridges off Defendants' list of	
15	ammunition "principally for use in handguns"	
16	that [based on his understanding of "handgun	
	ammunition"], should have been included.	
17	[Graham Deposition Vol. Two (Ex. 58 to	
18	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at 69:20-	
	70:5.]	
19	43. Defendants' expert's methodology for	
20	determining what ammunition was	
21	"principally for use in handguns" was a two-	
22	step process that involved the expert looking	
23	at the records of handgun sales in California,	
	and then reviewing websites, written	
	materials and drawing on his personal	
	experience.	
24	[Graham Deposition Vol. Two (Ex. 58 to	
25	Plaintiffs' Evidence in Support of Motion for	
26	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at 63:22-	
	64:6, 140:13-21.]	

1 44. Defendants' list of calibers that constitute
2 ammunition "principally for use in handguns"
3 was based on the records of handgun sales in
4 California over each of the past five years,
5 written materials, ammunition vendor
6 websites, and online encyclopedias."

7 [Responses to Specially Prepared
8 Interrogatories (Ex. 54 to Plaintiffs' Evidence
9 in Support of Motion for Summary Judgment
10 or in the Alternative Summary Adjudication /
11 Trial Brief) at 7:14-20.]

12 45. Defendant DOJ is required to keep and
13 maintain records of handgun sales in
14 California; this record is commonly referred
15 to as the Dealer Record of Sales ("DROS")
16 and it is linked to the Automated Firearms
17 System ("AFS").

18 [Responses to Specially Prepared
19 Interrogatories, Set One (Ex. 54 to Plaintiffs'
20 Evidence in Support of Motion for Summary
21 Judgment or in the Alternative Summary
22 Adjudication / Trial Brief) at 7:14; Graham
23 Deposition Vol. One (Ex. 57 to Plaintiffs'
24 Evidence in Support of Motion for Summary
25 Judgment or in the Alternative Summary
26 Adjudication / Trial Brief) at 176:14-17,
27 177:7-13, 190:3-6.]

28 46. Defendants and their expert witness relied
in part on the DROS records to determine
which ammunition should be included in
Defendants' list of ammunition they consider
"handgun ammunition" for purposes of the
Challenged Provisions.

[Responses to Specially Prepared
Interrogatories, Set One (Ex. 54 to Plaintiffs'
Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 7:13-18;
Graham Deposition Vol. One (Ex. 57 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
181:14-16, 181:23-182:1; Graham Deposition
Vol. Two (Ex. 58 to Plaintiffs' Evidence in
Support of Motion for Summary Judgment or
in the Alternative Summary Adjudication /
Trial Brief) at 9:17-20.]

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<p>47. Defendants' expert's reliance on DROS records was his "starting point." He used the records to determine which popular handgun calibers should be researched further to determine if ammunition of those calibers is "principally for use in handguns."</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 9:17-20, 63:22-64:6.]</p>	
<p>48. Defendants' expert admitted that certain calibers may have been omitted from Defendants' list of ammunition "principally for use in handguns" because they were "unpopular."</p> <p>[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 204:21-207:9.]</p>	
<p>49. Defendants and their expert relied on DROS records only from the previous five years to determine the handguns most commonly sold in California over the same time period.</p> <p>[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:14-16; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 115:18-116:2, 116:17-117:6.]</p>	

1 50. Defendants' expert does not have any
2 information regarding what percentage of the
3 total guns in circulation are represented by the
4 records of handgun sales in the past five
5 years.

6 [Graham Deposition Vol. Two (Ex. 58 to
7 Plaintiffs' Evidence in Support of Motion for
8 Summary Judgment or in the Alternative
9 Summary Adjudication / Trial Brief) at 118:4-
10 10.]

11 51. The DROS records relied upon by
12 Defendants' expert combine firearms that
13 utilize ammunition referred to by Defendants
14 as "handgun ammunition" and firearms that
15 utilize ammunition referred to by Defendants
16 as "rifle ammunition" under a single caliber
17 listing.

18 [Graham Deposition Vol. Two (Ex. 58 to
19 Plaintiffs' Evidence in Support of Motion for
20 Summary Judgment or in the Alternative
21 Summary Adjudication / Trial Brief) at 12:18-
22 14:2.]

23 52. The DROS records relied upon by
24 Defendants' expert are not precise in
25 identifying the sales of handguns that use a
26 specific cartridge.

27 [Graham Deposition Vol. Two (Ex. 58 to
28 Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 14:10-
23.]

53. The DROS system does not break down
sales by guns as to every cartridge of
ammunition sold and whether such
ammunition is a "rifle cartridge," "handgun
cartridge," or both.

[Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 19:23-
20:20.]

1 54. The DROS records relied on by
2 Defendants' expert does not contain a listing
3 of all types of cartridges fired by a firearm of
4 that caliber due to space limitations.

5 [Graham Deposition Vol. Two (Ex. 58 to
6 Plaintiffs' Evidence in Support of Motion for
7 Summary Judgment or in the Alternative
8 Summary Adjudication / Trial Brief) at 22:11-
9 23:9.]

10 55. Defendants' expert admitted that the
11 DROS records relied on to inform his
12 opinions contained categories of ammunition
13 that could have been a mixture of what he
14 considers "handgun ammunition" and "rifle
15 ammunition."

16 [Graham Deposition Vol. Two (Ex. 58 to
17 Plaintiffs' Evidence in Support of Motion for
18 Summary Judgment or in the Alternative
19 Summary Adjudication / Trial Brief) at 91:18-
20 92:6.]

21 56. The DROS records relied on by
22 Defendants' expert include a number of
23 entries in calibers Defendants' expert
24 considers "common rifle caliber rounds."

25 [Graham Deposition Vol. One (Ex. 57 to
26 Plaintiffs' Evidence in Support of Motion for
27 Summary Judgment or in the Alternative
28 Summary Adjudication / Trial Brief) at
189:10-192:18.]

57. There is no record of total rifle sales in
California in existence because Defendant
DOJ is prohibited from retaining records on
the sale of long-guns.

[Graham Deposition Vol. One (Ex. 57 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
183:19-184:15.]

1 58. Defendants' expert did not determine the
2 total number of rifle sales in California as
3 compared with the total number of handgun
4 sales to inform his opinion as to whether a
5 particular ammunition was principally used in
6 a handgun.

7 [Graham Deposition Vol. Two (Ex. 58 to
8 Plaintiffs' Evidence in Support of Motion for
9 Summary Judgment or in the Alternative
10 Summary Adjudication / Trial Brief) at 93:17-
11 24.]

12 59. Defendants' expert was unable to
13 compare the sales of handguns using a
14 particular ammunition with rifle sales that use
15 the same ammunition because he is
16 admittedly unaware of any source of data
17 regarding rifle sales.

18 [Graham Deposition Vol. Two (Ex. 58 to
19 Plaintiffs' Evidence in Support of Motion for
20 Summary Judgment or in the Alternative
21 Summary Adjudication / Trial Brief) at 93:6-
22 24.]

23 60. Defendants' expert admits his opinion as
24 to which ammunition is "principally for use in
25 handguns" may have been different had he
26 been able to compare handgun sales with rifle
27 sales.

28 [Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 95:13-
20.]

61. Defendants relied in part on the
representations made by ammunition vendors
on their websites to determine whether certain
ammunition should be included in
Defendants' list of ammunition they consider
"handgun ammunition" for purposes of the
Challenged Provisions.

[Responses to Specially Prepared
Interrogatories, Set One (Ex. 54 to Plaintiffs'
Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 7:18-20.]

62. Defendants' expert relied in part on the fact that ammunition vendor websites listed certain cartridges as "handgun ammunition" to inform his opinion as to whether specific ammunition was "principally for use in handguns."

[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 44:1-14, 64:17-65:6.]

63. Defendants' expert testified that the fact that certain websites refer to some ammunition as "handgun cartridges" helped establish the DOJ's list of calibers "principally for use in handgun."

[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 93:5-95:13, 160:19-23, 166:21-167:6.]

64. The four vendor websites that Defendants' expert relied to inform his opinion as to whether specific ammunition was "principally for use in handguns" include: Cabela's, Cheaper Than Dirt, Inc., J & G Sales, and Midway USA.

[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 93:5-20, 148:23-149:4; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 37:8-13, 40:11-15, 43:4-10.]

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<p>65. In forming his opinion regarding whether ammunition was principally used in handguns, Defendants' expert gave some weight to whether the website listed the ammunition as "popular."</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 65:9-16.]</p>	
<p>66. Defendants' expert did not contact the relied-upon website vendors or do any investigation as to what criteria the websites relied upon to characterize the ammunition as "popular" or what the websites' characterization meant.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 44:15-46:3.]</p>	
<p>67. Defendants' expert admitted there is a difference between "popular" ammunition for a handgun and ammunition that is "principally for use in a handgun."</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 102:6-104:3.]</p>	
<p>68. None of the relied-upon website vendors provided Defendants' expert with data regarding the total rounds of each type of ammunition sold.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 46:4-16.]</p>	

69. The websites Defendants' expert relied upon to inform his opinions as to which ammunition is "principally for use in handguns" list as "handgun ammunition" ammunition that Defendants' expert does not consider to be principally used in handguns.

[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 62:25-63:21.]

70. Defendants' expert's decision to exclude certain ammunition listed as "handgun ammunition" on the vendor websites he relied upon to inform his opinions as to which ammunition is "principally for use in handguns" was based on his experience in observing the use of that ammunition in the field.

Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 66:15-67:9.]

71. Michael Tenny, the party responsible for ensuring compliance with all applicable laws in the locations from and to which Cheaper Than Dirt, Inc., ships ammunition, does not know what ammunition is "handgun ammunition" and thus subject to the Challenged Provisions.

[Tenny Declaration at 1:6-11.]

72. Larry Potterfield, the party responsible for ensuring compliance with all applicable laws in the locations from and to which Midway Arms, Inc.(dba Midway USA), ships ammunition, does not know what ammunition is "handgun ammunition" and thus subject to the Challenged Provisions.

[Potterfield Declaration at 2:3-12.]

1 73. Brian Hall, the party responsible for
2 ensuring compliance with all applicable laws
3 in the locations from and to which
4 Chattanooga Shooting Supplies, Inc. (dba
5 Natchez Shooters Supplies), ships
6 ammunition, does not know what ammunition
7 is "handgun ammunition" and thus subject to
8 the Challenged Provisions.

9 [Hall Declaration at 2:3-12.]

10 74. Michael Tenny, the party responsible for
11 ensuring compliance with all applicable laws
12 in the locations from and to which Cheaper
13 Than Dirt, Inc., ships ammunition, does not
14 know what ammunition is "principally for use
15 in a handgun" and is unaware of any source to
16 which he can look to determine what
17 ammunition suitable for use in both handguns
18 and rifles is "principally for use in a
19 handgun."

20 [Tenny Declaration at 1:12-14.]

21 75. Larry Potterfield, the party responsible
22 for ensuring compliance with all applicable
23 laws in the locations from and to which
24 Midway Arms, Inc.(dba Midway USA), ships
25 ammunition, does not know what ammunition
26 is "principally for use in a handgun" and is
27 unaware of any source to which he can look
28 to determine what ammunition suitable for
use in both handguns and rifles is "principally
for use in a handgun."

[Potterfield Declaration at 2:13-15.]

76. Brian Hall, the party responsible for
ensuring compliance with all applicable laws
in the locations from and to which
Chattanooga Shooting Supplies, Inc. (dba
Natchez Shooters Supplies), ships
ammunition, does not know what ammunition
is "principally for use in a handgun" and is
unaware of any source to which he can look
to determine what ammunition suitable for
use in both handguns and rifles is "principally
for use in a handgun."

[Hall Declaration at 2:13-15.]

1 77. Michael Tenny, the party responsible for
2 ensuring compliance with all applicable laws
3 in the locations from and to which Cheaper
4 Than Dirt, Inc., ships ammunition, does not
5 know what ammunition is exempt from the
6 Challenged Provisions as ammunition that is
7 “designed and intended to be used in antique
8 firearms” manufactured before 1898, because
9 many cartridges of ammunition used in
10 firearms manufactured before 1898 are also
11 used in firearms manufactured after 1898,
12 including cartridges sold by Cheaper Than
13 Dirt, Inc.

14 [Tenny Declaration at 1:15-19.]

15 78. Larry Potterfield, the party responsible
16 for ensuring compliance with all applicable
17 laws in the locations from and to which
18 Midway Arms, Inc.(dba Midway USA), ships
19 ammunition, does not know what ammunition
20 is exempt from the Challenged Provisions as
21 ammunition that is “designed and intended to
22 be used in antique firearms” manufactured
23 before 1898, because many cartridges of
24 ammunition used in firearms manufactured
25 before 1898 are also used in firearms
26 manufactured after 1898, including cartridges
27 sold by Midway Arms, Inc.(dba Midway
28 USA).

[Potterfield Declaration at 2:16-20.]

79. Brian Hall, the party responsible for
ensuring compliance with all applicable laws
in the locations from and to which
Chattanooga Shooting Supplies, Inc. (dba
Natchez Shooters Supplies), ships
ammunition, does not know what ammunition
is exempt from the Challenged Provisions as
ammunition that is “designed and intended to
be used in antique firearms” manufactured
before 1898, because many cartridges of
ammunition used in firearms manufactured
before 1898 are also used in firearms
manufactured after 1898, including cartridges
sold by Chattanooga Shooting Supplies, Inc.
(dba Natchez Shooters Supplies).

[Hall Declaration at 2:16-20.]

80. Cheaper Than Dirt, Inc., has announced that it will cease shipping all ammunition to non-exempt California customers beginning January 1, 2011, to avoid risking criminal prosecution under Penal Code section 12328.

[Tenny Declaration at 2:1-8.]

81. Midway Arms, Inc.(dba Midway USA), has announced that it will cease shipping all ammunition to non-exempt California customers beginning January 1, 2011, to avoid risking criminal prosecution under Penal Code section 12318.

[Potterfield Declaration at 3:1-9.]

82. It is the current intent of Chattanooga Shooting Supplies, Inc. (dba Natchez Shooters Supplies), to cease shipping all ammunition that is suitable for use in both handguns and long-guns to non-exempt California customers beginning February 1, 2011, to avoid risking criminal prosecution under Penal Code section 12318.

[Hall Declaration at 3:1-6.]

83. Defendants' expert knows of no specific trade magazine articles that he used to inform his opinion regarding which ammunition is "principally for use in handguns."

[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 34:8-35:14.]

84. Defendants' expert did not use any trade magazine articles regarding the amount of particular ammunition sold.

[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 35:15-36:13.]

1 85. Defendants' expert's use of trade
2 magazines to inform his opinion regarding
3 ammunition "principally for use in handguns"
4 is based solely upon his reading of trade
magazines over the years, with no specific
reference to a particular article or data from
those trade magazines on the subject.

5 [Graham Deposition Vol. Two (Ex. 58 to
6 Plaintiffs' Evidence in Support of Motion for
7 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 35:15-
36:13, 36:14-37:6]

8 86. The DOJ's expert testified that he pulled
9 from his personal and professional
10 experiences to determine what ammunition
should be considered "handgun ammunition"
under the Challenged Provisions.

11 [Graham Deposition Vol. One (Ex. 57 to
12 Plaintiffs' Evidence in Support of Motion for
13 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 81:24-
82:4, 91:1-4, 186:17-24; Graham Deposition
14 Vol. Two (Ex. 58 to Plaintiffs' Evidence in
Support of Motion for Summary Judgment or
15 in the Alternative Summary Adjudication /
Trial Brief) at 24:8-18, 28:4-29:2, 64:1-6,
16 72:25-73:10.]

17 87. Defendants' expert concluded that, based
18 on his training and experience over the last
19 sixteen years or so, when added to experience
with handguns and other factors, he "*has a*
20 *feeling* that there are certain calibers that are
more often than not handgun calibers."

21 [Graham Deposition Vol. One (Ex. 57 to
22 Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 81:24-
23 82:4, 206:22-207:2.]

1 88. Defendants' expert's opinion regarding
2 ammunition "principally for use in handguns"
3 was not informed by information regarding
the amounts and types of ammunition used by
the military.

4 [Graham Deposition Vol. Two (Ex. 58 to
5 Plaintiffs' Evidence in Support of Motion for
6 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
109:14-18.]

7 89. Defendants' expert's opinion regarding
8 ammunition "principally for use in handguns"
9 was not informed by specific information
10 regarding the number of handguns and/or
rifles used by military service members
stationed in California.

11 [Graham Deposition Vol. Two (Ex. 58 to
12 Plaintiffs' Evidence in Support of Motion for
13 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 109:8-
13, 110:8-111:10.]

14 90. Defendants' expert's opinion regarding
15 ammunition "principally for use in handguns"
16 was not informed by research studies
regarding popular or prevalently used
ammunition.

17 [Graham Deposition Vol. Two (Ex. 58 to
18 Plaintiffs' Evidence in Support of Motion for
19 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
118:19-24.]

20 91. Defendants' expert's opinion regarding
21 ammunition "principally for use in handguns"
22 was not informed by existing polls regarding
23 the ammunition generally or the popularity of
certain cartridges.

24 [Graham Deposition Vol. Two (Ex. 58 to
25 Plaintiffs' Evidence in Support of Motion for
26 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
119:20-120:8.]

1 92. Prior to forming his opinion as to
2 ammunition prevalently used in handguns,
3 Defendants' expert did not personally conduct
any polls regarding the ammunition members
of the general public use in their handguns.

4 [Graham Deposition Vol. Two (Ex. 58 to
5 Plaintiffs' Evidence in Support of Motion for
6 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 120:9-
16.]

7
8 93. Defendants assert that the ammunition
9 they have identified as "principally for use in
10 handguns" is supported in part by the fact that
those calibers are identified as "handgun
ammunition" in *Cartridges of the World*.

11 [Responses to Specially Prepared
12 Interrogatories, Set One (Ex. 54 to Plaintiffs'
13 Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 7:18-21.]

14 94. In its sections on rifle cartridges,
15 *Cartridges of the World* identifies multiple
16 cartridges in the calibers included in
Defendants' list of ammunition "principally
for use in handguns."

17 [Barnes, *Cartridges of the World: A Complete*
18 *and Illustrated Reference for Over 1500*
19 *Cartridges* (11th ed. 2006) "Selected Pages
20 from Chapter 2: Current American Rifle
21 Cartridges and Chapter3: Obsolete Rifle
Cartridges " (Ex. 52 Plaintiffs' Evidence in
Support of Motion for Summary Judgment or
in the Alternative Summary Adjudication /
Trial Brief) *passim*.]

1 95. In its sections on handgun cartridges,
2 *Cartridges of the World* identifies multiple
3 cartridges in calibers not included in
Defendants' list of ammunition "principally
for use in handguns."

4 [Barnes, *Cartridges of the World: A Complete*
5 *and Illustrated Reference for Over 1500*
6 *Cartridges* (11th ed. 2006) "Selected Pages
7 from Chapter 6: Handgun Cartridges of the
8 World " (Ex. 53 to Plaintiffs' Evidence in
Support of Motion for Summary Judgment or
in the Alternative Summary Adjudication /
Trial Brief) *passim*.]

9 96. Defendants' expert admitted there are
10 many ammunition cartridges that fall within
11 the listed caliber classes that are not
12 "principally for use in a handgun."

13 [Graham Deposition Vol. One (Ex. 57 to
14 Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 135:7-
136:5, 137:8-22, 154:25-155:3, 155:21-
156:2.]

15 97. Defendants have suggested that the
16 Challenged Provisions apply to ammunition
17 that is "used principally" in handguns.

18 [Responses to Specially Prepared
19 Interrogatories, Set One (Ex. 54 to Plaintiffs'
Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 7:8-11.]

20 98. Defendants' expert suggested that the
21 "principally for use in handguns" language
22 relates to the total number of handguns in
23 circulation that are chambered in a particular
24 caliber versus the total number of rifles in
circulation that are chambered in the same
caliber.

25 [Graham Deposition Vol. Two (Ex. 58 to
26 Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 83:1-
27 16.]

1 99. Defendants' expert suggested that the
2 "principally for use in handguns" language
3 relates to a mix of factors, including "the
4 number of manufacturers that may have
5 produced a weapon in a particular caliber,"
6 "the length of time that a particular gun has
7 been available in a particular caliber," and the
8 number of rifles in that caliber, if any.

[Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 127:5-
128:25.]

9 100. When asked whether the "principally for
10 use in a handgun" standard required a
11 consideration of whether any particular
12 ammunition was fired more often through a
13 handgun than a long-gun, Defendants' expert
14 responded:

15 "I would say [its] not much of a factor
16 because principally for use really deals with
17 the kind of firearm its going to go into, in my
18 – in my est- -- in my understanding, so if you
19 have one weapon that can shoot a million
20 rounds a second and then you have 500,000
21 rounds – or handguns out there that shoot ten
22 rounds a minute, that weapon is actually – or
23 the ammunition is principally for use in the
24 larger pool of – of weapons."

25 [Graham Deposition Vol. Two (Ex. 58 to
26 Plaintiffs' Evidence in Support of Motion for
27 Summary Judgment or in the Alternative
28 Summary Adjudication / Trial Brief) at 83:1-
16.]

1 101. When asked to clarify whether he would
2 consider the numerosity of total weapons or
3 the numerosity of models of weapons to be
4 the determining factor determining whether
5 certain ammunition is "principally for use in
6 handguns," Defendants' expert stated:

7 "Given the available information in the
8 amount of time I had, I tried to compare the
9 number of manufacturers that may have
10 produced a weapon in a particular caliber, the
11 number of models that each manufacturer
12 used in that caliber, and then, perhaps, the
13 length of time that a particular gun has been
14 available in a particular caliber."

15 [Graham Deposition Vol. Two (Ex. 58 to
16 Plaintiffs' Evidence in Support of Motion for
17 Summary Judgment or in the Alternative
18 Summary Adjudication / Trial Brief) at 128:8-
19 25.]

20 102. Firearms chambered in .22 are among
21 the most popular weapons, as to both
22 handguns and rifles.

23 [Graham Deposition Vol. One (Ex. 57 to
24 Plaintiffs' Evidence in Support of Motion for
25 Summary Judgment or in the Alternative
26 Summary Adjudication / Trial Brief) at
27 185:21-186:5; Helsley Declaration at ¶¶ 29,
28 33.]

103. .22 Long Rifle is likely the most popular
firearm cartridge in the world.

[Helsley Declaration at ¶ 33.]

1 104. In December 2009, when Plaintiffs'
2 counsel inquired as to whether “.22 rimfire”
3 ammunition would be considered “handgun
4 ammunition” under the Challenged
Provisions, Counsel for Defendant DOJ stated
that she did not know.

5 [Public Records Act Request Sent to
6 California Department of Justice Re:
7 Assembly Bill 962, dated December 16, 2009
8 (Ex. 6 to Plaintiffs’ Evidence in Support of
9 Motion for Summary Judgment or in the
10 Alternative Summary Adjudication / Trial
11 Brief); Defendant Department of Justice
Response to Public Records Act and Relevant
E-mail Enclosures, dated January 25, 2010
(Ex. 7 to Plaintiffs’ Evidence in Support of
Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
Brief) at AM0002, AM0004, AM0006,
AM0013.]

12 105. Defendants’ expert suggests that, at this
13 time, .22 caliber is not “principally for use in
14 handguns,” but that his opinion could change
based on future research.

15 [Graham Deposition Vol. One (Ex. 57 to
16 Plaintiffs’ Evidence in Support of Motion for
17 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
186:25-187:17.]

19 106. Defendants expert stated he would only
20 classify three .45 caliber cartridges to be
“principally for use in a handgun”: .45 ACP,
21 .45 GAP, and .45 Long Colt.

22 [Graham Deposition Vol. One (Ex. 57 to
23 Plaintiffs’ Evidence in Support of Motion for
24 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
153:13-18.]

1 107. *Cartridges of the World* includes
2 numerous .45 cartridges in its section on
3 handgun cartridges besides the .45 ACP, .45
4 GAP, and .45 Long Colt.

5 [Barnes, *Cartridges of the World: A Complete*
6 *and Illustrated Reference for Over 1500*
7 *Cartridges* (11th ed. 2006) “Selected Pages
8 from Chapter 6: Handgun Cartridges of the
9 World ” (Ex. 53 Plaintiffs’ Evidence in
10 Support of Motion for Summary Judgment or
11 in the Alternative Summary Adjudication /
12 Trial Brief) *passim*.]

13 108. There are multiple cartridges that can be
14 used in firearms manufactured both before
15 and after 1898, including but not limited to,
16 cartridges in the following calibers: 22, .32,
17 .38, .44, .45, and .50.

18 [Helsley Declaration at ¶¶ 20-25.]

19 109. Ammunition that can be used in a
20 modern firearm chambered to fire that
21 cartridge can also be used in an antique
22 firearm chambered to fire that same cartridge.

23 [Helsley Declaration at ¶¶ 20-25.]

24 110. Ammunition, when it is manufactured,
25 is designed and intended to be used in any
26 firearm that is chambered for that cartridge,
27 regardless of when the firearm it will be used
28 in was manufactured.

[Helsley Declaration at ¶¶ 20-25.]

111. The calibers Defendants claim to be
“handgun ammunition” include cartridges
that are designed and intended to be used in
“antique firearms,” and thus should be
exempt from the Challenged Provisions.

[Helsley Declaration at ¶23.]

1 112. Defendants' expert witness testified that
2 .45 Long Colt is unequivocally "handgun
3 ammunition" under the Challenged
Provisions.

4 [Graham Deposition Vol. One (Ex. 57 to
5 Plaintiffs' Evidence in Support of Motion for
6 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
153:13-18.]

7 113. 45 Long Colt is used in firearms
8 manufactured prior to 1898.

9 [Helsley Decl. at ¶ 23.]

10 114. *State of Tennessee ex rel. Rayburn v.*
11 *Cooper*, involved a challenge to a state law
12 authorizing firearms to be carried by patrons
in establishments where "the serving of
meals" is the "*principle* business conducted"
– as opposed to the serving of alcohol.

13 [Amended Complaint for Injunctive and
14 Declaratory Relief in *Tennessee ex rel.*
15 *Rayburn v. Cooper*, Case No. 09-1284-I, filed
16 July 6, 2009 (Ex. A to Plaintiffs' Request for
Judicial Notice in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at ¶ 2;
17 Order of Chancellor Claudia Bonnyman in
Tennessee ex rel. Rayburn v. Cooper, Case
18 No. 09-1284-I, filed November 25, 2009 (Ex.
19 D to ' Request for Judicial Notice in Support
of Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
20 Brief) at 24:20-2.]

21 115. In *State of Tennessee ex rel. Rayburn v.*
22 *Cooper*, plaintiffs argued it would be
23 extremely difficult for an individual to
determine whether they were in a bar or a
restaurant.

24 [Amended Complaint for Injunctive and
25 Declaratory Relief in *Tennessee ex rel.*
26 *Rayburn v. Cooper*, Case No. 09-1284-I, filed
27 July 6, 2009 (Ex. A to Plaintiffs' Request for
Judicial Notice in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at ¶¶ 93,
28 97, 99.]

1 116. The court in *State of Tennessee ex rel.*
2 *Rayburn v. Cooper* found the statute
3 unconstitutionally vague, reasoning that
4 whether the serving of meals is a business's
5 principle business is *not something that can*
6 *be known* to the ordinary citizen. The court
7 added that inquiry would not suffice to
8 overcome the law's vagueness.

9 [Order of Chancellor Claudia Bonnyman in
10 *Tennessee ex rel. Rayburn v. Cooper*, Case
11 No. 09-1284-I, filed November 25, 2009 (Ex.
12 D to Plaintiffs' Request for Judicial Notice in
13 Support of Motion for Summary Judgment or
14 in the Alternative Summary Adjudication /
15 Trial Brief) at 12:24-13:6.]

16 117. Defendants in *State of Tennessee ex rel.*
17 *Rayburn v. Cooper* argued that the law was
18 not vague because there were obvious
19 instances where a patron could determine
20 whether a particular establishment was a
21 "restaurant," pointing to establishments that
22 only serve food – and no alcohol.

23 [Consolidated Memorandum of Law of
24 Defendant Attorney General Cooper in
25 Opposition to Plaintiffs' Motions for Partial
26 Summary Judgment and in Support of
27 Defendant's Cross-Motion for Judgment on
28 the Pleadings and/or for Summary Judgment
in *Tennessee ex rel. Rayburn v. Cooper*, Case
No. 09-1284-I, filed October 2, 2009 (Ex. I to
Plaintiffs' Request for Judicial Notice in
Support of Motion for Summary Judgment or
in the Alternative Summary Adjudication /
Trial Brief) at pp. 19-20.]

1 118. In conjunction with Fish and Game Code
2 section 3004.5, the Legislature granted the
3 Fish and Game Commission the authority to
4 certify and publish a list of nonlead
5 ammunition suitable for use in regulated
6 areas. The list of certified nonlead
7 ammunition can be easily accessed at the
8 Commission's website.

9 [California Department of Fish and Game,
10 Certified Nonlead Ammunition Information,
11 <http://www.dfg.ca.gov/wildlife/hunting/condor/certifiedammo.html> (last visited Nov. 29,
12 2010) (Ex. E to Plaintiffs' Request for
13 Judicial Notice in Support of Motion for
14 Summary Judgment or in the Alternative
15 Summary Adjudication / Trial Brief).]

16 119. On December 30, 2009, DOJ published
17 an "Information Bulletin" providing a brief
18 overview of AB 962.

19 [Information Bulletin from California
20 Department of Justice Re: New and Amended
21 Firearm Laws, dated December 30, 2009 (Ex.
22 8 to Plaintiffs' Evidence in Support of Motion
23 for Summary Judgment or in the Alternative
24 Summary Adjudication / Trial Brief).]

ISSUE NO. 2 – PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE SECOND CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF: DUE PROCESS VAGUENESS – AS APPLIED – BECAUSE, AS APPLIED TO PLAINTIFF BARRY BAUER, CALIFORNIA PENAL CODE SECTIONS 12060, 12061, AND 12318 PROVIDE NEITHER ADEQUATE NOTICE TO ORDINARY PERSONS NOR SUFFICIENT GUIDELINES TO LAW ENFORCEMENT TO PREVENT ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE LAW

Moving Parties Undisputed Material Facts and Supporting Evidence:	Opposing Parties Responses and Supporting Evidence:
<p>120. Assembly Bill 962 passed the Legislature on September 11, 2009, and was approved by Governor Schwarzenegger on October 11, 2009; it added sections 12060, 12061, and 12318 (hereafter referred to collectively as the “Challenged Provisions”) to the California Penal Code.</p> <p>[Assembly Bill No. 962 and Complete Bill History (Ex.1 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief).]</p>	
<p>121. There is general confusion as to what ammunition is “principally for use in handguns.”</p> <p>[Allman Declaration at 2:13, Bauer Declaration at 2:13, Giles Declaration at 2:12, Hall Declaration at 2:13, Parker Declaration at 2:14, Potterfield Declaration at 2:13, Stonecipher Declaration at 2:10, Tenny Declaration at 1:12, Wright Declaration at 2:13.]</p>	
<p>122. There is confusion among law enforcement officers as to what ammunition is “principally for use in handguns.”</p> <p>[Parker Declaration at 2:13, Allman Declaration at 2:13]</p>	
<p>123. Penal Code section 12060 does not rely on a list of ammunition “principally for use in handguns.”</p> <p>[Pen. Code, § 12060.]</p>	

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124. Penal Code section 12061 does not rely on a list of ammunition “principally for use in handguns.” [Pen. Code, § 12061.]	
125. Penal Code section 12318 does not rely on a list of ammunition “principally for use in handguns.” [Pen. Code, § 12318.]	
126. Penal Code section 12323 does not rely on a list of ammunition “principally for use in handguns.” [Pen. Code, § 12323.]	
127. Defendant DOJ has not promulgated regulations regarding the definition of “handgun ammunition” for purposes of the Challenged Provisions. [Responses to Plaintiffs’ Request for Admissions, Set One (Ex. 56 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:22-24.]	
128. Penal Code section 12060 does not confer authority on the Department of Justice (“DOJ”) to create a list of ammunition “principally for use in handguns.” [Pen. Code, § 12060.]	
129. Penal Code section 12061 does not confer authority on the Department of Justice (“DOJ”) to create a list of ammunition “principally for use in handguns.” [Pen. Code, § 12061.]	
130. Penal Code section 12318 does not confer authority on the Department of Justice (“DOJ”) to create a list of ammunition “principally for use in handguns.” [Pen. Code, § 12318.]	

1	131. Penal Code section 12323 does not	
2	confer authority on the Department of Justice	
3	("DOJ") to create a list of ammunition	
4	"principally for use in handguns."	
	[Pen. Code, § 12323.]	
5	132. Senate Bill 1276 was a failed measure	
6	introduced by Senator Hart in 1994. It	
7	attempted to introduce provisions regulating	
8	the transfer of "handgun ammunition"	
9	substantially similar to those appearing in the	
10	Challenged Provisions.	
11	[Senate Bill 1276 (1994) as Amended in	
12	Senate on May 26, 1994 (Ex. H to Plaintiffs'	
13	Request for Judicial Notice in Support of	
14	Motion for Summary Judgment or in the	
15	Alternative Summary Adjudication / Trial	
16	Brief) at p. 4; Legislative History Report and	
17	Analysis Re: Senate Bill 1276 (Hart – 1994)	
18	(Ex. 5 to Plaintiffs' Evidence in Support of	
19	Motion for Summary Judgment or in the	
20	Alternative Summary Adjudication / Trial	
21	Brief) at LH009–010.]	
22	133. A Bill Analysis conducted by the Senate	
23	Committee on Judiciary for Senate Bill 1276	
24	contains a "comment" on Penal Code section	
25	12323's definition of "handgun ammunition	
26	which reads, in relevant part:	
27	"Existing Penal Code section 12323 was	
28	added in 1982 and defines handgun	
	ammunition as "ammunition principally for	
	use in pistols and revolvers . . .	
	notwithstanding that the ammunition may	
	also be used in some rifles. . . ." However, it	
	may not be suitable for defining handgun	
	ammunition in general. It may be assumed	
	that many ammunition calibers are suitable	
	for both rifles and handguns. Without	
	additional statutory guidance, it may be very	
	difficult for dealers to determine which	
	ammunition is "handgun ammunition" for	
	purposes of the requirements added to Penal	
	Code section 12076."	
	[Legislative History Report and Analysis Re:	
	Senate Bill 1276 (Hart – 1994) (Ex. 5 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at	
	LH010.]	

1 134. Senate Bill 1276 (1994) relied on the
2 definition of "handgun ammunition" found at
Penal Code section 12323.

3 [Senate Bill 1276 (1994) as Amended in
4 Senate on May 26, 1994 (Ex. H to Plaintiffs'
5 Request for Judicial Notice in Support of
6 Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
Brief) at p. 4.]

7 135. Defendants' expert admitted that he was
8 asked to opine on what he thought should be
9 included as "handgun ammunition" in
Assembly Bill 2358's enumerated list of
"handgun ammunition" calibers.

10 [Graham Deposition Vol. One (Ex. 57 to
11 Plaintiffs' Evidence in Support of Motion for
12 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
102:21-103:17]

13 136. When asked which ammunition he
14 thought should be included in AB 2358's list
15 of "handgun ammunition," Defendants'
16 expert said he remembered identifying the
following:
17 ".45, .380., .25, .40, .38, .357, possibly .4.54,
18 and possibly .762, and maybe .223."

19 [Graham Deposition Vol. One (Ex. 57 to
20 Plaintiffs' Evidence in Support of Motion for
21 Summary Judgment or in the Alternative
22 Summary Adjudication / Trial Brief) at
23 103:18-104:10.]
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1 137. Counsel for Defendant DOJ has stated
2 that Defendant DOJ will not and cannot adopt
3 a policy as to what ammunition constitutes
"handgun ammunition" for purposes of the
Challenged Provisions.

4 [Public Records Act Request Sent to
5 California Department of Justice Re:
6 Assembly Bill 962, dated December 16, 2009
7 (Ex. 6 to Plaintiffs' Evidence in Support of
8 Motion for Summary Judgment or in the
9 Alternative Summary Adjudication / Trial
10 Brief); Defendant Department of Justice
11 Response to Public Records Act and Relevant
E-mail Enclosures, dated January 25, 2010
(Ex. 7 to Plaintiffs' Evidence in Support of
Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
Brief) at AM0002, AM0004, AM0006,
AM0013.]

12 138. On August 19, 2010, then pending
13 Assembly Bill 2358 was amended to include
14 in Penal Code section 12323 the following
15 definition of "handgun ammunition": "any
16 variety of ammunition in the following
calibers, notwithstanding that the ammunition
may also be used in some rifles: .22 *rimfire*,
.25, .32, .38, .9mm, .10mm, .40, .41, .44, .45,
5.7x28mm, .223, .357, .454, .5.56x45mm,
7.62x39, 7.63mm, 7.65mm, .50."

17 [Assembly Bill No. 2358 (2010) as Amended
18 in Senate August 19, 2010 (Ex.2 to Plaintiffs'
19 Evidence in Support of Motion for Summary
20 Judgment or in the Alternative Summary
21 Adjudication / Trial Brief, Ex. F to Plaintiffs'
22 Request for Judicial Notice in Support of
23 Motion for Summary Judgment or in the
24 Alternative Summary Adjudication / Trial
Brief) at 7:29-8:21; Complete Bill History,
A.B. No. 2358 (Ex. 4 to Plaintiffs' Evidence
in Support of Motion for Summary Judgment
or in the Alternative Summary Adjudication /
Trial Brief).]

1 139. On August 30, 2010, then pending
2 Assembly Bill 2358 was amended to include
3 in Penal Code section 12323 the following
4 definition of "handgun ammunition": "any
5 variety of ammunition in the following
6 calibers, notwithstanding that the ammunition
7 may also be used in some rifles: .22 *rimfire*,
8 .25, .32, .38, .9mm, .10mm. .40, .41, .44, .45,
9 5.7x28mm, .357, .454, .556x45mm, 7.63mm,
10 7.65mm."

11 [Assembly Bill No. 2358 (2010) as Amended
12 in Senate August 30, 2010 (attached as Ex. 3
13 to Plaintiffs' Evidence in Support of Motion
14 for Summary Judgment or in the Alternative
15 Summary Adjudication / Trial Brief, Ex. G to
16 Plaintiffs' Request for Judicial Notice in
17 Support of Motion for Summary Judgment or
18 in the Alternative Summary Adjudication /
19 Trial Brief) at 16:11-40; Complete Bill
20 History, A.B. No. 2358 (attached as Ex.4 to
21 Plaintiffs' Evidence in Support of Motion for
22 Summary Judgment or in the Alternative
23 Summary Adjudication / Trial Brief).]

14 140. All modern centerfire and rimfire
15 ammunition for use in handguns or rifles
16 consist of the same components: a metal
17 casing that suspends a metal projectile over a
18 charge of powder confined within the metal
19 casing and a primer (or priming charge) to
20 ignite the powder - ("self-contained metallic
21 ammunition").

18 [Helsley Declaration at ¶ 20.]

20 141. In order of their specificity, these three
21 terms are used to describe a self-contained
22 metallic cartridge: "ammunition," "caliber,"
23 and its given "cartridge name."

22 [Helsley Declaration at ¶ 54.]

1 142. "Ammunition" is defined in the
2 Glossary of the Association of Firearms and
Tool Mark Examiners as:

3 "One or more loaded cartridges consisting of
4 a primed case, propellant, and with one or
5 more projectiles. Also referred to as fixed or
live ammunition."

6 [Graham Deposition Vol. One (Ex. 57 to
7 Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
8 Summary Adjudication / Trial Brief) at
Merged Ex. C at p. 2.]

9 143. The definition of "caliber" depends on
10 whether it is applied to a firearm or to
ammunition. When applied to ammunition,
11 the Glossary of the Association of Firearms
and Tool Mark Examiners defines it as: "A
12 numerical term, without the decimal point,
included in a cartridge name to indicate the
nominal bullet diameter."

13 [Graham Deposition Vol. One (Ex. 57 to
14 Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
15 Summary Adjudication / Trial Brief) at
Merged Ex. C at p. 5.]

16
17 144. It is a more precise description of
18 ammunition to identify it by its specific
cartridge name because often the "caliber" in
19 the cartridge's given name does not reflect the
actual bore or bullet diameter.

20 [Helsley Declaration at ¶¶ 54-64.]

21 145. Within any given "caliber," there are
22 usually various "cartridges," some of which
may be used more often in a handgun, and
23 some of which may be used more often in a
rifle.

24 [Helsley Declaration at ¶¶ 56-64.]
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146. Reference to the measurement of a projectile's diameter (i.e., its caliber) is not a particularly precise method of identifying ammunition. [Helsley Declaration at ¶ 55-64.]	
147. Virtually all calibers can be and are fired safely through both handguns and rifles. [Helsley Declaration at ¶ 65.]	
148. Virtually all cartridges can be and are fired safely through both handguns and rifles. [Helsley Declaration at ¶ 65.]	
149. Packaging for ammunition often has no label associating its use with either a handgun or a rifle. [Helsley Declaration at ¶¶ 68-69.]	
150. Packaging for ammunition does not identify whether the ammunition it contains is "principally for use in handguns." [Helsley Declaration at ¶ 69.]	
151. In those instances where ammunition manufacturers or vendors label or market a particular cartridge as a "handgun cartridge," such markings do not identify whether that cartridge, or ammunition of that caliber, is actually "principally used in handguns." [Helsley Declaration at ¶¶ 68-69.]	
152. Experts cannot form a reliable opinion as to whether a given caliber or cartridge is intended to be or has actually been fired more than fifty percent of the time through a handgun. [Helsley Declaration at ¶¶ 66, 72-73.]	

1 153. There exists in the firearms industry no
2 commonly understood delineation between
3 “handgun ammunition” and other ammunition
4 that indicates whether certain ammunition is
5 actually fired or intended to be fired more
6 often in handguns than in long-guns.

7 [Helsley Declaration at ¶¶ 65-70, 72-73.]

8 154. There exists in the firearms industry no
9 commonly understood definition of “handgun
10 ammunition” that equates with the
11 “principally for use in handguns” language
12 relied on by the Challenged Provisions.

13 [Helsley Declaration at ¶¶ 65-70.]

14 155. Defendants assert that “there is a
15 common understanding among those
16 individuals and businesses who might be
17 subject to sections 12060, 12061, and 12318
18 of the Penal Code, as well as among those
19 might enforce them,” as to what ammunition
20 is “used principally in pistols and revolvers.”

21 [Responses to Specially Prepared
22 Interrogatories, Set One (Ex. 54 to Plaintiffs’
23 Evidence in Support of Motion for Summary
24 Judgment or in the Alternative Summary
25 Adjudication / Trial Brief) at 6:16-19, 7:8-
26 11.]

27 156. Defendants identify the following
28 ammunition as “principally for use in
handguns” for purposes of the Challenged
Provisions: .45, 9mm, 10mm, .40, .357, .38,
.44, .380, .454, .25, and .32.

[Responses to Specially Prepared
Interrogatories, Set One (Ex. 54 to Plaintiffs’
Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 5:7-8, 5:21-22;
Amended Response to Specially Prepared
Interrogatory No. 5 (Ex. 55 to Plaintiffs’
Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 2:24-3:2.]

1 157. Defendants assert that the ammunition
2 they deemed “principally for use in
3 handguns” based on their review of handgun
4 sales records in California, written
5 documents, ammunition vendor websites, and
6 online encyclopedias, is “commonly
7 understood” to be “handgun ammunition” for
8 purposes of the Challenged Provisions.

9 [Responses to Specially Prepared
10 Interrogatories, Set One (Ex. 54 to Plaintiffs’
11 Evidence in Support of Motion for Summary
12 Judgment or in the Alternative Summary
13 Adjudication / Trial Brief) at 7:8-20; Graham
14 Deposition Vol. One (Ex. 57 to Plaintiffs’
15 Evidence in Support of Motion for Summary
16 Judgment or in the Alternative Summary
17 Adjudication / Trial Brief) at 118:3-11,
18 142:21-25.]

19 158. Additional research over time may
20 cause Defendants’ list of ammunition
21 “principally for use in handguns” to change.

22 [Graham Deposition Vol. One (Ex. 57 to
23 Plaintiffs’ Evidence in Support of Motion for
24 Summary Judgment or in the Alternative
25 Summary Adjudication / Trial Brief) at
26 204:21-205:8; Graham Deposition Vol. Two
27 (Ex. 58 to Plaintiffs’ Evidence in Support of
28 Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
Brief) at 67:21-68:1, 116:11-18, 118:11-18
9.]

159. Regulations promulgated at some date
in the future may cause Defendants’ list of
ammunition “principally for use in handguns”
to change.

[Amended Response to Specially Prepared
Interrogatory No. 5 (Ex. 55 to Plaintiffs’
Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 2:26-3:2.]

1 160. Defendants' expert admitted that if he
2 had the opportunity to review sales records
3 over a larger time frame, his opinion as to
what ammunition is "principally for use in a
handgun" might have changed.

4 [Graham Deposition Vol. Two (Ex. 58 to
5 Plaintiffs' Evidence in Support of Motion for
6 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
118:11-18.]

7
8 161. Defendants' expert admits he may have
9 left cartridges off Defendants' list of
ammunition "principally for use in handguns"
that [based on his understanding of "handgun
ammunition"], should have been included.

10 [Graham Deposition Vol. Two (Ex. 58 to
11 Plaintiffs' Evidence in Support of Motion for
12 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 69:20-
70:5.]

13
14 162. Defendants' expert's methodology for
15 determining what ammunition was
"principally for use in handguns" was a two-
16 step process that involved the expert looking
at the records of handgun sales in California,
17 and then reviewing websites, written
materials and drawing on his personal
experience.

18 [Graham Deposition Vol. Two (Ex. 58 to
19 Plaintiffs' Evidence in Support of Motion for
20 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 63:22-
64:6, 140:13-21.]

21
22 163. Defendants' list of calibers that
23 constitute ammunition "principally for use in
handguns" was based on the records of
24 handgun sales in California over each of the
past five years, written materials, ammunition
vendor websites, and online encyclopedias."

25 [Responses to Specially Prepared
26 Interrogatories (Ex. 54 to Plaintiffs' Evidence
27 in Support of Motion for Summary Judgment
or in the Alternative Summary Adjudication /
Trial Brief) at 7:14-20.]

1 164. Defendant DOJ is required to keep and
2 maintain records of handgun sales in
3 California; this record is commonly referred
4 to as the Dealer Record of Sales ("DROS")
5 and it is linked to the Automated Firearms
6 System ("AFS").

7 [Responses to Specially Prepared
8 Interrogatories, Set One (Ex. 54 to Plaintiffs'
9 Evidence in Support of Motion for Summary
10 Judgment or in the Alternative Summary
11 Adjudication / Trial Brief) at 7:14; Graham
12 Deposition Vol. One (Ex. 57 to Plaintiffs'
13 Evidence in Support of Motion for Summary
14 Judgment or in the Alternative Summary
15 Adjudication / Trial Brief) at 176:14-17,
16 177:7-13, 190:3-6.]

17 165. Defendants and their expert witness
18 relied in part on the DROS records to
19 determine which ammunition should be
20 included in Defendants' list of ammunition
21 they consider "handgun ammunition" for
22 purposes of the Challenged Provisions.

23 [Responses to Specially Prepared
24 Interrogatories, Set One (Ex. 54 to Plaintiffs'
25 Evidence in Support of Motion for Summary
26 Judgment or in the Alternative Summary
27 Adjudication / Trial Brief) at 7:13-18;
28 Graham Deposition Vol. One (Ex. 57 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
181:14-16, 181:23-182:1; Graham Deposition
Vol. Two (Ex. 58 to Plaintiffs' Evidence in
Support of Motion for Summary Judgment or
in the Alternative Summary Adjudication /
Trial Brief) at 9:17-20.]

166. Defendants' expert's reliance on DROS
records was his "starting point." He used the
records to determine which popular handgun
calibers should be researched further to
determine if ammunition of those calibers is
"principally for use in handguns."

[Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 9:17-
20, 63:22-64:6.]

1 167. Defendants' expert admitted that certain
2 calibers may have been omitted from
3 Defendants' list of ammunition "principally
for use in handguns" because they were
"unpopular."

4 [Graham Deposition Vol. One (Ex. 57 to
5 Plaintiffs' Evidence in Support of Motion for
6 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
204:21-207:9.]

7
8 168. Defendants and their expert relied on
9 DROS records only from the previous five
10 years to determine the handguns most
commonly sold in California over the same
time period.

11 [Responses to Specially Prepared
12 Interrogatories, Set One (Ex. 54 to Plaintiffs'
Evidence in Support of Motion for Summary
13 Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 7:14-16;
14 Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
15 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
115:18-116:2, 116:17-117:6.]

16 169. Defendants' expert does not have any
17 information regarding what percentage of the
18 total guns in circulation are represented by the
records of handgun sales in the past five
years.

19 [Graham Deposition Vol. Two (Ex. 58 to
20 Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
21 Summary Adjudication / Trial Brief) at 118:4-
10.]

1 170. The DROS records relied upon by
2 Defendants' expert combine firearms that
3 utilize ammunition referred to by Defendants
4 as "handgun ammunition" and firearms that
utilize ammunition referred to by Defendants
as "rifle ammunition" under a single caliber
listing.

5 [Graham Deposition Vol. Two (Ex. 58 to
6 Plaintiffs' Evidence in Support of Motion for
7 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 12:18-
14:2.]

8 171. The DROS records relied upon by
9 Defendants' expert are not precise in
10 identifying the sales of handguns that use a
specific cartridge.

11 [Graham Deposition Vol. Two (Ex. 58 to
12 Plaintiffs' Evidence in Support of Motion for
13 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 14:10-
23.]

14 172. The DROS system does not break down
15 sales by guns as to every cartridge of
16 ammunition sold and whether such
ammunition is a "rifle cartridge," "handgun
cartridge," or both.

17 [Graham Deposition Vol. Two (Ex. 58 to
18 Plaintiffs' Evidence in Support of Motion for
19 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 19:23-
20:20.]

21 173. The DROS records relied on by
22 Defendants' expert does not contain a listing
of all types of cartridges fired by a firearm of
that caliber due to space limitations.

23 [Graham Deposition Vol. Two (Ex. 58 to
24 Plaintiffs' Evidence in Support of Motion for
25 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 22:11-
23:9.]

1 174. Defendants' expert admitted that the
2 DROS records relied on to inform his
3 opinions contained categories of ammunition
4 that could have been a mixture of what he
5 considers "handgun ammunition" and "rifle
6 ammunition."

7 [Graham Deposition Vol. Two (Ex. 58 to
8 Plaintiffs' Evidence in Support of Motion for
9 Summary Judgment or in the Alternative
10 Summary Adjudication / Trial Brief) at 91:18-
11 92:6.]

12 175. The DROS records relied on by
13 Defendants' expert include a number of
14 entries in calibers Defendants' expert
15 considers "common rifle caliber rounds."

16 [Graham Deposition Vol. One (Ex. 57 to
17 Plaintiffs' Evidence in Support of Motion for
18 Summary Judgment or in the Alternative
19 Summary Adjudication / Trial Brief) at
20 189:10-192:18.]

21 176. There is no record of total rifle sales in
22 California in existence because Defendant
23 DOJ is prohibited from retaining records on
24 the sale of long-guns.

25 [Graham Deposition Vol. One (Ex. 57 to
26 Plaintiffs' Evidence in Support of Motion for
27 Summary Judgment or in the Alternative
28 Summary Adjudication / Trial Brief) at
183:19-184:15.]

177. Defendants' expert did not determine the
total number of rifle sales in California as
compared with the total number of handgun
sales to inform his opinion as to whether a
particular ammunition was principally used in
a handgun.

[Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 93:17-
24.]

1 178. Defendants' expert was unable to
2 compare the sales of handguns using a
3 particular ammunition with rifle sales that use
4 the same ammunition because he is
5 admittedly unaware of any source of data
6 regarding rifle sales.

7 [Graham Deposition Vol. Two (Ex. 58 to
8 Plaintiffs' Evidence in Support of Motion for
9 Summary Judgment or in the Alternative
10 Summary Adjudication / Trial Brief) at 93:6-
11 24.]

12 179. Defendants' expert admits his opinion
13 as to which ammunition is "principally for
14 use in handguns" may have been different had
15 he been able to compare handgun sales with
16 rifle sales.

17 [Graham Deposition Vol. Two (Ex. 58 to
18 Plaintiffs' Evidence in Support of Motion for
19 Summary Judgment or in the Alternative
20 Summary Adjudication / Trial Brief) at 95:13-
21 20.]

22 180. Defendants relied in part on the
23 representations made by ammunition vendors
24 on their websites to determine whether certain
25 ammunition should be included in
26 Defendants' list of ammunition they consider
27 "handgun ammunition" for purposes of the
28 Challenged Provisions.

[Responses to Specially Prepared
Interrogatories, Set One (Ex. 54 to Plaintiffs'
Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 7:18-20.]

181. Defendants' expert relied in part on the
fact that ammunition vendor websites listed
certain cartridges as "handgun ammunition"
to inform his opinion as to whether specific
ammunition was "principally for use in
handguns."

[Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 44:1-
14, 64:17-65:6.]

1 182. Defendants' expert testified that the fact
2 that certain websites refer to some
3 ammunition as "handgun cartridges" helped
establish the DOJ's list of calibers
"principally for use in handgun."

4 [Graham Deposition Vol. One (Ex. 57 to
5 Plaintiffs' Evidence in Support of Motion for
6 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 93:5-
95:13, 160:19-23, 166:21-167:6.]

7 183. The four vendor websites that
8 Defendants' expert relied to inform his
9 opinion as to whether specific ammunition
10 was "principally for use in handguns"
include: Cabela's, Cheaper Than Dirt, Inc., J
& G Sales, and Midway USA.

11 [Graham Deposition Vol. One (Ex. 57 to
12 Plaintiffs' Evidence in Support of Motion for
13 Summary Judgment or in the Alternative
14 Summary Adjudication / Trial Brief) at 93:5-
20, 148:23-149:4; Graham Deposition Vol.
15 Two (Ex. 58 to Plaintiffs' Evidence in
Support of Motion for Summary Judgment or
in the Alternative Summary Adjudication /
Trial Brief) at 37:8-13, 40:11-15, 43:4-10.]

16 184. In forming his opinion regarding
17 whether ammunition was principally used in
18 handguns, Defendants' expert gave some
19 weight to whether the website listed the
ammunition as "popular."

20 [Graham Deposition Vol. Two (Ex. 58 to
21 Plaintiffs' Evidence in Support of Motion for
22 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 65:9-
16.]

1 185. Defendants' expert did not contact the
2 relied-upon website vendors or do any
3 investigation as to what criteria the websites
4 relied upon to characterize the ammunition as
5 "popular" or what the websites'
6 characterization meant.

7 [Graham Deposition Vol. Two (Ex. 58 to
8 Plaintiffs' Evidence in Support of Motion for
9 Summary Judgment or in the Alternative
10 Summary Adjudication / Trial Brief) at 44:15-
11 46:3.]

12 186. Defendants' expert admitted there is a
13 difference between "popular" ammunition for
14 a handgun and ammunition that is
15 "principally for use in a handgun."

16 [Graham Deposition Vol. Two (Ex. 58 to
17 Plaintiffs' Evidence in Support of Motion for
18 Summary Judgment or in the Alternative
19 Summary Adjudication / Trial Brief) at 102:6-
20 104:3.]

21 187. None of the relied-upon website
22 vendors provided Defendants' expert with
23 data regarding the total rounds of each type of
24 ammunition sold.

25 [Graham Deposition Vol. Two (Ex. 58 to
26 Plaintiffs' Evidence in Support of Motion for
27 Summary Judgment or in the Alternative
28 Summary Adjudication / Trial Brief) at 46:4-
16.]

188. The websites Defendants' expert relied
upon to inform his opinions as to which
ammunition is "principally for use in
handguns" list as "handgun ammunition"
ammunition that Defendants' expert does not
consider to be principally used in handguns.

[Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 62:25-
63:21.]

1 189. Defendants' expert's decision to
2 exclude certain ammunition listed as
3 "handgun ammunition" on the vendor
4 websites he relied upon to inform his
5 opinions as to which ammunition is
6 "principally for use in handguns" was based
7 on his experience in observing the use of that
8 ammunition in the field.

Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 66:15-
67:9.]

9 190. Michael Tenny, the party responsible for
10 ensuring compliance with all applicable laws
11 in the locations from and to which Cheaper
12 Than Dirt, Inc., ships ammunition, does not
13 know what ammunition is "handgun
14 ammunition" and thus subject to the
15 Challenged Provisions.

[Tenny Declaration at 1:6-11.]

16 191. Larry Potterfield, the party responsible
17 for ensuring compliance with all applicable
18 laws in the locations from and to which
19 Midway Arms, Inc.(dba Midway USA), ships
20 ammunition, does not know what ammunition
21 is "handgun ammunition" and thus subject to
22 the Challenged Provisions.

[Potterfield Declaration at 2:3-12.]

23 192. Brian Hall, the party responsible for
24 ensuring compliance with all applicable laws
25 in the locations from and to which
26 Chattanooga Shooting Supplies, Inc. (dba
27 Natchez Shooters Supplies), ships
28 ammunition, does not know what ammunition
is "handgun ammunition" and thus subject to
the Challenged Provisions.

[Hall Declaration at 2:3-12.]

1 193. Michael Tenny, the party responsible for
2 ensuring compliance with all applicable laws
3 in the locations from and to which Cheaper
4 Than Dirt, Inc., ships ammunition, does not
5 know what ammunition is “principally for use
6 in a handgun” and is unaware of any source to
7 which he can look to determine what
8 ammunition suitable for use in both handguns
9 and rifles is “principally for use in a
10 handgun.”

11 [Tenny Declaration at 1:12-14.]

12 194. Larry Potterfield, the party responsible
13 for ensuring compliance with all applicable
14 laws in the locations from and to which
15 Midway Arms, Inc.(dba Midway USA), ships
16 ammunition, does not know what ammunition
17 is “principally for use in a handgun” and is
18 unaware of any source to which he can look
19 to determine what ammunition suitable for
20 use in both handguns and rifles is “principally
21 for use in a handgun.”

22 [Potterfield Declaration at 2:13-15.]

23 195. Brian Hall, the party responsible for
24 ensuring compliance with all applicable laws
25 in the locations from and to which
26 Chattanooga Shooting Supplies, Inc. (dba
27 Natchez Shooters Supplies), ships
28 ammunition, does not know what ammunition
is “principally for use in a handgun” and is
unaware of any source to which he can look
to determine what ammunition suitable for
use in both handguns and rifles is “principally
for use in a handgun.”

[Hall Declaration at 2:13-15.]

1 196. Michael Tenny, the party responsible for
2 ensuring compliance with all applicable laws
3 in the locations from and to which Cheaper
4 Than Dirt, Inc., ships ammunition, does not
5 know what ammunition is exempt from the
6 Challenged Provisions as ammunition that is
7 “designed and intended to be used in antique
8 firearms” manufactured before 1898, because
9 many cartridges of ammunition used in
10 firearms manufactured before 1898 are also
11 used in firearms manufactured after 1898,
12 including cartridges sold by Cheaper Than
13 Dirt, Inc.

14 [Tenny Declaration at 1:15-19.]

15 197. Larry Potterfield, the party responsible
16 for ensuring compliance with all applicable
17 laws in the locations from and to which
18 Midway Arms, Inc.(dba Midway USA), ships
19 ammunition, does not know what ammunition
20 is exempt from the Challenged Provisions as
21 ammunition that is “designed and intended to
22 be used in antique firearms” manufactured
23 before 1898, because many cartridges of
24 ammunition used in firearms manufactured
25 before 1898 are also used in firearms
26 manufactured after 1898, including cartridges
27 sold by Midway Arms, Inc.(dba Midway
28 USA).

[Potterfield Declaration at 2:16-20.]

198. Brian Hall, the party responsible for
ensuring compliance with all applicable laws
in the locations from and to which
Chattanooga Shooting Supplies, Inc. (dba
Natchez Shooters Supplies), ships
ammunition, does not know what ammunition
is exempt from the Challenged Provisions as
ammunition that is “designed and intended to
be used in antique firearms” manufactured
before 1898, because many cartridges of
ammunition used in firearms manufactured
before 1898 are also used in firearms
manufactured after 1898, including cartridges
sold by Chattanooga Shooting Supplies, Inc.
(dba Natchez Shooters Supplies).

[Hall Declaration at 2:16-20.]

1	199. Cheaper Than Dirt, Inc., has announced	
2	that it will cease shipping all ammunition to	
3	non-exempt California customers beginning	
4	January 1, 2011, to avoid risking criminal	
5	prosecution under Penal Code section 12328.	
6	[Tenny Declaration at 2:1-8.]	
7	200. Midway Arms, Inc.(dba Midway USA),	
8	has announced that it will cease shipping all	
9	ammunition to non-exempt California	
10	customers beginning January 1, 2011, to	
11	avoid risking criminal prosecution under	
12	Penal Code section 12318.	
13	[Potterfield Declaration at 3:1-9.]	
14	201. It is the current intent of Chattanooga	
15	Shooting Supplies, Inc. (dba Natchez	
16	Shooters Supplies), to cease shipping all	
17	ammunition that is suitable for use in both	
18	handguns and long-guns to non-exempt	
19	California customers beginning February 1,	
20	2011, to avoid risking criminal prosecution	
21	under Penal Code section 12318.	
22	[Hall Declaration at 3:1-6.]	
23	202. Defendants' expert knows of no specific	
24	trade magazine articles that he used to inform	
25	his opinion regarding which ammunition is	
26	"principally for use in handguns."	
27	[Graham Deposition Vol. Two (Ex. 58 to	
28	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at 34:8-	
	35:14.]	
	203. Defendants' expert did not use any trade	
	magazine articles regarding the amount of	
	particular ammunition sold.	
	[Graham Deposition Vol. Two (Ex. 58 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at 35:15-	
	36:13.]	

1 204. Defendants' expert's use of trade
2 magazines to inform his opinion regarding
3 ammunition "principally for use in handguns"
4 is based solely upon his reading of trade
5 magazines over the years, with no specific
6 reference to a particular article or data from
7 those trade magazines on the subject.

8 [Graham Deposition Vol. Two (Ex. 58 to
9 Plaintiffs' Evidence in Support of Motion for
10 Summary Judgment or in the Alternative
11 Summary Adjudication / Trial Brief) at 35:15-
12 36:13, 36:14-37:6]

13 205. The DOJ's expert testified that he
14 pulled from his personal and professional
15 experiences to determine what ammunition
16 should be considered "handgun ammunition"
17 under the Challenged Provisions.

18 [Graham Deposition Vol. One (Ex. 57 to
19 Plaintiffs' Evidence in Support of Motion for
20 Summary Judgment or in the Alternative
21 Summary Adjudication / Trial Brief) at 81:24-
22 82:4, 91:1-4, 186:17-24; Graham Deposition
23 Vol. Two (Ex. 58 to Plaintiffs' Evidence in
24 Support of Motion for Summary Judgment or
25 in the Alternative Summary Adjudication /
26 Trial Brief) at 24:8-18, 28:4-29:2, 64:1-6,
27 72:25-73:10.]

28 206. Defendants' expert concluded that,
based on his training and experience over the
last sixteen years or so, when added to
experience with handguns and other factors,
he "*has a feeling* that there are certain calibers
that are more often than not handgun
calibers."

[Graham Deposition Vol. One (Ex. 57 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 81:24-
82:4, 206:22-207:2.]

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207. Defendants' expert's opinion regarding ammunition "principally for use in handguns" was not informed by information regarding the amounts and types of ammunition used by the military. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 109:14-18.]	
208. Defendants' expert's opinion regarding ammunition "principally for use in handguns" was not informed by specific information regarding the number of handguns and/or rifles used by military service members stationed in California. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 109:8-13, 110:8-111:10.]	
209. Defendants' expert's opinion regarding ammunition "principally for use in handguns" was not informed by research studies regarding popular or prevalently used ammunition. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 118:19-24.]	
210. Defendants' expert's opinion regarding ammunition "principally for use in handguns" was not informed by existing polls regarding the ammunition generally or the popularity of certain cartridges. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 119:20-120:8.]	

211. Prior to forming his opinion as to ammunition prevalently used in handguns, Defendants' expert did not personally conduct any polls regarding the ammunition members of the general public use in their handguns.

[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 120:9-16.]

212. Defendants assert that the ammunition they have identified as "principally for use in handguns" is supported in part by the fact that those calibers are identified as "handgun ammunition" in *Cartridges of the World*.

[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:18-21.]

213. In its sections on rifle cartridges, *Cartridges of the World* identifies multiple cartridges in the calibers included in Defendants' list of ammunition "principally for use in handguns."

[Barnes, *Cartridges of the World: A Complete and Illustrated Reference for Over 1500 Cartridges* (11th ed. 2006) "Selected Pages from Chapter 2: Current American Rifle Cartridges and Chapter3: Obsolete Rifle Cartridges" (Ex. 52 Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) *passim*.]

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|---|---|--|
| 1 | 214. In its sections on handgun cartridges, | |
| 2 | <i>Cartridges of the World</i> identifies multiple | |
| 3 | cartridges in calibers not included in | |
| | Defendants' list of ammunition "principally | |
| | for use in handguns." | |
| 4 | [Barnes, <i>Cartridges of the World: A Complete</i> | |
| | <i>and Illustrated Reference for Over 1500</i> | |

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<p>218. Defendants’ expert suggested that the “principally for use in handguns” language relates to a mix of factors, including “the number of manufacturers that may have produced a weapon in a particular caliber,” “the length of time that a particular gun has been available in a particular caliber,” and the number of rifles in that caliber, if any.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 127:5-128:25.]</p>	
<p>219. When asked whether the “principally for use in a handgun” standard required a consideration of whether any particular ammunition was fired more often through a handgun than a long-gun, Defendants’ expert responded:</p> <p>“I would say [its] not much of a factor because principally for use really deals with the kind of firearm its 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 ammunition is principally for use in the larger pool of – of weapons.”</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 83:1-16.]</p>	

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<p>220. When asked to clarify whether he would consider the numerosity of total weapons or the numerosity of models of weapons to be the determining factor determining whether certain ammunition is “principally for use in handguns,” Defendants’ expert stated:</p> <p>“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.”</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 128:8-25.]</p>	
<p>221. Firearms chambered in .22 are among the most popular weapons, as to both handguns and rifles.</p> <p>[Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 185:21-186:5; Helsley Declaration at ¶¶ 29, 33.]</p>	
<p>222. .22 Long Rifle is likely the most popular firearm cartridge in the world.</p> <p>[Helsley Declaration at ¶ 33.]</p>	

1 223. In December 2009, when Plaintiffs'
2 counsel inquired as to whether ".22 rimfire"
3 ammunition would be considered "handgun
4 ammunition" under the Challenged
Provisions, Counsel for Defendant DOJ stated
that she did not know.

5 [Public Records Act Request Sent to
6 California Department of Justice Re:
7 Assembly Bill 962, dated December 16, 2009
8 (Ex. 6 to Plaintiffs' Evidence in Support of
9 Motion for Summary Judgment or in the
10 Alternative Summary Adjudication / Trial
11 Brief); Defendant Department of Justice
12 Response to Public Records Act and Relevant
E-mail Enclosures, dated January 25, 2010
(Ex. 7 to Plaintiffs' Evidence in Support of
Motion for Summary Judgment or in the
Alternative Summary Adjudication / Trial
Brief) at AM0002, AM0004, AM0006,
AM0013.]

13 224. Defendants' expert suggests that, at this
14 time, .22 caliber is not "principally for use in
handguns," but that his opinion could change
based on future research.

15 [Graham Deposition Vol. One (Ex. 57 to
16 Plaintiffs' Evidence in Support of Motion for
17 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
18 186:25-187:17.]

19 225. Defendants expert stated he would only
20 classify three .45 caliber cartridges to be
"principally for use in a handgun": .45 ACP,
21 .45 GAP, and .45 Long Colt.

22 [Graham Deposition Vol. One (Ex. 57 to
23 Plaintiffs' Evidence in Support of Motion for
24 Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at
25 153:13-18.]
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1 226. *Cartridges of the World* includes
2 numerous .45 cartridges in its section on
3 handgun cartridges besides the .45 ACP, .45
4 GAP, and .45 Long Colt.

5 [Barnes, *Cartridges of the World: A Complete*
6 *and Illustrated Reference for Over 1500*
7 *Cartridges* (11th ed. 2006) "Selected Pages
8 from Chapter 6: Handgun Cartridges of the
9 World " (Ex. 53 Plaintiffs' Evidence in
10 Support of Motion for Summary Judgment or
11 in the Alternative Summary Adjudication /
12 Trial Brief) *passim*.]

13 227. There are multiple cartridges that can be
14 used in firearms manufactured both before
15 and after 1898, including but not limited to,
16 cartridges in the following calibers: 22, .32,
17 .38, .44, .45, and .50.

18 [Helsley Declaration at ¶¶ 20-25.]

19 228. Ammunition that can be used in a
20 modern firearm chambered to fire that
21 cartridge can also be used in an antique
22 firearm chambered to fire that same cartridge.

23 [Helsley Declaration at ¶¶ 20-25.]

24 229. Ammunition, when it is manufactured,
25 is designed and intended to be used in any
26 firearm that is chambered for that cartridge,
27 regardless of when the firearm it will be used
28 in was manufactured.

[Helsley Declaration at ¶¶ 20-25.]

21 230. The calibers Defendants claim to be
22 "handgun ammunition" include cartridges
23 that are designed and intended to be used in
24 "antique firearms," and thus should be
25 exempt from the Challenged Provisions.

26 [Helsley Declaration at ¶23.]

1	231. Defendants' expert witness testified that	
2	.45 Long Colt is unequivocally "handgun	
3	ammunition" under the Challenged	
4	Provisions.	
5	[Graham Deposition Vol. One (Ex. 57 to	
6	Plaintiffs' Evidence in Support of Motion for	
7	Summary Judgment or in the Alternative	
8	Summary Adjudication / Trial Brief) at	
9	153:13-18.]	
10	232. 45 Long Colt is used in firearms	
11	manufactured prior to 1898.	
12	[Helsley Decl. at ¶ 23.]	
13	233. <i>State of Tennessee ex rel. Rayburn v.</i>	
14	<i>Cooper</i> , involved a challenge to a state law	
15	authorizing firearms to be carried by patrons	
16	in establishments where "the serving of	
17	meals" is the " <i>principle</i> business conducted"	
18	– as opposed to the serving of alcohol.	
19	[Amended Complaint for Injunctive and	
20	Declaratory Relief in <i>Tennessee ex rel.</i>	
21	<i>Rayburn v. Cooper</i> , Case No. 09-1284-I, filed	
22	July 6, 2009 (Ex. A to Plaintiffs' Request for	
23	Judicial Notice in Support of Motion for	
24	Summary Judgment or in the Alternative	
25	Summary Adjudication / Trial Brief) at ¶ 2;	
26	Order of Chancellor Claudia Bonnyman in	
27	<i>Tennessee ex rel. Rayburn v. Cooper</i> , Case	
28	No. 09-1284-I, filed November 25, 2009 (Ex.	
	D to ' Request for Judicial Notice in Support	
	of Motion for Summary Judgment or in the	
	Alternative Summary Adjudication / Trial	
	Brief) at 24:20-2.]	
	234. In <i>State of Tennessee ex rel. Rayburn v.</i>	
	<i>Cooper</i> , plaintiffs argued it would be	
	extremely difficult for an individual to	
	determine whether they were in a bar or a	
	restaurant.	
	[Amended Complaint for Injunctive and	
	Declaratory Relief in <i>Tennessee ex rel.</i>	
	<i>Rayburn v. Cooper</i> , Case No. 09-1284-I, filed	
	July 6, 2009 (Ex. A to Plaintiffs' Request for	
	Judicial Notice in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at ¶¶ 93,	
	97, 99.]	

1 235. The court in *State of Tennessee ex rel.*
2 *Rayburn v. Cooper* found the statute
3 unconstitutionally vague, reasoning that
4 whether the serving of meals is a business's
5 principle business is *not something that can*
6 *be known* to the ordinary citizen. The court
7 added that inquiry would not suffice to
8 overcome the law's vagueness.

9 [Order of Chancellor Claudia Bonnyman in
10 *Tennessee ex rel. Rayburn v. Cooper*, Case
11 No. 09-1284-I, filed November 25, 2009 (Ex.
12 D to Plaintiffs' Request for Judicial Notice in
13 Support of Motion for Summary Judgment or
14 in the Alternative Summary Adjudication /
15 Trial Brief) at 12:24-13:6.]

16 236. Defendants in *State of Tennessee ex rel.*
17 *Rayburn v. Cooper* argued that the law was
18 not vague because there were obvious
19 instances where a patron could determine
20 whether a particular establishment was a
21 "restaurant," pointing to establishments that
22 only serve food – and no alcohol.

23 [Consolidated Memorandum of Law of
24 Defendant Attorney General Cooper in
25 Opposition to Plaintiffs' Motions for Partial
26 Summary Judgment and in Support of
27 Defendant's Cross-Motion for Judgment on
28 the Pleadings and/or for Summary Judgment
in *Tennessee ex rel. Rayburn v. Cooper*, Case
No. 09-1284-I, filed October 2, 2009 (Ex. I to
Plaintiffs' Request for Judicial Notice in
Support of Motion for Summary Judgment or
in the Alternative Summary Adjudication /
Trial Brief) at pp. 19-20.]

1 237. In conjunction with Fish and Game Code
2 section 3004.5, the Legislature granted the
3 Fish and Game Commission the authority to
4 certify and publish a list of nonlead
5 ammunition suitable for use in regulated
6 areas. The list of certified nonlead
7 ammunition can be easily accessed at the
8 Commission's website.

9 [California Department of Fish and Game,
10 Certified Nonlead Ammunition Information,
11 [http://www.dfg.ca.gov/wildlife/hunting/condo](http://www.dfg.ca.gov/wildlife/hunting/condor/certifiedammo.html)
12 [r/certifiedammo.html](http://www.dfg.ca.gov/wildlife/hunting/condor/certifiedammo.html) (last visited Nov. 29,
13 2010) (Ex. E to Plaintiffs' Request for
14 Judicial Notice in Support of Motion for
15 Summary Judgment or in the Alternative
16 Summary Adjudication / Trial Brief).]

17 238. On December 30, 2009, DOJ published
18 an "Information Bulletin" providing a brief
19 overview of AB 962.

20 [Information Bulletin from California
21 Department of Justice Re: New and Amended
22 Firearm Laws, dated December 30, 2009 (Ex.
23 8 to Plaintiffs' Evidence in Support of Motion
24 for Summary Judgment or in the Alternative
25 Summary Adjudication / Trial Brief).]

26 239. Defendant DOJ provided notice to all
27 California firearm dealers, including Plaintiffs
28 Herb Bauer Sporting Goods, Inc., that Penal
Code section 12061, subdivisions (a)(1) and
(2) took effect, and have been in force, since
January 1, 2010, effectively threatening all
California firearm dealers with enforcement
of those sections.

[Information Bulletin from California
Department of Justice Re: New and Amended
Firearm Laws, dated December 30, 2009 (Ex.
8 to Plaintiffs' Evidence in Support of Motion
for Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief).]

29 Dated: December 6, 2010

MICHEL & ASSOCIATES, P.C.

Clinton B. Monfort
Attorneys for Plaintiffs

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA
3 COUNTY OF FRESNO

4 I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
6 business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

7 On December 22, 2010, I served the foregoing document(s) described as
8 **NOTICE OF ERRATA RE: PLAINTIFFS' SEPARATE STATEMENT OF UNDISPUTED**
9 **FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE**
10 **ALTERNATIVE SUMMARY ADJUDICATION / TRIAL BRIEF**

11 on the interested parties in this action by placing

12 ☐ the original

13 ☒ a true and correct copy

14 thereof enclosed in sealed envelope(s) addressed as follows:

15 Edmund G. Brown, Jr.
16 Attorney General of California
17 Zackery P. Morazzini
18 Supervising Deputy Attorney General
19 Peter A. Krause
20 Deputy Attorney General (185098)
21 1300 I Street, Suite 125
22 P.O. Box 944255
23 Sacramento, CA 94244-2550

24 X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
25 processing correspondence for mailing. Under the practice it would be deposited with the
26 U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach,
27 California, in the ordinary course of business. I am aware that on motion of the party
28 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 22, 2010, at Long Beach, California.

29 — (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of
30 collection and processing correspondence for overnight delivery by UPS/FED-EX. Under
31 the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for
32 receipt on the same day in the ordinary course of business. Such envelope was sealed and
33 placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for
34 in accordance with ordinary business practices.

Executed on December 22, 2010, at Long Beach, California.

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

Executed on December 22, 2010, at Long Beach, California.

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

41 
42 CLAUDIA AYALA

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10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF FRESNO
13

14
15 **SHERIFF CLAY PARKER, ET AL.,**
16 Plaintiffs and Petitioners,
17
18 v.
19 **THE STATE OF CALIFORNIA, ET AL.,**
20 Defendants and Respondents.
21
22

Case No. 10CECG02116

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE SUMMARY
ADJUDICATION/TRIAL BRIEF**

Date: January 18, 2011
Time: 8:30 a.m.
Dept: 402
Judge: The Honorable Jeff Hamilton

Trial Date: January 18, 2011
Action Filed: June 17, 2010

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

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INTRODUCTION

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

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

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

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

SUMMARY OF ALLEGATIONS IN THE COMPLAINT

Plaintiffs allege that three statutes adopted as part of Assembly Bill 962 (the “Anti-Gang Neighborhood Protection Act of 2009”) are void for vagueness under the due process clause of the Fourteenth Amendment. (¶¶ 1-2.¹) Specifically, they contend that many calibers of ammunition can be used in both handguns and rifles, so sections 12060, 12061, and 12318 of the Penal Code are fatally vague, both facially and as applied, because their definition of “handgun ammunition” – a definition imported from section 12323(a) of the Penal Code – fails “to provide any standard whereby a person of ordinary intelligence can understand and determine whether a given caliber of ammunition is ‘principally for use’ in a handgun.” (¶ 3.) They assert that this alleged vagueness gives law enforcement officials “essentially unbridled discretion to interpret and apply the Challenged Provisions.” (¶ 9.)

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

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

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

ARGUMENT

I. LEGAL STANDARD APPLICABLE TO VAGUENESS CHALLENGES.

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

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

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

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

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

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

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

9 Although Plaintiffs purport to challenge sections 12060, 12061, and 12318 of the
10 Penal Code, their challenge really is limited to the definition of “handgun ammunition,”
11 which is imported from Penal Code section 12323(a). Section 12323(a) provides that
12 handgun ammunition is “ammunition principally for use in pistols, revolvers, and other
13 firearms capable of being concealed upon the person, as defined in subdivision (a) of
14 Section 12001,³ notwithstanding that the ammunition may also be used in some rifles.”
15 Blanks, as well as ammunition designed and intended to be used in “antique firearms” are
16 excluded from this definition under the challenged statutes. (Pen. Code, § 12060(b).)
17 (Hereinafter, the “Challenged Definition.”)

18 **III. PLAINTIFFS’ FACIAL VAGUENESS CHALLENGE FAILS AS A MATTER OF LAW**
19 **BECAUSE THEY ADMIT THAT THE CHALLENGED DEFINITION HAS SEVERAL**
20 **VALID APPLICATIONS.**

21 Plaintiffs’ first cause of action seeks a declaration that sections 12060, 12061, and
22 12318 of the Penal Code are facially void for vagueness “because they fail to provide notice
23 to persons of ordinary intelligence regarding which calibers of ammunition are ‘handgun
24 ammunition’ and thus subject to” the challenged statutes. (Complaint, ¶ 91.) The
25 declaration they seek is unavailable because, even if certain calibers (or cartridges) of

26 ³ Section 12001(a)(1) provides: “As used in this title, the terms ‘pistol,’ ‘revolver,’ and
27 ‘firearm capable of being concealed upon the person’ shall apply to and include any device
28 designed to be used as a weapon, from which is expelled a projectile by the force of any
explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These
terms also include any device that has a barrel 16 inches or more in length which is designed to be
interchanged with a barrel less than 16 inches in length.”

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

A. Plaintiffs' Burden Under the Facial Vagueness Test.

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

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

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

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

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

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

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

19 **a. Plaintiffs and their ammunition expert identified**
20 **numerous cartridges of ammunition that are “principally**
21 **for use” in handguns.**

22 Plaintiffs assert that they do not know what cartridges of ammunition fall within the
23 Challenged Definition, yet in deposition, plaintiffs Clay Parker, Steve Stonecipher, and
24 Herb Bauer Sporting Goods identified *fifteen different cartridges* of ammunition between
25 them that were used more often in handguns than in rifles.⁴ (State’s Supplemental
26

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

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

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

13 The mere *possibility* that the Challenged Definition might be misapplied to cartridges
14 of ammunition that are not “principally for use” in a handgun is an insufficient platform
15 upon which to base a facial vagueness challenge. Any purported uncertainty about the
16 challenged law must be “cured through case-by-case analysis of the fact situations to which
17 its sanctions, assertedly, may not be applied.” (*Williams v. Garcetti* (1993) 5 Cal.4th 561,
18 578 [citations omitted].)

19 **b. Plaintiffs’ ammunition expert is materially biased and his**
20 **testimony and opinions should be regarded with**
skepticism.

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

24 ⁵ Opinion evidence about the meaning of a statute from an expert has long been held
25 inadmissible. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46; see also *In re Brian J.* (2007)
26 150 Cal.App.4th 97, 120-121.) Whether a statute is so vague and ambiguous that it offends due
27 process, and how its terms should be interpreted, are legal questions for the Court to decide, and
28 the opinions of experts are of little to no relevance. (*Torres*, 33 Cal.App.4th at p. 46; see also
County of Yolo v. Los Rios Community Coll. Dist. (1992) 5 Cal.App.4th 1242, 1257 [refusing to
defer to opinions of county clerk and economics expert regarding meaning of statutory terms
because statutory interpretation is the court’s responsibility].)

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

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

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

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

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

1 **2. Even without Plaintiffs’ admissions, the Challenged Definition**
2 **passes constitutional muster.**

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

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

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

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

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

18 Finally, it is important to remember that the challenged statutes do not exist in
19 isolation. They apply chiefly to ammunition vendors, who generally have superior
20 knowledge as to which calibers and cartridges of ammunition are used more often in
21 handguns than in rifles. The California Supreme Court has held that "where the language of
22 a statute fails to provide an objective standard by which conduct can be judged, the required
23 specificity may nonetheless be provided by the common knowledge and understanding of
24

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

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

7 **3. Plaintiffs do not even attempt to establish, as they must, that the**
8 **definition of “handgun ammunition” is vague in all of its**
9 **applications.**

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

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

24 Plaintiffs note they do not challenge Penal Code section 12323(a) itself, as it is
25 referenced by Penal Code sections other than the Challenged Provisions which

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

1 include additional language to allow individuals to determine whether
2 ammunition is “handgun ammunition.” For example, Penal Code section
3 12316[(a)(1)(B)] follows the reference to section 12323(a) with the following:
4 “Where ammunition or reloaded ammunition may be used in both a rifle and a
5 handgun, it may be sold to a person who is at least 18 years of age, but less
6 than 21 years of age, if the vendor reasonably believes that the ammunition is
being acquired for use in a rifle and not a handgun.” The Challenged
Provisions do not include such “clarifying language.”

7 (State’s Request for Judicial Notice [“RFJN”], Exh. “C,” p. 9, fn. 10.) Plaintiffs’ effort to
8 distinguish the use of “handgun ammunition” in section 12316 from the references in the
9 sections 12060, 12061, and 12318 is unpersuasive. The “clarifying language” Plaintiffs
10 identify has no effect on the Legislature’s basic definition of handgun ammunition in
11 section 12323(a). Moreover, section 12316 was revised as part of the *same Assembly Bill* as
12 sections 12060, 12061, and 12318.¹⁰ (See A. B. 962, 2009-2010 Sess. (Cal. 2009).) For
13 purposes of Plaintiffs’ facial challenge, the legal question before the Court is binary –
14 section 12323(a)’s definition of handgun ammunition either is or is not vague – Plaintiffs
15 cannot have it both ways.

16 Given Plaintiffs’ admission that the definition has a valid application in section
17 12316(a)(1)(B), and their failure to address why the Challenged Definition is not vague in
18 other contexts, Plaintiffs tacitly concede that they cannot meet their burden to show that the
19 Challenged Definition “is invalid in all of its applications.”

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

23 **1. Plaintiffs offer no evidence of arbitrary enforcement.**

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

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

1 officers will be unable to determine what ammunition is principally for use in a handgun.
2 (Motion, pp. 12:8-15:16.) In their Complaint, Plaintiffs likewise allege that “because of the
3 failure to clearly specify which calibers of ammunition should be regulated by the
4 Challenged Provisions, law enforcement officials have unbridled discretion to interpret and
5 enforce the Challenged Provisions.” (Complaint, ¶ 86.) Plaintiffs provide no admissible
6 evidence on any of these allegations in their motion, and instead base the allegations on the
7 conclusory assertions of two law enforcement officers, one of whom admitted that he made
8 *no attempt* to research or otherwise determine what ammunition might be covered by the
9 Challenged Definition, and that he leaves enforcement of firearms laws at gun dealers and
10 ammunition vendors to the California Department of Justice. (State Supp. UMF No. 6-7 &
11 13-14; see also State’s Objections to Evidence Nos. 1-8, 80-86.)

12 **2. The State will enforce the challenged statutes objectively,**
13 **notwithstanding Plaintiffs’ spurious attack on the State ammunition**
14 **expert’s methodology.**

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

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

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

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

18 Plaintiffs cite a number of cases in which laws were struck down because they lacked
19 sufficient clarity and left basic policymaking decisions to police officers. These cases,
20 however, are materially distinguishable insofar as they truly gave officers unfettered
21 discretion to enforce the statutes at issue. (See *City of Chicago v. Morales* (1999) 527 U.S.
22 41, 47 [loitering ordinance that provided "absolute discretion" to officers was "inherently
23 subjective because its application depends on whether some purpose is 'apparent' to the

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

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

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

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

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

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

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

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

3 List all **types** of ammunition DEFENDANTS consider “handgun ammunition”
4 for purposes of California Penal Code sections 12060, 12061, and 12318.

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

8 3. The term “types” is vague and ambiguous. The State is uncertain whether
9 Plaintiffs are referring to calibers, rimfire, centerfire or other “types” of
10 ammunition. *The State will construe the word “types” to refer to “calibers”*
11 *throughout these responses.*

12 Without waiving any of the foregoing general or specific objections, the State
13 responds as follows: The State considers the following calibers to be “handgun
14 ammunition” within the meaning of California Penal Code sections 12060,
15 12061, and 12318: .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, .32.

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

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

23 **2. Plaintiffs’ comparison of AB2358 with the State’s interrogatory**
24 **response is misleading and irrelevant to any material issue in**
25 **the case.**

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

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

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

5 **IV. THE “LEGISLATIVE HISTORY” OFFERED BY PLAINTIFFS IS IRRELEVANT.**

6 **A. There is No Reason to Resort to Legislative History in this Case, and** 7 **Even if There Were, Assembly Bills 2358 and 1276 are Neither** 8 **Legislative History, Nor Otherwise Relevant to the Court’s Analysis.**

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

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

24 **B. AB 2358 Proposed to Delete Penal Code Section 12323’s “Principally** 25 **for Use” Standard to Expand the Scope of Covered Ammunition, So** 26 **Any Comparison with AB962 is Meaningless.**

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

1 on which they fail to provide evidence. (Motion, p. 11:26-12:2.) The Court should decline
2 to admit or consider this irrelevant bit of “legislative history.” (See State’s Objections to
3 Request for Judicial Notice; State’s Objections to Evidence Nos. 123-125.) Again, nothing
4 in the true legislative history of AB 962 (or the 1982 bill under which Penal Code section
5 12323 was adopted) speaks to the intent of the Legislature when they adopted the definition
6 of handgun ammunition, so Plaintiffs’ reliance on AB2358 is a red herring.

7 Even if Plaintiffs’ summary of Assembly Member De Leon’s testimony were accurate
8 or admissible, “[c]omments made by an individual legislator . . . about unpassed legislation
9 have little value as evidence of legislative intent behind the statute the legislation sought to
10 amend.” (*California Highway Patrol v. Superior Court* (2006) 135 Cal.App.4th 488, 506
11 fn.13.) Moreover, even if a legislator opined that an existing statute was vague, which did
12 not occur here, his or her remark would not be probative of whether the statutes were vague
13 in a *constitutional* sense. That is a legal question for the Court to decide. (See discussion in
14 footnote 5, *supra*; *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383,
15 402, fn. 11 [“in construing a statute, [courts] do not consider the motives or understandings
16 of either its author or the individual legislators who voted for it”].)¹² In sum, Plaintiffs’
17 discussion of AB2358 is no more than inflammatory rhetoric.

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

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

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

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

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

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

15 **A. Legal Standard.**

16 In an as-applied challenge, the plaintiff must plead and prove specific facts giving rise
17 to the alleged constitutional violation. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th
18 1069, 1084.) To prevail, the plaintiff must establish the particular application of the statute
19 violates the plaintiff's constitutional rights. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404-
20 405; *Coffman Specialties, Inc. v. Department of Transp.* (2009) 176 Cal.App.4th 1135,
21 1144-1145.) Plaintiff Herb Bauer Sporting Goods cannot meet this burden, and the Court
22 should enter judgment in favor of the State on the second cause of action.

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

26 Plaintiff Herb Bauer Sporting Goods, Inc. alleges in the second cause of action that
27 "subparagraphs (1) and (2) of Penal Code section 12061(a)¹³ are void for vagueness as
28

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

1 applied to [it] because these provisions fail to provide notice . . . regarding which calibers of
2 ammunition are ‘handgun ammunition’ as defined in Penal Code section 12060(b) and
3 12323(a), and because such vagueness encourages arbitrary and discriminatory enforcement
4 of these laws against Plaintiff.” (Complaint, ¶100.) But in its Motion, Herb Bauer Sporting
5 Goods all but concedes the infirmity of this claim, offering just a single paragraph of
6 argument and *no evidence* in its defense.¹⁴ (Motion, p. 25, ll. 1-10.)

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

14 For a case to be ripe, the plaintiff must suffer direct and actual injury from the
15 challenged portions of the allegedly unconstitutional law. (*In re Tania S.* (1992) 5
16 Cal.App.4th 728, 736-737 [“questions as to the constitutionality of a statute [must be]
17 necessary to the determination of a *real and vital controversy between the litigants in the*
18 *particular case before it*”] [italics in original].) Mere dissatisfaction with legislative policy
19 does not present a justiciable controversy. (See, e.g., *Zetterberg v. State Dep’t of Pub.*
20 *Health* (1974) 43 Cal.App.3d 657, 662 [no standing to challenge state statute where plaintiff
21 has not suffered direct and actual injury]; see also *City of Santa Monica v. Stewart* (2005)
22 126 Cal.App.4th 43, 64 [the mere belief that state law is unconstitutional does not give rise
23 to a ripe controversy].) In short, the legal issues must be framed with sufficient
24 concreteness and immediacy to allow the Court to render a conclusive and definitive
25 judgment, rather than an advisory opinion based on hypothetical facts or speculative future

26
27 ¹⁴ The only “fact” offered in support of the as applied challenge is that defendant DOJ
28 issued an information bulletin in December 2009 that summarizes four new California firearms
laws. The bulletin did not threaten enforcement against anyone, let alone Plaintiffs.

1 events. (*Pacific Legal Found. v. California Coastal Comm'n* (1982) 33 Cal.3d 158, 170-
2 173.)

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

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

14 (Declaration of Barry Bauer, ¶ 11; see also State’s Objections to Evidence Nos. 15-17.)

15 Although plaintiff Herb Bauer Sporting Goods claims to harbor a vague fear of prosecution,
16 there is no evidence of a threat of enforcement or prosecution by the State or any other law
17 enforcement authority. This was confirmed in deposition when Mr. Bauer conceded that his
18 fears of prosecution had no basis in fact as there have been no threats of prosecution or
19 enforcement by any law enforcement agency. (State’s Supplemental UMF No. 5 & 12.)

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

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

1 **VI. THE THIRD CAUSE OF ACTION SHOULD BE DISMISSED.**

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

5 **CONCLUSION**

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

13 Dated: January 3, 2011

Respectfully Submitted,

14
15 KAMALA D. HARRIS
Attorney General of California
16 ZACKERY P. MORAZZINI
Supervising Deputy Attorney General
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18 

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21 *State of California, Edmund G. Brown Jr.,*
22 *and the California Department of Justice*

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

DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On January 3, 2011, I served the attached

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF

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

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

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

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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California Department of Justice

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF FRESNO

15 **SHERIFF CLAY PARKER, et al.,**

16 Plaintiffs and Petitioners,

17 vs.

18 **THE STATE OF CALIFORNIA, et al.**

19 Defendants and Respondents.

Case No. 10CECG02116

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

**(2) SUPPLEMENTAL STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF OPPOSITION TO
PLAINTIFFS' MOTION**

Date: January 18, 2011
Time: 8:30 a.m.
Dept: 402
Judge: Honorable Jeffrey Hamilton

Trial Date: January 18, 2011
Action Filed: June 17, 2010

26 Defendants the State of California, Edmund G. Brown Jr. (erroneously sued as "Jerry
27 Brown"), and the California Department of Justice (collectively, "the State") respectfully submit
28

this separate statement in response to plaintiffs Sheriff Clay Parker, Herb Bauer Sporting Goods, Inc., California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Collectibles, LLC, and Steven Stonecipher's (collectively, "Plaintiffs") Separate Statement of Undisputed Facts, together with references to supporting evidence, in support of the State's Opposition to Plaintiffs' Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief.

ISSUE NO. 1 – PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE FIRST CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF: DUE PROCESS VAGUENESS – FACIAL – BECAUSE CALIFORNIA PENAL CODE SECTIONS 12060, 12061, AND 12318 PROVIDE NEITHER ADEQUATE NOTICE TO ORDINARY PERSONS NOR SUFFICIENT GUIDELINES TO LAW ENFORCEMENT TO PREVENT ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE LAW

Moving Party's Undisputed Material Facts and Supporting Evidence:	Opposing Party's Response and Supporting Evidence:
<p>1. Assembly Bill 962 passed the Legislature on September 11, 2009, and was approved by Governor Schwarzenegger on October 11, 2009; it added sections 12060, 12061, and 12318 (hereafter referred to collectively as the "Challenged Provisions") to the California Penal Code.</p> <p>[Assembly Bill No. 962 and Complete Bill History (Ex.1 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief).]</p>	<p>Undisputed.</p>
<p>2. There is general confusion as to what ammunition is "principally for use in handguns."</p> <p>[Allman Declaration at 2:13, Bauer Declaration at 2:13, Giles Declaration at 2:12, Hall Declaration at 2:13, Parker Declaration at 2:14, Potterfield Declaration at 2:13, Stonecipher Declaration at 2:10, Tenny Declaration at 1:12, Wright Declaration at 2:13.]</p>	<p>Disputed.</p> <p>Objection: Vague and ambiguous as to the meaning of "general confusion." See also the State's Objections to Evidence Nos.1-37, & 80-122 objecting to the cited portions of the declarations.</p> <p>State's Compendium of Evidence, Exh. "A," B. Bauer Deposition, pp.36:18-37:3; 42:1-9; 42:19-43:2; 43:9-17; 43:18-44:2; 44:3-44:20; 49:8-49:19; Exh. "D," S. Helsley Deposition, pp. 129:12-17; 146:1-5; 155:22-156:7; 158:9-</p>

1		17; 159:24-160:1; 163:15-17; 165:2-4; 172:12-14; Exh. "E," C. Parker Deposition, pp. 49:3-16; 54:25-55:7; 55:8-14; 55:15-22; 60:9-14; 61:7-20; Exh. "F," S. Stonecipher Deposition, pp. 43:6-14; 43:18-22; 48:16-19; 52:1-24; 53:3-7; 53:11-15; 53:19-22; 54:1-5, 55:1-5; 56:23-57:1; 57:6-11.
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7	3. There is confusion among law enforcement officers as to what ammunition is "principally for use in handguns."	Disputed.
8		Objection: Conclusory; Lacks Foundation; Vague. See Objections to Evidence Nos. 2-8 and 80-86.
9	[Parker Declaration at 2:13, Allman Declaration at 2:13]	
10		Deposition of Clay Parker, pp. 44:20-23, 45:14-47:20 [testifying he has not attempted to research or determine what ammunition might qualify]; pp. 42:6-15; 42:20-43:7 [testifying that the Tehama County Sheriff's Department defers to the California Department of Justice enforcement of gun laws at gun and ammunition vendors]
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12		
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15		Declaration of Blake Graham, ¶¶ 10-17.
16	4. Penal Code section 12060 does not rely on a list of ammunition "principally for use in handguns."	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12060 of the Penal Code provides the best evidence of its content.
17		
18	[Pen. Code, § 12060.]	
19		
20	5. Penal Code section 12061 does not rely on a list of ammunition "principally for use in handguns."	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12061 of the Penal Code provides the best evidence of its content.
21		
22	[Pen. Code, § 12061.]	
23		
24	6. Penal Code section 12318 does not rely on a list of ammunition "principally for use in handguns."	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12318 of the Penal Code provides the best evidence of its content.
25		
26	[Pen. Code, § 12318.]	
27		
28	7. Penal Code section 12323 does not rely on a list of ammunition "principally for use in	Objection: Relevance; Secondary Evidence

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handguns.”
[Pen. Code, § 12323.]

8. Defendant DOJ has not promulgated regulations regarding the definition of “handgun ammunition” for purposes of the Challenged Provisions.

[Responses to Plaintiffs’ Request for Admissions, Set One (Ex. 56 to Plaintiffs’ Evidence in Support of Motion for Summary

Rule (Evid. Code §§ 1521 & 1523. Section 12323 of the Penal Code provides the best evidence of its content.

Undisputed.

1	substantially similar to those appearing in the	(1) The State's Objections to Plaintiffs' Request
2	Challenged Provisions.	for Judicial Notice; and
3	[Senate Bill 1276 (1994) as Amended in	(2) The State's Objections to Evidence No. 126.
4	Senate on May 26, 1994 (Ex. H to Plaintiffs'	
5	Request for Judicial Notice in Support of	
6	Motion for Summary Judgment or in the	
7	Alternative Summary Adjudication / Trial	
8	Brief) at p. 4; Legislative History Report and	
9	Analysis Re: Senate Bill 1276 (Hart – 1994)	
10	(Ex. 5 to Plaintiffs' Evidence in Support of	
11	Motion for Summary Judgment or in the	
12	Alternative Summary Adjudication / Trial	
13	Brief) at LH009–010.]	
14	14. A Bill Analysis conducted by the Senate	Objection: Relevance. Hearsay. Senate Bill
15	Committee on Judiciary for Senate Bill 1276	1276 has no bearing on any material fact before
16	contains a "comment" on Penal Code section	the Court and is not legislative history. See:
17	12323's definition of "handgun ammunition	(1) The State's Objections to Plaintiffs' Request
18	which reads, in relevant part:	for Judicial Notice; and
19	"Existing Penal Code section 12323 was added	(2) The State's Objections to Evidence No. 126.
20	in 1982 and defines handgun ammunition as	
21	"ammunition principally for use in pistols and	
22	revolvers . . . notwithstanding that the	
23	ammunition may also be used in some rifles. . .	
24	." However, it may not be suitable for defining	
25	handgun ammunition in general. It may be	
26	assumed that many ammunition calibers are	
27	suitable for both rifles and handguns. Without	
28	additional statutory guidance, it may be very	
	difficult for dealers to determine which	
	ammunition is "handgun ammunition" for	
	purposes of the requirements added to Penal	
	Code section 12076."	
	[Legislative History Report and Analysis Re:	
	Senate Bill 1276 (Hart – 1994) (Ex. 5 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at	
	LH010.]	
	15. Senate Bill 1276 (1994) relied on the	Objection: Relevance. Hearsay. Senate Bill
	definition of "handgun ammunition" found at	1276 has no bearing on any material fact before
	Penal Code section 12323.	the Court and is not legislative history. See:
	[Senate Bill 1276 (1994) as Amended in	(1) The State's Objections to Plaintiffs' Request
	Senate on May 26, 1994 (Ex. H to Plaintiffs'	for Judicial Notice; and
	Request for Judicial Notice in Support of	(2) The State's Objections to Evidence No. 126.
	Motion for Summary Judgment or in the	
	Alternative Summary Adjudication / Trial	
	Brief) at p. 4.]	

1		
2	16. Defendants' expert admitted that he was	Objection: Relevance. What Mr. Graham was
3	asked to opine on what he thought should be	asked to do vis-à-vis Assembly Bill 2358 is not
4	included as "handgun ammunition" in	relevant to any material fact in this case. See:
5	Assembly Bill 2358's enumerated list of	(1) The State's Objections to Plaintiffs' Request
6	"handgun ammunition" calibers.	for Judicial Notice; and
7	[Graham Deposition Vol. One (Ex. 57 to	(2) Objections to Evidence Nos. 123-125.
8	Plaintiffs' Evidence in Support of Motion for	
9	Summary Judgment or in the Alternative	
10	Summary Adjudication / Trial Brief) at	
11	102:21-103:17]	
12	17. When asked which ammunition he thought	Objection: Relevance. What Mr. Graham was
13	should be included in AB 2358's list of	asked to do vis-à-vis Assembly Bill 2358 is not
14	"handgun ammunition," Defendants' expert	relevant to any material fact in this case. See:
15	said he remembered identifying the following:	(1) The State's Objections to Plaintiffs' Request
16	".45, .380., .25, .40, .38, .357, possibly .4.54,	for Judicial Notice; and
17	and possibly .762, and maybe .223."	(2) Objections to Evidence Nos. 123-125.
18	[Graham Deposition Vol. One (Ex. 57 to	
19	Plaintiffs' Evidence in Support of Motion for	
20	Summary Judgment or in the Alternative	
21	Summary Adjudication / Trial Brief) at	
22	103:18-104:10.]	
23	18. Counsel for Defendant DOJ has stated that	Objection: Relevance. Hearsay. See
24	Defendant DOJ will not and cannot adopt a	Objections to Evidence Nos. 127-128.
25	policy as to what ammunition constitutes	
26	"handgun ammunition" for purposes of the	
27	Challenged Provisions.	
28	[Public Records Act Request Sent to California	
	Department of Justice Re: Assembly Bill 962,	
	dated December 16, 2009 (Ex. 6 to Plaintiffs'	
	Evidence in Support of Motion for Summary	
	Judgment or in the Alternative Summary	
	Adjudication / Trial Brief); Defendant	
	Department of Justice Response to Public	
	Records Act and Relevant E-mail Enclosures,	
	dated January 25, 2010 (Ex. 7 to Plaintiffs'	
	Evidence in Support of Motion for Summary	
	Judgment or in the Alternative Summary	
	Adjudication / Trial Brief) at AM0002,	
	AM0004, AM0006, AM0013.]	
	19. On August 19, 2010, then pending	Objection: Relevance. Assembly Bill 2358 is
	Assembly Bill 2358 was amended to include in	not relevant to any material fact in this case.
	Penal Code section 12323 the following	See:

1	definition of "handgun ammunition": "any	(1) The State's Objections to Plaintiffs' Request for Judicial Notice; and (2) Objections to Evidence Nos. 123-125
2	variety of ammunition in the following	
3	calibers, notwithstanding that the ammunition	
4	may also be used in some rifles: .22 <i>rimfire</i> , .25, .32, .38, .9mm, .10mm, .40, .41, .44, .45, 5.7x28mm, .223, .357, .454, .5.56x45mm, 7.62x39, 7.63mm, 7.65mm, .50."	
5	[Assembly Bill No. 2358 (2010) as Amended	
6	in Senate August 19, 2010 (Ex.2 to Plaintiffs'	Objection: Relevance. Assembly Bill 2358 is not relevant to any material fact in this case. See: (1) The State's Objections to Plaintiffs' Request for Judicial Notice; and (2) Objections to Evidence Nos. 123-125
7	Evidence in Support of Motion for Summary	
8	Judgment or in the Alternative Summary	
9	Adjudication / Trial Brief, Ex. F to Plaintiffs'	
10	Request for Judicial Notice in Support of	
11	Motion for Summary Judgment or in the	Undisputed.
12	Alternative Summary Adjudication / Trial	
13	Brief) at 7:29-8:21; Complete Bill History,	
14	A.B. No. 2358 (Ex. 4 to Plaintiffs' Evidence in	
15	Support of Motion for Summary Judgment or	
16	in the Alternative Summary Adjudication /	Undisputed.
17	Trial Brief).]	
18	20. On August 30, 2010, then pending	
19	Assembly Bill 2358 was amended to include in	
20	Penal Code section 12323 the following	
21	definition of "handgun ammunition": " any	(1) The State's Objections to Plaintiffs' Request for Judicial Notice; and (2) Objections to Evidence Nos. 123-125
22	variety of ammunition in the following	
23	calibers, notwithstanding that the ammunition	
24	may also be used in some rifles: .22 <i>rimfire</i> , .25, .32, .38, .9mm, .10mm, .40, .41, .44, .45, 5.7x28mm, .357, .454, .5.56x45mm, 7.63mm, 7.65mm."	
25	[Assembly Bill No. 2358 (2010) as Amended	
26	in Senate August 30, 2010 (attached as Ex. 3 to	Undisputed.
27	Plaintiffs' Evidence in Support of Motion for	
28	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief, Ex. G to	
	Plaintiffs' Request for Judicial Notice in	
	Support of Motion for Summary Judgment or	Undisputed.
	in the Alternative Summary Adjudication /	
	Trial Brief) at 16:11-40; Complete Bill	
	History, A.B. No. 2358 (attached as Ex.4 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	Undisputed.
	Summary Adjudication / Trial Brief).]	
	21. All modern centerfire and rimfire	
	ammunition for use in handguns or rifles	
	consist of the same components: a metal casing	
	that suspends a metal projectile over a charge	
	of powder confined within the metal casing	

1	and a primer (or priming charge) to ignite the	
2	powder - ("self-contained metallic	
3	ammunition").	
4	[Helsley Declaration at ¶ 20.]	
5	22. In order of their specificity, these three	Undisputed.
6	terms are used to describe a self-contained	
7	metallic cartridge: "ammunition," "caliber,"	
8	and its given "cartridge name."	
9	[Helsley Declaration at ¶ 54.]	
10	23. "Ammunition" is defined in the Glossary	Undisputed.
11	of the Association of Firearms and Tool Mark	
12	Examiners as:	
13	"One or more loaded cartridges consisting of a	
14	primed case, propellant, and with one or more	
15	projectiles. Also referred to as fixed or live	
16	ammunition."	
17	[Graham Deposition Vol. One (Ex. 57 to	
18	Plaintiffs' Evidence in Support of Motion for	
19	Summary Judgment or in the Alternative	
20	Summary Adjudication / Trial Brief) at	
21	Merged Ex. C at p. 2.]	
22	24. The definition of "caliber" depends on	Undisputed.
23	whether it is applied to a firearm or to	
24	ammunition. When applied to ammunition, the	
25	Glossary of the Association of Firearms and	
26	Tool Mark Examiners defines it as: "A	
27	numerical term, without the decimal point,	
28	included in a cartridge name to indicate the	
	nominal bullet diameter."	
	[Graham Deposition Vol. One (Ex. 57 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at	
	Merged Ex. C at p. 5.]	
	25. It is a more precise description of	Objection: Relevance; Mischaracterizes the
	ammunition to identify it by its specific	witness's testimony; vague and ambiguous as to
	cartridge name because often the "caliber" in	the context where the description might be
	the cartridge's given name does not reflect the	more precise.
	actual bore or bullet diameter.	

1	[Helsley Declaration at ¶¶ 54-64.]	
2	26. Within any given “caliber,” there are	Undisputed.
3	usually various “cartridges,” some of which	
4	may be used more often in a handgun, and	
5	some of which may be used more often in a	
6	rifle. [Helsley Declaration at ¶¶ 56-64.]	
7	27. Reference to the measurement of a	Objection: Mischaracterizes the witness’s
8	projectile’s diameter (i.e., its caliber) is not a	
9	particularly precise method of identifying	
10	ammunition. [Helsley Declaration at ¶ 55-64.]	testimony. Vague and ambiguous as to context
11	28. Virtually all calibers can be and are fired	Objection: Mischaracterizes the witness’s
12	safely through both handguns and rifles.	
13	[Helsley Declaration at ¶ 65.]	testimony; Conclusory; Lacks foundation;
14	29. Virtually all cartridges can be and are fired	Objection: Mischaracterizes the witness’s
15	safely through both handguns and rifles.	
16	[Helsley Declaration at ¶ 65.]	
17	30. Packaging for ammunition often has no	Objection: Mischaracterizes the witness’s
18	label associating its use with either a handgun	
19	or a rifle.	
20	[Helsley Declaration at ¶¶ 68-69.]	testimony; Conclusory; Lacks foundation;
21	31. Packaging for ammunition does not	Objection: Mischaracterizes the witness’s
22	identify whether the ammunition it contains is	
23	“principally for use in handguns.”	
24	[Helsley Declaration at ¶ 69.]	testimony; Conclusory; Lacks foundation;
25	32. In those instances where ammunition	Objection: Mischaracterizes the witness’s
26	manufacturers or vendors label or market a	
27	particular cartridge as a “handgun cartridge,”	
28	such markings do not identify whether that	testimony; Conclusory; Lacks foundation;
	cartridge, or ammunition of that caliber, is	vague. See Objections to Evidence Nos. 48-50.
	actually “principally used in handguns.”	

1	[Helsley Declaration at ¶¶ 68-69.]	
2		
3	33. Experts cannot form a reliable opinion as to whether a given caliber or cartridge is intended to be or has actually been fired more than fifty percent of the time through a handgun.	Disputed. Objection: Assumes facts not in evidence; mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 45-47, 56-59.
4		
5	[Helsley Declaration at ¶¶ 66, 72-73.]	Declaration of Blake Graham, ¶¶ 10-17.
6		
7	34. There exists in the firearms industry no commonly understood delineation between "handgun ammunition" and other ammunition that indicates whether certain ammunition is actually fired or intended to be fired more often in handguns than in long-guns.	Objection: Mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 42-59.
8		
9		
10		
11	[Helsley Declaration at ¶¶ 65-70, 72-73.]	
12		
13	35. There exists in the firearms industry no commonly understood definition of "handgun ammunition" that equates with the "principally for use in handguns" language relied on by the Challenged Provisions.	Objection: Mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 42-52.
14		
15	[Helsley Declaration at ¶¶ 65-70.]	
16		
17	36. Defendants assert 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 might enforce them," as to what ammunition is "used principally in pistols and revolvers."	Undisputed.
18		
19		
20		
21	[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 6:16-19, 7:8-11.]	
22		
23		
24		
25	37. Defendants identify the following ammunition as "principally for use in handguns" for purposes of the Challenged Provisions: .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, and .32.	Undisputed that the State identified these calibers of ammunition in response to Plaintiff's Special Interrogatory No. 5 after objecting to the Plaintiff's use of the phrase "types of ammunition" as vague and ambiguous.
26		
27		
28	[Responses to Specially Prepared	

1	Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 5:7-8, 5:21-22;	
2	Amended Response to Specially Prepared Interrogatory No. 5 (Ex. 55 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 2:24-3:2.]	
3		
4	38. Defendants assert that the ammunition they deemed "principally for use in handguns" based on their review of handgun sales records in California, written documents, ammunition vendor websites, and online encyclopedias, is "commonly understood" to be "handgun ammunition" for purposes of the Challenged Provisions.	Undisputed that these comprised some of the steps Mr. Graham took in his expert analysis, otherwise disputed.
5		Declaration of Blake Graham, ¶¶ 10-17.
6	[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:8-20; Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 118:3-11, 142:21-25.]	
7		
8	39. Additional research over time may cause Defendants' list of ammunition "principally for use in handguns" to change.	Undisputed.
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10	[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 204:21-205:8; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 67:21-68:1, 116:11-18, 118:11-18 9.]	
11		
12	40. Regulations promulgated at some date in the future may cause Defendants' list of ammunition "principally for use in handguns" to change.	Undisputed.
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14	[Amended Response to Specially Prepared Interrogatory No. 5 (Ex. 55 to Plaintiffs'	
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1	Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 2:26-3:2.]	
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3	41. Defendants' expert admitted that if he had the opportunity to review sales records over a larger time frame, his opinion as to what ammunition is "principally for use in a handgun" might have changed.	Objection: Mischaracterizes the witness's testimony.
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5	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 118:11-18.]	
6		
7	42. Defendants' expert admits he may have left cartridges off Defendants' list of ammunition "principally for use in handguns" that [based on his understanding of "handgun ammunition"], should have been included.	Objection: Mischaracterizes the witness's testimony (which testimony is not included on Plaintiffs' Exhibit 58).
8		
9	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 69:20-70:5.]	
10		
11	43. Defendants' expert's methodology for determining what ammunition was "principally for use in handguns" was a two-step process that involved the expert looking at the records of handgun sales in California, and then reviewing websites, written materials and drawing on his personal experience.	Undisputed that these comprised some of the steps Mr. Graham took in his expert analysis, otherwise disputed.
12		Declaration of Blake Graham, ¶¶ 10-17.
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14	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 63:22-64:6, 140:13-21.]	
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16	44. Defendants' list of calibers that constitute ammunition "principally for use in handguns" was based on the records of handgun sales in California over each of the past five years, written materials, ammunition vendor websites, and online encyclopedias."	Undisputed that these comprised some of the steps Mr. Graham took in his expert analysis, otherwise disputed.
17		Declaration of Blake Graham, ¶¶ 10-17.
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1	[Responses to Specially Prepared Interrogatories (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:14-20.]	
4	45. Defendant DOJ is required to keep and maintain records of handgun sales in California; this record is commonly referred to as the Dealer Record of Sales ("DROS") and it is linked to the Automated Firearms System ("AFS").	Undisputed.
8	[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:14; Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 176:14-17, 177:7-13, 190:3-6.]	
14	46. Defendants and their expert witness relied in part on the DROS records to determine which ammunition should be included in Defendants' list of ammunition they consider "handgun ammunition" for purposes of the Challenged Provisions.	Undisputed.
18	[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:13-18; Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 181:14-16, 181:23-182:1; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 9:17-20.]	
26	47. Defendants' expert's reliance on DROS records was his "starting point." He used the records to determine which popular handgun calibers should be researched further to determine if ammunition of those calibers is	Objection: Mischaracterizes the witness's testimony. Declaration of Blake Graham, ¶ 13.

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<p>“principally for use in handguns.”</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 9:17-20, 63:22-64:6.]</p>	
<p>48. Defendants’ expert admitted that certain calibers may have been omitted from Defendants’ list of ammunition “principally for use in handguns” because they were “unpopular.”</p> <p>[Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 204:21-207:9.]</p>	<p>Objection: Mischaracterizes the witness’s testimony.</p> <p>Declaration of Blake Graham, ¶¶ 10-17.</p>
<p>49. Defendants and their expert relied on DROS records only from the previous five years to determine the handguns most commonly sold in California over the same time period.</p> <p>[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:14-16; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 115:18-116:2, 116:17-117:6.]</p>	<p>Undisputed.</p>
<p>50. Defendants’ expert does not have any information regarding what percentage of the total guns in circulation are represented by the records of handgun sales in the past five years.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 118:4-10.]</p>	<p>Undisputed.</p>

<p>51. The DROS records relied upon by Defendants' expert combine firearms that utilize ammunition referred to by Defendants as "handgun ammunition" and firearms that utilize ammunition referred to by Defendants as "rifle ammunition" under a single caliber listing.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 12:18-14:2.]</p>	<p>Objection: Mischaracterizes the witness' testimony.</p> <p>Declaration of Blake Graham, ¶ 13.</p>
<p>52. The DROS records relied upon by Defendants' expert are not precise in identifying the sales of handguns that use a specific cartridge.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 14:10-23.]</p>	<p>Objection: Mischaracterizes the witness' testimony.</p>
<p>53. The DROS system does not break down sales by guns as to every cartridge of ammunition sold and whether such ammunition is a "rifle cartridge," "handgun cartridge," or both.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 19:23-20:20.]</p>	<p>Undisputed.</p>
<p>54. The DROS records relied on by Defendants' expert does not contain a listing of all types of cartridges fired by a firearm of that caliber due to space limitations.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 22:11-23:9.]</p>	<p>Undisputed.</p>

1	55. Defendants' expert admitted that the DROS records relied on to inform his opinions contained categories of ammunition that could have been a mixture of what he considers "handgun ammunition" and "rifle ammunition."	Objection: Mischaracterizes the witness' testimony.
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5	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 91:18-92:6.]	
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8	56. The DROS records relied on by Defendants' expert include a number of entries in calibers Defendants' expert considers "common rifle caliber rounds."	Objection: Mischaracterizes the witness' testimony. Testimony also subject to objections made during the deposition concerning speculation and vagueness.
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11	[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 189:10-192:18.]	
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14	57. There is no record of total rifle sales in California in existence because Defendant DOJ is prohibited from retaining records on the sale of long-guns.	Undisputed.
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17	[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 183:19-184:15.]	
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20	58. Defendants' expert did not determine the total number of rifle sales in California as compared with the total number of handgun sales to inform his opinion as to whether a particular ammunition was principally used in a handgun.	Disputed.
21		Objection: Mischaracterizes the witness' testimony.
22		
23		Declaration of Blake Graham, ¶¶ 15-17.
24	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 93:17-24.]	
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27	59. Defendants' expert was unable to compare	Undisputed.
28		

1 the sales of handguns using a particular
2 ammunition with rifle sales that use the same
3 ammunition because he is admittedly unaware
4 of any source of data regarding rifle sales.

5 [Graham Deposition Vol. Two (Ex. 58 to
6 Plaintiffs' Evidence in Support of Motion for
7 Summary Judgment or in the Alternative
8 Summary Adjudication / Trial Brief) at 93:6-
9 24.]

10 60. Defendants' expert admits his opinion as
11 to which ammunition is "principally for use in
12 handguns" may have been different had he
13 been able to compare handgun sales with rifle
14 sales.

15 [Graham Deposition Vol. Two (Ex. 58 to
16 Plaintiffs' Evidence in Support of Motion for
17 Summary Judgment or in the Alternative
18 Summary Adjudication / Trial Brief) at 95:13-
19 20.]

Objection: Mischaracterizes the witness's
testimony which merely says it may have been
helpful to have that data.

See also Declaration of Blake Graham, ¶¶ 15-
17.

20 61. Defendants relied in part on the
21 representations made by ammunition vendors
22 on their websites to determine whether certain
23 ammunition should be included in Defendants'
24 list of ammunition they consider "handgun
25 ammunition" for purposes of the Challenged
26 Provisions.

27 [Responses to Specially Prepared
28 Interrogatories, Set One (Ex. 54 to Plaintiffs'
Evidence in Support of Motion for Summary
Judgment or in the Alternative Summary
Adjudication / Trial Brief) at 7:18-20.]

Undisputed.

62. Defendants' expert relied in part on the
fact that ammunition vendor websites listed
certain cartridges as "handgun ammunition" to
inform his opinion as to whether specific
ammunition was "principally for use in
handguns."

[Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs' Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 44:1-
14, 64:17-65:6.]

Undisputed.

<p>63. Defendants' expert testified that the fact that certain websites refer to some ammunition as "handgun cartridges" helped establish the DOJ's list of calibers "principally for use in handgun."</p> <p>[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 93:5-95:13, 160:19-23, 166:21-167:6.]</p>	<p>Objection: Mischaracterizes the witness's testimony.</p> <p>Declaration of Blake Graham, ¶¶ 10-17.</p>
<p>64. The four vendor websites that Defendants' expert relied to inform his opinion as to whether specific ammunition was "principally for use in handguns" include: Cabela's, Cheaper Than Dirt, Inc., J & G Sales, and Midway USA.</p> <p>[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 93:5-20, 148:23-149:4; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 37:8-13, 40:11-15, 43:4-10.]</p>	<p>Objection: Mischaracterizes the witness's testimony.</p> <p>Declaration of Blake Graham, ¶¶ 10-17.</p>
<p>65. In forming his opinion regarding whether ammunition was principally used in handguns, Defendants' expert gave some weight to whether the website listed the ammunition as "popular."</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 65:9-16.]</p>	<p>Objection: Mischaracterizes the witness's testimony.</p>
<p>66. Defendants' expert did not contact the relied-upon website vendors or do any investigation as to what criteria the websites relied upon to characterize the ammunition as "popular" or what the websites' characterization meant.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to</p>	<p>Undisputed.</p>

1	Plaintiffs' Evidence in Support of Motion for	
2	Summary Judgment or in the Alternative	
3	Summary Adjudication / Trial Brief) at 44:15-	
4	46:3.]	
5	67. Defendants' expert admitted there is a	Objection: Mischaracterizes the witness's
6	difference between "popular" ammunition for a	
7	handgun and ammunition that is "principally	
8	for use in a handgun."	testimony.
9	[Graham Deposition Vol. Two (Ex. 58 to	
10	Plaintiffs' Evidence in Support of Motion for	
11	Summary Judgment or in the Alternative	
12	Summary Adjudication / Trial Brief) at 102:6-	
13	104:3.]	
14	68. None of the relied-upon website vendors	Undisputed.
15	provided Defendants' expert with data	
16	regarding the total rounds of each type of	
17	ammunition sold.	
18	[Graham Deposition Vol. Two (Ex. 58 to	
19	Plaintiffs' Evidence in Support of Motion for	
20	Summary Judgment or in the Alternative	
21	Summary Adjudication / Trial Brief) at 46:4-	
22	16.]	
23	69. The websites Defendants' expert relied	Undisputed.
24	upon to inform his opinions as to which	
25	ammunition is "principally for use in	
26	handguns" list as "handgun ammunition"	
27	ammunition that Defendants' expert does not	
28	consider to be principally used in handguns.	
	[Graham Deposition Vol. Two (Ex. 58 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at 62:25-	
	63:21.]	
	70. Defendants' expert's decision to exclude	Objection: Mischaracterizes the witness's
	certain ammunition listed as "handgun	
	ammunition" on the vendor websites he relied	
	upon to inform his opinions as to which	
	ammunition is "principally for use in	
	handguns" was based on his experience in	
	observing the use of that ammunition in the	
	field.	

1	Graham Deposition Vol. Two (Ex. 58 to	
2	Plaintiffs' Evidence in Support of Motion for	
3	Summary Judgment or in the Alternative	
4	Summary Adjudication / Trial Brief) at 66:15-	
5	67:9.]	
6	71. Michael Tenny, the party responsible for	Objection: Relevance; Conclusory; Lacks
7	ensuring compliance with all applicable laws in	Foundation. See Objections to Evidence Nos.
8	the locations from and to which Cheaper Than	105-113 & 133.
9	Dirt, Inc., ships ammunition, does not know	
10	what ammunition is "handgun ammunition"	
11	and thus subject to the Challenged Provisions.	
12	[Tenny Declaration at 1:6-11.]	
13	72. Larry Potterfield, the party responsible for	Objection: Relevance; Conclusory; Lacks
14	ensuring compliance with all applicable laws in	Foundation. See Objections to Evidence Nos.
15	the locations from and to which Midway Arms,	87-95 & 132.
16	Inc.(dba Midway USA), ships ammunition,	
17	does not know what ammunition is "handgun	
18	ammunition" and thus subject to the	
19	Challenged Provisions.	
20	[Potterfield Declaration at 2:3-12.]	
21	73. Brian Hall, the party responsible for	Objection: Relevance; Conclusory; Lacks
22	ensuring compliance with all applicable laws in	Foundation. See Objections to Evidence Nos.
23	the locations from and to which Chattanooga	27-37.
24	Shooting Supplies, Inc. (dba Natchez Shooters	
25	Supplies), ships ammunition, does not know	
26	what ammunition is "handgun ammunition"	
27	and thus subject to the Challenged Provisions.	
28	[Hall Declaration at 2:3-12.]	
	74. Michael Tenny, the party responsible for	Objection: Relevance; Conclusory; Lacks
	ensuring compliance with all applicable laws in	Foundation. See Objections to Evidence Nos.
	the locations from and to which Cheaper Than	105-113 & 133.
	Dirt, Inc., ships ammunition, does not know	
	what ammunition is "principally for use in a	
	handgun" and is unaware of any source to	
	which he can look to determine what	
	ammunition suitable for use in both handguns	
	and rifles is "principally for use in a handgun."	
	[Tenny Declaration at 1:12-14.]	
	75. Larry Potterfield, the party responsible for	Objection: Relevance; Conclusory; Lacks

1 ensuring compliance with all applicable laws in
2 the locations from and to which Midway Arms,
3 Inc.(dba Midway USA), ships ammunition,
4 does not know what ammunition is
5 “principally for use in a handgun” and is
6 unaware of any source to which he can look to
7 determine what ammunition suitable for use in
8 both handguns and rifles is “principally for use
9 in a handgun.”

10 [Potterfield Declaration at 2:13-15.]

Foundation. See Objections to Evidence Nos.
87-95 & 132.

11 76. Brian Hall, the party responsible for
12 ensuring compliance with all applicable laws in
13 the locations from and to which Chattanooga
14 Shooting Supplies, Inc. (dba Natchez Shooters
15 Supplies), ships ammunition, does not know
16 what ammunition is “principally for use in a
17 handgun” and is unaware of any source to
18 which he can look to determine what
19 ammunition suitable for use in both handguns
20 and rifles is “principally for use in a handgun.”

21 [Hall Declaration at 2:13-15.]

Objection: Relevance; Conclusory; Lacks
Foundation. See Objections to Evidence Nos.
27-37.

22 77. Michael Tenny, the party responsible for
23 ensuring compliance with all applicable laws in
24 the locations from and to which Cheaper Than
25 Dirt, Inc., ships ammunition, does not know
26 what ammunition is exempt from the
27 Challenged Provisions as ammunition that is
28 “designed and intended to be used in antique
firearms” manufactured before 1898, because
many cartridges of ammunition used in
firearms manufactured before 1898 are also
used in firearms manufactured after 1898,
including cartridges sold by Cheaper Than
Dirt, Inc.

[Tenny Declaration at 1:15-19.]

Objection: Relevance; Conclusory; Lacks
Foundation. See Objections to Evidence Nos.
105-113 & 133.

78. Larry Potterfield, the party responsible for
ensuring compliance with all applicable laws in
the locations from and to which Midway Arms,
Inc.(dba Midway USA), ships ammunition,
does not know what ammunition is exempt
from the Challenged Provisions as ammunition
that is “designed and intended to be used in
antique firearms” manufactured before 1898,
because many cartridges of ammunition used
in firearms manufactured before 1898 are also

Objection: Relevance; Conclusory; Lacks
Foundation. See Objections to Evidence Nos.
87-95 & 132.

1 used in firearms manufactured after 1898,
2 including cartridges sold by Midway Arms,
Inc.(dba Midway USA).

3 [Potterfield Declaration at 2:16-20.]

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5 79. Brian Hall, the party responsible for
6 ensuring compliance with all applicable laws in
7 the locations from and to which Chattanooga
8 Shooting Supplies, Inc. (dba Natchez Shooters
9 Supplies), ships ammunition, does not know
10 what ammunition is exempt from the
11 Challenged Provisions as ammunition that is
12 “designed and intended to be used in antique
13 firearms” manufactured before 1898, because
14 many cartridges of ammunition used in
15 firearms manufactured before 1898 are also
16 used in firearms manufactured after 1898,
17 including cartridges sold by Chattanooga
18 Shooting Supplies, Inc. (dba Natchez Shooters
19 Supplies).

20 [Hall Declaration at 2:16-20.]

Objection: Relevance; Conclusory; Lacks
Foundation. See Objections to Evidence Nos.
27-37.

21 80. Cheaper Than Dirt, Inc., has announced
22 that it will cease shipping all ammunition to
23 non-exempt California customers beginning
24 January 1, 2011, to avoid risking criminal
25 prosecution under Penal Code section 12328.

26 [Tenny Declaration at 2:1-8.]

Objection: Relevance; Conclusory; Lacks
Foundation. See Objections to Evidence Nos.
105-113 & 133.

27 81. Midway Arms, Inc.(dba Midway USA),
28 has announced that it will cease shipping all
ammunition to non-exempt California
customers beginning January 1, 2011, to avoid
risking criminal prosecution under Penal Code
section 12318.

[Potterfield Declaration at 3:1-9.]

Objection: Relevance; Conclusory; Lacks
Foundation. See Objections to Evidence Nos.
87-95 & 132.

82. It is the current intent of Chattanooga
Shooting Supplies, Inc. (dba Natchez Shooters
Supplies), to cease shipping all ammunition
that is suitable for use in both handguns and
long-guns to non-exempt California customers
beginning February 1, 2011, to avoid risking
criminal prosecution under Penal Code section
12318.

Objection: Relevance; Conclusory; Lacks
Foundation. See Objections to Evidence Nos.
27-37.

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[Hall Declaration at 3:1-6.]	
83. Defendants' expert knows of no specific trade magazine articles that he used to inform his opinion regarding which ammunition is "principally for use in handguns." [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 34:8-35:14.]	Undisputed
84. Defendants' expert did not use any trade magazine articles regarding the amount of particular ammunition sold. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 35:15-36:13.]	Undisputed.
85. Defendants' expert's use of trade magazines to inform his opinion regarding ammunition "principally for use in handguns" is based solely upon his reading of trade magazines over the years, with no specific reference to a particular article or data from those trade magazines on the subject. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 35:15-36:13, 36:14-37:6]	Undisputed.
86. The DOJ's expert testified that he pulled	Undisputed subject to objections in the

1	Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 24:8-18, 28:4-29:2, 64:1-6, 72:25-73:10.]	
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4	87. Defendants' expert concluded that, based on his training and experience over the last sixteen years or so, when added to experience with handguns and other factors, he <i>"has a feeling</i> that there are certain calibers that are more often than not handgun calibers."	Disputed. Objection: Mischaracterizes the witness's testimony. Declaration of Blake Graham, ¶¶ 10-17.
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8	[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 81:24-82:4, 206:22-207:2.]	
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10		
11	88. Defendants' expert's opinion regarding ammunition "principally for use in handguns" was not informed by information regarding the amounts and types of ammunition used by the military.	Undisputed.
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15	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 109:14-18.]	
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18	89. Defendants' expert's opinion regarding ammunition "principally for use in handguns" was not informed by specific information regarding the number of handguns and/or rifles used by military service members stationed in California.	Undisputed.
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22	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 109:8-13, 110:8-111:10.]	
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24		
25	90. Defendants' expert's opinion regarding ammunition "principally for use in handguns" was not informed by research studies regarding popular or prevalently used ammunition.	Objection: Mischaracterizes the witness's testimony. Evidence cited bears no relation to facts asserted.
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1	[Graham Deposition Vol. Two (Ex. 58 to	
2	Plaintiffs' Evidence in Support of Motion for	
3	Summary Judgment or in the Alternative	
4	Summary Adjudication / Trial Brief) at	
5	118:19-24.]	
6	91. Defendants' expert's opinion regarding	Undisputed subject to the objections raised
7	ammunition "principally for use in handguns"	during the cited portion of the deposition.
8	was not informed by existing polls regarding	
9	the ammunition generally or the popularity of	
10	certain cartridges.	
11	[Graham Deposition Vol. Two (Ex. 58 to	
12	Plaintiffs' Evidence in Support of Motion for	
13	Summary Judgment or in the Alternative	
14	Summary Adjudication / Trial Brief) at	
15	119:20-120:8.]	
16	92. Prior to forming his opinion as to	Undisputed subject to vagueness objections
17	ammunition prevalently used in handguns,	raised during the cited portion of the deposition.
18	Defendants' expert did not personally conduct	
19	any polls regarding the ammunition members	
20	of the general public use in their handguns.	
21	[Graham Deposition Vol. Two (Ex. 58 to	
22	Plaintiffs' Evidence in Support of Motion for	
23	Summary Judgment or in the Alternative	
24	Summary Adjudication / Trial Brief) at 120:9-	
25	16.]	
26	93. Defendants assert that the ammunition	Undisputed.
27	they have identified as "principally for use in	
28	handguns" is supported in part by the fact that	
	those calibers are identified as "handgun	
	ammunition" in <i>Cartridges of the World</i> .	
	[Responses to Specially Prepared	
	Interrogatories, Set One (Ex. 54 to Plaintiffs'	
	Evidence in Support of Motion for Summary	
	Judgment or in the Alternative Summary	
	Adjudication / Trial Brief) at 7:18-21.]	
	94. In its sections on rifle cartridges,	Objection: This "fact" is vague and
	<i>Cartridges of the World</i> identifies multiple	ambiguous. It also is unclear to which portions
	cartridges in the calibers included in	of the cited exhibit Plaintiffs are relying upon.
	Defendants' list of ammunition "principally for	
	use in handguns."	
	[Barnes, Cartridges of the World: A Complete	

1	and Illustrated Reference for Over 1500	
2	Cartridges (11th ed. 2006) “Selected Pages	
3	from Chapter 2: Current American Rifle	
4	Cartridges and Chapter 3: Obsolete Rifle	
5	Cartridges “ (Ex. 52 Plaintiffs’ Evidence in	
6	Support of Motion for Summary Judgment or	
7	in the Alternative Summary Adjudication /	
8	Trial Brief) <i>passim</i> .]	
9		
10	95. In its sections on handgun cartridges,	Undisputed.
11	<i>Cartridges of the World</i> identifies multiple	
12	cartridges in calibers not included in	
13	Defendants’ list of ammunition “principally for	
14	use in handguns.”	
15		
16	[Barnes, Cartridges of the World: A Complete	
17	and Illustrated Reference for Over 1500	
18	Cartridges (11th ed. 2006) “Selected Pages	
19	from Chapter 6: Handgun Cartridges of the	
20	World “ (Ex. 53 to Plaintiffs’ Evidence in	
21	Support of Motion for Summary Judgment or	
22	in the Alternative Summary Adjudication /	
23	Trial Brief) <i>passim</i> .]	
24		
25	96. Defendants’ expert admitted there are	Undisputed subject to the objections raised
26	many ammunition cartridges that fall within	during the cited portions of the deposition.
27	the listed caliber classes that are not	
28	“principally for use in a handgun.”	
29		
30	[Graham Deposition Vol. One (Ex. 57 to	
31	Plaintiffs’ Evidence in Support of Motion for	
32	Summary Judgment or in the Alternative	
33	Summary Adjudication / Trial Brief) at 135:7-	
34	136:5, 137:8-22, 154:25-155:3, 155:21-156:2.]	
35		
36	97. Defendants have suggested that the	Undisputed subject to the objections raised
37	Challenged Provisions apply to ammunition	during the cited portions of the deposition. See
38	that is “used principally” in handguns.	also Graham Deposition transcript, Plaintiffs’
39		Ex.54, p. 5:18 – 20.
40	[Responses to Specially Prepared	
41	Interrogatories, Set One (Ex. 54 to Plaintiffs’	
42	Evidence in Support of Motion for Summary	
43	Judgment or in the Alternative Summary	
44	Adjudication / Trial Brief) at 7:8-11.]	
45		
46	98. Defendants’ expert suggested that the	Disputed.
47	“principally for use in handguns” language	
48	relates to the total number of handguns in	
49	circulation that are chambered in a particular	Objection: Mischaracterizes the witness’s
50		testimony.

1 2 3 4 5	caliber versus the total number of rifles in circulation that are chambered in the same caliber. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 83:1-16.]	Declaration of Blake Graham, ¶¶ 10-17.
6 7 8 9 10 11 12 13	99. Defendants' expert suggested that the "principally for use in handguns" language relates to a mix of factors, including "the number of manufacturers that may have produced a weapon in a particular caliber," "the length of time that a particular gun has been available in a particular caliber," and the number of rifles in that caliber, if any. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 127:5-128:25.]	Disputed. Objection: Mischaracterizes the witness's testimony. Declaration of Blake Graham, ¶¶ 10-17.
14 15 16 17 18 19 20 21 22 23 24 25 26	100. When asked whether the "principally for use in a handgun" standard required a consideration of whether any particular ammunition was fired more often through a handgun than a long-gun, Defendants' expert responded: "I would say [its] not much of a factor because principally for use really deals with the kind of firearm its going to go into, in my -- 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 ammunition is principally for use in the larger pool of -- of weapons." [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 83:1-16.]	Undisputed subject to the objections raised during the cited portion of the deposition.
27 28	101. When asked to clarify whether he would consider the numerosity of total weapons or the	Undisputed subject to the objections raised

<p>1 numerosity of models of weapons to be the 2 determining factor determining whether certain 3 ammunition is “principally for use in 4 handguns,” Defendants’ expert stated: 5 6 “Given the available information in the amount 7 of time I had, I tried to compare the number of 8 manufacturers that may have produced a 9 weapon in a particular caliber, the number of 10 models that each manufacturer used in that 11 caliber, and then, perhaps, the length of time 12 that a particular gun has been available in a 13 particular caliber.” 14 15 [Graham Deposition Vol. Two (Ex. 58 to 16 Plaintiffs’ Evidence in Support of Motion for 17 Summary Judgment or in the Alternative 18 Summary Adjudication / Trial Brief) at 128:8- 19 25.]</p>	<p>during the cited portion of the deposition. See generally Graham Deposition transcript.</p>
<p>102. Firearms chambered in .22 are among the most popular weapons, as to both handguns and rifles. [Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 185:21-186:5; Helsley Declaration at ¶¶ 29, 33.]</p>	<p>Undisputed. Objection: Relevance. The State has not identified .22 caliber ammunition as handgun ammunition within the meaning of the Challenged Definition.</p>
<p>103. .22 Long Rifle is likely the most popular firearm cartridge in the world. [Helsley Declaration at ¶ 33.]</p>	<p>Undisputed. Objection: Relevance. The State has not identified .22 caliber ammunition as handgun ammunition within the meaning of the Challenged Definition.</p>
<p>104. In December 2009, when Plaintiffs’ counsel inquired as to whether “.22 rimfire” ammunition would be considered “handgun ammunition” under the Challenged Provisions, Counsel for Defendant DOJ stated that she did not know. [Public Records Act Request Sent to California Department of Justice Re: Assembly Bill 962, dated December 16, 2009 (Ex. 6 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief); Defendant Department of Justice Response to Public</p>	<p>Objection: Relevance; Hearsay. See Objections to Evidence Nos. 127-128. The State has not identified .22 caliber ammunition as handgun ammunition within the meaning of the Challenged Definition.</p>

Records Act and Relevant E-mail Enclosures, dated January 25, 2010 (Ex. 7 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at AM0002, AM0004, AM0006, AM0013.]

105. Defendants' expert suggests that, at this time, .22 caliber is not "principally for use in handguns," but that his opinion could change based on future research.

[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 186:25-187:17.]

Undisputed.

106. Defendants expert stated he would only classify three .45 caliber cartridges to be "principally for use in a handgun": .45 ACP, .45 GAP, and .45 Long Colt.

[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 153:13-18.]

Undisputed.

107. *Cartridges of the World* includes numerous .45 cartridges in its section on handgun cartridges besides the .45 ACP, .45 GAP, and .45 Long Colt.

[Barnes, *Cartridges of the World: A Complete and Illustrated Reference for Over 1500 Cartridges* (11th ed. 2006) "Selected Pages from Chapter 6: Handgun Cartridges of the World" (Ex. 53 Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) *passim*.]

Undisputed.

108. There are multiple cartridges that can be used in firearms manufactured both before and after 1898, including but not limited to, cartridges in the following calibers: 22, .32, .38, .44, .45, and .50.

Undisputed.

1	[Helsley Declaration at ¶¶ 20-25.]	
2		
3	109. Ammunition that can be used in a	Objection: Mischaracterizes the witness's testimony.
4	modern firearm chambered to fire that	
5	cartridge can also be used in an antique firearm	
6	chambered to fire that same cartridge.	
7	[Helsley Declaration at ¶¶ 20-25.]	
8		
9	110. Ammunition, when it is manufactured, is	Objection: Mischaracterizes the witness's testimony.
10	designed and intended to be used in any	
11	firearm that is chambered for that cartridge,	
12	regardless of when the firearm it will be used	
13	in was manufactured.	
14	[Helsley Declaration at ¶¶ 20-25.]	
15		
16	111. The calibers Defendants claim to be	Undisputed, subject to vagueness objections raised in response to Plaintiffs' special interrogatories.
17	"handgun ammunition" include cartridges that	
18	are designed and intended to be used in	
19	"antique firearms," and thus should be exempt	
20	from the Challenged Provisions.	
21	[Helsley Declaration at ¶23.]	
22		
23	112. Defendants' expert witness testified that	Undisputed.
24	.45 Long Colt is unequivocally "handgun	
25	ammunition" under the Challenged Provisions.	
26	[Graham Deposition Vol. One (Ex. 57 to	
27	Plaintiffs' Evidence in Support of Motion for	
28	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at	
	153:13-18.]	
	113. 45 Long Colt is used in firearms	Undisputed.
	manufactured prior to 1898.	
	[Helsley Decl. at ¶ 23.]	
	114. <i>State of Tennessee ex rel. Rayburn v. Cooper</i> ,	Objection: Relevance. Hearsay. The <i>Rayburn</i> case has no bearing on any material fact before the Court, is not precedent, and is hearsay.
	involved a challenge to a state law	
	authorizing firearms to be carried by patrons in	
	establishments where "the serving of meals" is	
	the " <i>principle</i> business conducted" – as	

opposed to the serving of alcohol. [Amended Complaint for Injunctive and Declaratory Relief in <i>Tennessee ex rel. Rayburn v. Cooper</i> , Case No. 09-1284-I, filed July 6, 2009 (Ex. A to Plaintiffs' Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at ¶ 2; Order of Chancellor Claudia Bonnyman in <i>Tennessee ex rel. Rayburn v. Cooper</i> , Case No. 09-1284-I, filed November 25, 2009 (Ex. D to ' Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 24:20-2.]	See the State's Objections to Plaintiffs' Request for Judicial Notice.
115. In <i>State of Tennessee ex rel. Rayburn v. Cooper</i> , plaintiffs argued it would be extremely difficult for an individual to determine whether they were in a bar or a restaurant. [Amended Complaint for Injunctive and Declaratory Relief in <i>Tennessee ex rel. Rayburn v. Cooper</i> , Case No. 09-1284-I, filed July 6, 2009 (Ex. A to Plaintiffs' Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at ¶¶ 93, 97, 99.]	Objection: Relevance. Hearsay. The <i>Rayburn</i> case has no bearing on any material fact before the Court, is not precedent, and is hearsay. See the State's Objections to Plaintiffs' Request for Judicial Notice.
116. The court in <i>State of Tennessee ex rel. Rayburn v. Cooper</i> found the statute unconstitutionally vague, reasoning that whether the serving of meals is a business's principle business is <i>not something that can be known</i> to the ordinary citizen. The court added that inquiry would not suffice to overcome the law's vagueness. [Order of Chancellor Claudia Bonnyman in <i>Tennessee ex rel. Rayburn v. Cooper</i> , Case No. 09-1284-I, filed November 25, 2009 (Ex. D to Plaintiffs' Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 12:24-13:6.]	Objection: Relevance. Hearsay. The <i>Rayburn</i> case has no bearing on any material fact before the Court, is not precedent, and is hearsay. See the State's Objections to Plaintiffs' Request for Judicial Notice.
117. Defendants in <i>State of Tennessee ex rel. Rayburn v. Cooper</i> argued that the law was not	Objection: Relevance. Hearsay. The <i>Rayburn</i>

1 2 3 4 5 6 7 8 9 10	<p>vague because there were obvious instances where a patron could determine whether a particular establishment was a “restaurant,” pointing to establishments that only serve food – and no alcohol.</p> <p>[Consolidated Memorandum of Law of Defendant Attorney General Cooper in Opposition to Plaintiffs’ Motions for Partial Summary Judgment and in Support of Defendant’s Cross-Motion for Judgment on the Pleadings and/or for Summary Judgment in <i>Tennessee ex rel. Rayburn v. Cooper</i>, Case No. 09-1284-I, filed October 2, 2009 (Ex. I to Plaintiffs’ Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at pp. 19-20.]</p>	<p>case has no bearing on any material fact before the Court, is not precedent, and is hearsay.</p> <p>See the State’s Objections to Plaintiffs’ Request for Judicial Notice.</p>
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11 12 13 14 15 16 17 18 19	<p>118. In conjunction with Fish and Game Code section 3004.5, the Legislature granted the Fish and Game Commission the authority to certify and publish a list of nonlead ammunition suitable for use in regulated areas. The list of certified nonlead ammunition can be easily accessed at the Commission’s website.</p> <p>[California Department of Fish and Game, Certified Nonlead Ammunition Information, http://www.dfg.ca.gov/wildlife/hunting/condor/certifiedammo.html (last visited Nov. 29, 2010) (Ex. E to Plaintiffs’ Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief).]</p>	<p>Objection: Relevance; otherwise undisputed.</p>
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20 21 22 23 24 25	<p>119. On December 30, 2009, DOJ published an “Information Bulletin” providing a brief overview of AB 962.</p> <p>[Information Bulletin from California Department of Justice Re: New and Amended Firearm Laws, dated December 30, 2009 (Ex. 8 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief).]</p>	<p>Undisputed.</p>
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27 **ISSUE NO. 1: THE STATE’S SUPPLEMENTAL UNDISPUTED MATERIAL FACTS IN**

28 **SUPPORT OF OPPOSITION TO PLAINTIFFS’ MOTION FOR SUMMARY**

JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

The State also submits the following statement of additional material facts that raise a triable issue with respect to Issue No. 1, together with references to supporting evidence, in opposition to Plaintiffs Motion.

The State's Supplemental Undisputed Material Facts and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
<p>1. Barry Bauer, president of plaintiff Herb Bauer Sporting Goods, testified that in his experience, the following cartridges of ammunition were chambered, or used, more often in a handgun than a rifle: .45 ACP, .45 GAP, 9mm Luger, 10mm Auto, .40 S&W, .25 ACP, and .380 ACP.</p> <p>[State's Compendium of Evidence, Exh. "A," B. Bauer Deposition, pp.36:18-37:3; 42:1-9; 42:19-43:2; 43:9-17; 43:18-44:2; 44:3-44:20; 49:8-49:19.]</p>	
<p>2. Plaintiffs' expert witness, Stephen Helsley, testified that the following cartridges of ammunition were handgun cartridges: .25 ACP, .45 GAP, 9mm Federal, 10mm Auto, .357 SIG, .44 Auto Mag, and .38 S&W.</p> <p>[State's Compendium of Evidence, Exh. "D," S. Helsley Deposition, pp. 129:12-17; 146:1-5; 155:22-156:7; 158:9-17; 159:24-160:1; 163:15-17; 165:2-4; 172:12-14.]</p>	
<p>3. Plaintiff Sheriff Clay Parker testified that, in his experience, the following calibers and cartridges of ammunition were used more often handguns: .45 ACP, .40 caliber, .25 ACP, .32 ACP, .38 Special, and .380 ACP.</p> <p>[State's Compendium of Evidence, Exh. "E," C. Parker Deposition, pp. 49:3-16; 54:25-55:7; 55:8-14; 55:15-22; 60:9-14; 61:7-20.]</p>	
<p>4. Plaintiff Steven Stonecipher testified that, in his experience, the following cartridges were chambered, or used, more often in handguns: .45 ACP, .380 ACP, 9mm Luger, 10mm, .40 S&W, .25 ACP, .32 ACP, .357 SIG, .454 Casull.</p> <p>[State's Compendium of Evidence, Exh. "F," S. Stonecipher Deposition, pp. 43:6-14; 43:18-22; 48:16-19; 52:1-24; 53:3-7; 53:11-15; 53:19-22; 54:1-5, 55:1-5; 56:23-57:1; 57:6-11.]</p>	

1 5. Barry Bauer, president of plaintiff Herb
2 Bauer Sporting Goods, testified that no one
3 from the California Department of Justice,
4 federal Bureau of Alcohol, Tobacco, Firearms
5 and Explosives, the Fresno County Sheriff's
6 Office, the Fresno County District Attorneys'
7 Office, or the Fresno City Police Department
8 have enforced sections 12060, 12061, or 12318
9 of the Penal Code against the company, or
10 threatened to do so.

11 [State's Compendium of Evidence, Exh. "A,"
12 B. Bauer Deposition, pp.117:3-119:6.]

13 6. Plaintiff Sheriff Clay Parker testified that he
14 has never visited a gun dealer or ammunition
15 vendor in Tehama County to determine
16 compliance with California's gun laws, opting
17 instead to allow the California Department of
18 Justice handle such enforcement duties.

19 [State's Compendium of Evidence, Exh. "E,"
20 C. Parker Deposition, pp. 42:6-15; 42:20-43:7.]

21 7. Plaintiff Sheriff Clay Parker testified that he
22 did not research, visited no websites, and read
23 no books to try to determine what ammunition
24 might be considered handgun ammunition or
25 "antique ammunition" within the meaning of
26 AB 962.

27 [State's Compendium of Evidence, Exh. "E,"
28 C. Parker Deposition, pp. 44:20-23; 45:14-
47:20.]

ISSUE NO. 2 – PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE SECOND CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF: DUE PROCESS VAGUENESS – AS APPLIED – BECAUSE, AS APPLIED TO PLAINTIFF BARRY BAUER, CALIFORNIA PENAL CODE SECTIONS 12060, 12061, AND 12318 PROVIDE NEITHER ADEQUATE NOTICE TO ORDINARY PERSONS NOR SUFFICIENT GUIDELINES TO LAW ENFORCEMENT TO PREVENT ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE LAW

Moving Party's Undisputed Material Facts and Supporting Evidence:	Opposing Party's Response and Supporting Evidence:
<p>120. Assembly Bill 962 passed the Legislature on September 11, 2009, and was approved by Governor Schwarzenegger on October 11, 2009; it added sections 12060, 12061, and 12318 (hereafter referred to collectively as the "Challenged Provisions") to the California Penal Code.</p> <p>[Assembly Bill No. 962 and Complete Bill History (Ex.1 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief).]</p>	<p>Undisputed .</p>
<p>121. There is general confusion as to what ammunition is "principally for use in handguns."</p> <p>[Allman Declaration at 2:13, Bauer Declaration at 2:13, Giles Declaration at 2:12, Hall Declaration at 2:13, Parker Declaration at 2:14, Potterfield Declaration at 2:13, Stonecipher Declaration at 2:10, Tenny Declaration at 1:12, Wright Declaration at 2:13.]</p>	<p>Disputed.</p> <p>Objection: Vague and ambiguous as to the meaning of "general confusion." See also the State's Objections to Evidence Nos.1-37, & 80-122 objecting to the cited portions of the declarations.</p> <p>State's Compendium of Evidence, Exh. "A," B. Bauer Deposition, pp.36:18-37:3; 42:1-9; 42:19-43:2; 43:9-17; 43:18-44:2; 44:3-44:20; 49:8-49:19; Exh. "D," S. Helsley Deposition, pp. 129:12-17; 146:1-5; 155:22-156:7; 158:9-17; 159:24-160:1; 163:15-17; 165:2-4; 172:12-14; Exh. "E," C. Parker Deposition, pp. 49:3-16; 54:25-55:7; 55:8-14; 55:15-22; 60:9-14; 61:7-20; Exh. "F," S. Stonecipher Deposition, pp. 43:6-14; 43:18-22; 48:16-19; 52:1-24; 53:3-7; 53:11-15; 53:19-22; 54:1-5, 55:1-5; 56:23-57:1; 57:6-11.</p>

1	122. There is confusion among law enforcement officers as to what ammunition is “principally for use in handguns.”	Disputed.
2		Objection: Conclusory; Lacks Foundation; Vague. See Objections to Evidence Nos. 2-8 and 80-86.
3	[Parker Declaration at 2:13, Allman Declaration at 2:13]	
4		Deposition of Clay Parker, pp. 44:20-23, 45:14-47:20 [testifying he has not attempted to research or determine what ammunition might qualify]; pp. 42:6-15; 42:20-43:7 [testifying that the Tehama County Sheriff’s Department defers to the California Department of Justice enforcement of gun laws at gun and ammunition vendors]
5		Declaration of Blake Graham, ¶¶ 10-17
6	123. Penal Code section 12060 does not rely on a list of ammunition “principally for use in handguns.”	Objection: Relevance, Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12060 of the Penal Code provides the best evidence of its content.
7	[Pen. Code, § 12060.]	
8	124. Penal Code section 12061 does not rely on a list of ammunition “principally for use in handguns.”	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12061 of the Penal Code provides the best evidence of its content.
9	[Pen. Code, § 12061.]	
10	125. Penal Code section 12318 does not rely on a list of ammunition “principally for use in handguns.”	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12318 of the Penal Code provides the best evidence of its content.
11	[Pen. Code, § 12318.]	
12	126. Penal Code section 12323 does not rely on a list of ammunition “principally for use in handguns.”	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12323 of the Penal Code provides the best evidence of its content.
13	[Pen. Code, § 12323.]	
14	127. Defendant DOJ has not promulgated regulations regarding the definition of “handgun ammunition” for purposes of the Challenged Provisions.	Undisputed.
15	[Responses to Plaintiffs’ Request for	

1	Admissions, Set One (Ex. 56 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:22-24.]	
4	128. Penal Code section 12060 does not confer authority on the Department of Justice ("DOJ") to create a list of ammunition "principally for use in handguns."	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12060 of the Penal Code provides the best evidence of its content.
7	[Pen. Code, § 12060.]	
8	129. Penal Code section 12061 does not confer authority on the Department of Justice ("DOJ") to create a list of ammunition "principally for use in handguns."	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12061 of the Penal Code provides the best evidence of its content.
11	[Pen. Code, § 12061.]	
12	130. Penal Code section 12318 does not confer authority on the Department of Justice ("DOJ") to create a list of ammunition "principally for use in handguns."	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12318 of the Penal Code provides the best evidence of its content.
15	[Pen. Code, § 12318.]	
16	131. Penal Code section 12323 does not confer authority on the Department of Justice ("DOJ") to create a list of ammunition "principally for use in handguns."	Objection: Relevance; Secondary Evidence Rule (Evid. Code §§ 1521 & 1523. Section 12323 of the Penal Code provides the best evidence of its content.
19	[Pen. Code, § 12323.]	
21	132. Senate Bill 1276 was a failed measure introduced by Senator Hart in 1994. It attempted to introduce provisions regulating the transfer of "handgun ammunition" substantially similar to those appearing in the Challenged Provisions.	Objection: Relevance. Hearsay. Senate Bill 1276 has no bearing on any material fact before the Court and is not legislative history. See:
24	[Senate Bill 1276 (1994) as Amended in Senate on May 26, 1994 (Ex. H to Plaintiffs' Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at p. 4; Legislative History Report and Analysis Re: Senate Bill 1276 (Hart – 1994) (Ex. 5 to Plaintiffs' Evidence in Support of	(1) The State's Objections to Plaintiffs' Request for Judicial Notice; and
25		(2) The State's Objections to Evidence No. 126.

1	Motion for Summary Judgment or in the	
2	Alternative Summary Adjudication / Trial	
3	Brief) at LH009–010.]	
4	133. A Bill Analysis conducted by the Senate	Objection: Relevance. Hearsay. Senate Bill
5	Committee on Judiciary for Senate Bill 1276	1276 has no bearing on any material fact before
6	contains a “comment” on Penal Code section	the Court and is not legislative history. See:
7	12323’s definition of “handgun ammunition	(1) The State’s Objections to Plaintiffs’ Request
8	which reads, in relevant part:	for Judicial Notice; and
9	“Existing Penal Code section 12323 was added	(2) The State’s Objections to Evidence No. 126.
10	in 1982 and defines handgun ammunition as	
11	“ammunition principally for use in pistols and	
12	revolvers . . . notwithstanding that the	
13	ammunition may also be used in some rifles. . .	
14	.” However, it may not be suitable for defining	
15	handgun ammunition in general. It may be	
16	assumed that many ammunition calibers are	
17	suitable for both rifles and handguns. Without	
18	additional statutory guidance, it may be very	
19	difficult for dealers to determine which	
20	ammunition is “handgun ammunition” for	
21	purposes of the requirements added to Penal	
22	Code section 12076.”	
23	[Legislative History Report and Analysis Re:	
24	Senate Bill 1276 (Hart – 1994) (Ex. 5 to	
25	Plaintiffs’ Evidence in Support of Motion for	
26	Summary Judgment or in the Alternative	
27	Summary Adjudication / Trial Brief) at	
28	LH010.]	
18	134. Senate Bill 1276 (1994) relied on the	Objection: Relevance. Hearsay. Senate Bill
19	definition of “handgun ammunition” found at	1276 has no bearing on any material fact before
20	Penal Code section 12323.	the Court and is not legislative history. See:
21	[Senate Bill 1276 (1994) as Amended in	(1) The State’s Objections to Plaintiffs’ Request
22	Senate on May 26, 1994 (Ex. H to Plaintiffs’	for Judicial Notice; and
23	Request for Judicial Notice in Support of	(2) The State’s Objections to Evidence No. 126.
24	Motion for Summary Judgment or in the	
25	Alternative Summary Adjudication / Trial	
26	Brief) at p. 4.]	
27	135. Defendants’ expert admitted that he was	Objection: Relevance. What Mr. Graham was
28	asked to opine on what he thought should be	asked to do vis-à-vis Assembly Bill 2358 is not
	included as “handgun ammunition” in	relevant to any material fact in this case. See:
	Assembly Bill 2358’s enumerated list of	(1) The State’s Objections to Plaintiffs’ Request
	“handgun ammunition” calibers.	for Judicial Notice; and
	[Graham Deposition Vol. One (Ex. 57 to	
	Plaintiffs’ Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	

1	Summary Adjudication / Trial Brief) at 102:21-103:17]	(2) Objections to Evidence Nos. 123-125.
2		
3	136. When asked which ammunition he	Objection: Relevance. What Mr. Graham was
4	thought should be included in AB 2358's list	asked to do vis-à-vis Assembly Bill 2358 is not
5	of "handgun ammunition," Defendants' expert	relevant to any material fact in this case. See:
6	said he remembered identifying the following:	(1) The State's Objections to Plaintiffs' Request
7	" .45, .380., .25, .40, .38, .357, possibly .4.54,	for Judicial Notice; and
8	and possibly .762, and maybe .223."	(2) Objections to Evidence Nos. 123-125.
9	[Graham Deposition Vol. One (Ex. 57 to	
10	Plaintiffs' Evidence in Support of Motion for	
11	Summary Judgment or in the Alternative	
12	Summary Adjudication / Trial Brief) at	
13	103:18-104:10.]	
14	137. Counsel for Defendant DOJ has stated	Objection: Relevance. Hearsay. See
15	that Defendant DOJ will not and cannot adopt	Objections to Evidence Nos. 127-128.
16	a policy as to what ammunition constitutes	
17	"handgun ammunition" for purposes of the	
18	Challenged Provisions.	
19	[Public Records Act Request Sent to California	
20	Department of Justice Re: Assembly Bill 962,	
21	dated December 16, 2009 (Ex. 6 to Plaintiffs'	
22	Evidence in Support of Motion for Summary	
23	Judgment or in the Alternative Summary	
24	Adjudication / Trial Brief); Defendant	
25	Department of Justice Response to Public	
26	Records Act and Relevant E-mail Enclosures,	
27	dated January 25, 2010 (Ex. 7 to Plaintiffs'	
28	Evidence in Support of Motion for Summary	
	Judgment or in the Alternative Summary	
	Adjudication / Trial Brief) at AM0002,	
	AM0004, AM0006, AM0013.]	
21	138. On August 19, 2010, then pending	Objection: Relevance. Assembly Bill 2358 is
22	Assembly Bill 2358 was amended to include in	not relevant to any material fact in this case.
23	Penal Code section 12323 the following	See:
24	definition of "handgun ammunition": "any	(1) The State's Objections to Plaintiffs' Request
25	variety of ammunition in the following	for Judicial Notice; and
26	calibers, notwithstanding that the ammunition	(2) Objections to Evidence Nos. 123-125
27	may also be used in some rifles: .22 rimfire,	
28	.25, .32, .38, .9mm, .10mm, .40, .41, .44, .45,	
	5.7x28mm, .223, .357, .454, .5.56x45mm,	
	7.62x39, 7.63mm, 7.65mm, .50."	
	[Assembly Bill No. 2358 (2010) as Amended	
	in Senate August 19, 2010 (Ex.2 to Plaintiffs'	
	Evidence in Support of Motion for Summary	
	Judgment or in the Alternative Summary	

1	Adjudication / Trial Brief, Ex. F to Plaintiffs' Request for Judicial Notice in Support of	
2	Motion for Summary Judgment or in the	
3	Alternative Summary Adjudication / Trial	
4	Brief) at 7:29-8:21; Complete Bill History,	
5	A.B. No. 2358 (Ex. 4 to Plaintiffs' Evidence in	
6	Support of Motion for Summary Judgment or	
7	in the Alternative Summary Adjudication /	
8	Trial Brief).]	
9	139. On August 30, 2010, then pending	Objection: Relevance. Assembly Bill 2358 is
10	Assembly Bill 2358 was amended to include in	not relevant to any material fact in this case.
11	Penal Code section 12323 the following	See:
12	definition of "handgun ammunition": "any	(1) The State's Objections to Plaintiffs' Request
13	variety of ammunition in the following	for Judicial Notice; and
14	calibers, notwithstanding that the ammunition	(2) Objections to Evidence Nos. 123-125
15	may also be used in some rifles: .22 <i>rimfire</i> ,	
16	.25, .32, .38, .9mm, .10mm, .40, .41, .44, .45,	
17	5.7x28mm, .357, .454, .556x45mm, 7.63mm,	
18	7.65mm."	
19	[Assembly Bill No. 2358 (2010) as Amended	
20	in Senate August 30, 2010 (attached as Ex. 3 to	
21	Plaintiffs' Evidence in Support of Motion for	
22	Summary Judgment or in the Alternative	
23	Summary Adjudication / Trial Brief, Ex. G to	
24	Plaintiffs' Request for Judicial Notice in	
25	Support of Motion for Summary Judgment or	
26	in the Alternative Summary Adjudication /	
27	Trial Brief) at 16:11-40; Complete Bill	
28	History, A.B. No. 2358 (attached as Ex.4 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief).]	
	140. All modern centerfire and rimfire	Undisputed.
	ammunition for use in handguns or rifles	
	consist of the same components: a metal casing	
	that suspends a metal projectile over a charge	
	of powder confined within the metal casing	
	and a primer (or priming charge) to ignite the	
	powder - ("self-contained metallic	
	ammunition").	
	[Helsley Declaration at ¶ 20.]	
	141. In order of their specificity, these three	Undisputed.
	terms are used to describe a self-contained	
	metallic cartridge: "ammunition," "caliber,"	
	and its given "cartridge name."	

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[Helsley Declaration at ¶ 54.]	
<p>142. “Ammunition” is defined in the Glossary of the Association of Firearms and Tool Mark Examiners as:</p> <p>“One or more loaded cartridges consisting of a primed case, propellant, and with one or more projectiles. Also referred to as fixed or live ammunition.”</p> <p>[Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at Merged Ex. C at p. 2.]</p>	Undisputed.
<p>143. The definition of “caliber” depends on whether it is applied to a firearm or to ammunition. When applied to ammunition, the Glossary of the Association of Firearms and Tool Mark Examiners defines it as: “A numerical term, without the decimal point, included in a cartridge name to indicate the nominal bullet diameter.”</p> <p>[Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at Merged Ex. C at p. 5.]</p>	Undisputed.
<p>144. It is a more precise description of ammunition to identify it by its specific cartridge name because often the “caliber” in the cartridge’s given name does not reflect the actual bore or bullet diameter.</p> <p>[Helsley Declaration at ¶¶ 54-64.]</p>	Objection: Mischaracterizes the witness’s testimony; vague and ambiguous as to the context where the description might be more precise.
<p>145. Within any given “caliber,” there are usually various “cartridges,” some of which may be used more often in a handgun, and some of which may be used more often in a rifle.</p> <p>[Helsley Declaration at ¶¶ 56-64.]</p>	Undisputed.

146. Reference to the measurement of a projectile's diameter (i.e., its caliber) is not a particularly precise method of identifying ammunition. [Helsley Declaration at ¶ 55-64.]	Objection: Mischaracterizes the witness's testimony. Vague and ambiguous as to context and the phrase "not a particularly precise method."
147. Virtually all calibers can be and are fired safely through both handguns and rifles. [Helsley Declaration at ¶ 65.]	Objection: Mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 42-44.
148. Virtually all cartridges can be and are fired safely through both handguns and rifles. [Helsley Declaration at ¶ 65.]	Objection: Mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 42-44.
149. Packaging for ammunition often has no label associating its use with either a handgun or a rifle. [Helsley Declaration at ¶¶ 68-69.]	Objection: Mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 48-50.
150. Packaging for ammunition does not identify whether the ammunition it contains is "principally for use in handguns." [Helsley Declaration at ¶ 69.]	Objection: Mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 48-50.
151. In those instances where ammunition manufacturers or vendors label or market a particular cartridge as a "handgun cartridge," such markings do not identify whether that cartridge, or ammunition of that caliber, is actually "principally used in handguns." [Helsley Declaration at ¶¶ 68-69.]	Objection: Mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 48-50.
152. Experts cannot form a reliable opinion as to whether a given caliber or cartridge is intended to be or has actually been fired more than fifty percent of the time through a handgun. [Helsley Declaration at ¶¶ 66, 72-73.]	Disputed. Objection: Assumes facts not in evidence; mischaracterizes the witness's testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 45-47, 56-59. Declaration of Blake Graham, ¶¶ 10-17.

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<p>153. There exists in the firearms industry no commonly understood delineation between “handgun ammunition” and other ammunition that indicates whether certain ammunition is actually fired or intended to be fired more often in handguns than in long-guns.</p> <p>[Helsley Declaration at ¶¶ 65-70, 72-73.]</p>	<p>Objection: Mischaracterizes the witness’s testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 42-59.</p>
<p>154. There exists in the firearms industry no commonly understood definition of “handgun ammunition” that equates with the “principally for use in handguns” language relied on by the Challenged Provisions.</p> <p>[Helsley Declaration at ¶¶ 65-70.]</p>	<p>Objection: Mischaracterizes the witness’s testimony; Conclusory; Lacks foundation; vague. See Objections to Evidence Nos. 42-52.</p>
<p>155. Defendants assert 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 might enforce them,” as to what ammunition is “used principally in pistols and revolvers.”</p> <p>[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 6:16-19, 7:8-11.]</p>	<p>Undisputed.</p>
<p>156. Defendants identify the following ammunition as “principally for use in handguns” for purposes of the Challenged Provisions: .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25, and .32.</p> <p>[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 5:7-8, 5:21-22; Amended Response to Specially Prepared Interrogatory No. 5 (Ex. 55 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 2:24-3:2.]</p>	<p>Undisputed that the State indentified these calibers of ammunition in response to Plaintiff’s Special Interrogatory No. 5 after objecting to the Plaintiff’s use of the phrase “types of ammunition” as vague and ambiguous.</p>

1	157. Defendants assert that the ammunition they deemed “principally for use in handguns”	Undisputed that these comprised some of the
2	based on their review of handgun sales records in California, written documents, ammunition	steps Mr. Graham took in his expert analysis,
3	vendor websites, and online encyclopedias, is “commonly understood” to be “handgun	otherwise disputed.
4	ammunition” for purposes of the Challenged Provisions.	Declaration of Blake Graham, ¶¶ 10-17.
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6	[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs’	
7	Evidence in Support of Motion for Summary Judgment or in the Alternative Summary	
8	Adjudication / Trial Brief) at 7:8-20; Graham Deposition Vol. One (Ex. 57 to Plaintiffs’	
9	Evidence in Support of Motion for Summary Judgment or in the Alternative Summary	
10	Adjudication / Trial Brief) at 118:3-11, 142:21-25.]	
11		
12	158. Additional research over time may cause Defendants’ list of ammunition “principally for	Undisputed.
13	use in handguns” to change.	
14	[Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for	
15	Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at	
16	204:21-205:8; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of	
17	Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial	
18	Brief) at 67:21-68:1, 116:11-18, 118:11-18 9.]	
19		
20	159. Regulations promulgated at some date in the future may cause Defendants’ list of	Undisputed.
21	ammunition “principally for use in handguns” to change.	
22	[Amended Response to Specially Prepared Interrogatory No. 5 (Ex. 55 to Plaintiffs’	
23	Evidence in Support of Motion for Summary Judgment or in the Alternative Summary	
24	Adjudication / Trial Brief) at 2:26-3:2.]	
25		
26	160. Defendants’ expert admitted that if he had the opportunity to review sales records	Objection: Mischaracterizes the witness’s
27	over a larger time frame, his opinion as to what ammunition is “principally for use in a	testimony.
28	handgun” might have changed.	

1	[Graham Deposition Vol. Two (Ex. 58 to	
2	Plaintiffs' Evidence in Support of Motion for	
3	Summary Judgment or in the Alternative	
4	Summary Adjudication / Trial Brief) at	
5	118:11-18.]	
6	161. Defendants' expert admits he may have	Objection: Mischaracterizes the witness's
7	left cartridges off Defendants' list of	
8	ammunition "principally for use in handguns"	testimony (which testimony is not included on
9	that [based on his understanding of "handgun	
10	ammunition"], should have been included.	Plaintiffs' Exhibit 58).
11	[Graham Deposition Vol. Two (Ex. 58 to	
12	Plaintiffs' Evidence in Support of Motion for	
13	Summary Judgment or in the Alternative	
14	Summary Adjudication / Trial Brief) at 69:20-	
15	70:5.]	
16	162. Defendants' expert's methodology for	Undisputed that these comprised some of the
17	determining what ammunition was "principally	
18	for use in handguns" was a two-step process	steps Mr. Graham took in his expert analysis,
19	that involved the expert looking at the records	
20	of handgun sales in California, and then	otherwise disputed.
21	reviewing websites, written materials and	
22	drawing on his personal experience.	Declaration of Blake Graham, ¶¶ 10-17.
23	[Graham Deposition Vol. Two (Ex. 58 to	
24	Plaintiffs' Evidence in Support of Motion for	
25	Summary Judgment or in the Alternative	
26	Summary Adjudication / Trial Brief) at 63:22-	
27	64:6, 140:13-21.]	
28	163. Defendants' list of calibers that constitute	Undisputed that these comprised some of the
	ammunition "principally for use in handguns"	
	was based on the records of handgun sales in	steps Mr. Graham took in his expert analysis,
	California over each of the past five years,	
	written materials, ammunition vendor	otherwise disputed.
	websites, and online encyclopedias."	
	[Responses to Specially Prepared	Declaration of Blake Graham, ¶¶ 10-17.
	Interrogatories (Ex. 54 to Plaintiffs' Evidence	
	in Support of Motion for Summary Judgment	
	or in the Alternative Summary Adjudication /	
	Trial Brief) at 7:14-20.]	
	164. Defendant DOJ is required to keep and	Undisputed.
	maintain records of handgun sales in	
	California; this record is commonly referred to	
	as the Dealer Record of Sales ("DROS") and it	

1	is linked to the Automated Firearms System ("AFS").	
2		
3	[Responses to Specially Prepared	
4	Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:14; Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 176:14-17, 177:7-13, 190:3-6.]	
8		
9	165. Defendants and their expert witness relied in part on the DROS records to determine which ammunition should be included in Defendants' list of ammunition they consider "handgun ammunition" for purposes of the Challenged Provisions.	Undisputed.
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12	[Responses to Specially Prepared	
13	Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:13-18; Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 181:14-16, 181:23-182:1; Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 9:17-20.]	
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20	166. Defendants' expert's reliance on DROS records was his "starting point." He used the records to determine which popular handgun calibers should be researched further to determine if ammunition of those calibers is "principally for use in handguns."	Objection: Mischaracterizes the witness's testimony.
21		Declaration of Blake Graham, ¶ 13.
22		
23		
24	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 9:17-20, 63:22-64:6.]	
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26		
27	167. Defendants' expert admitted that certain calibers may have been omitted from	Objection: Mischaracterizes the witness's
28		

1	Defendants' list of ammunition "principally for use in handguns" because they were	testimony.
2	"unpopular."	Declaration of Blake Graham, ¶¶ 10-17.
3	[Graham Deposition Vol. One (Ex. 57 to	
4	Plaintiffs' Evidence in Support of Motion for	
5	Summary Judgment or in the Alternative	
6	Summary Adjudication / Trial Brief) at	
7	204:21-207:9.]	
8	168. Defendants and their expert relied on	Undisputed.
9	DROS records only from the previous five	
10	years to determine the handguns most	
11	commonly sold in California over the same	
12	time period.	
13	[Responses to Specially Prepared	
14	Interrogatories, Set One (Ex. 54 to Plaintiffs'	
15	Evidence in Support of Motion for Summary	
16	Judgment or in the Alternative Summary	
17	Adjudication / Trial Brief) at 7:14-16; Graham	
18	Deposition Vol. Two (Ex. 58 to Plaintiffs'	
19	Evidence in Support of Motion for Summary	
20	Judgment or in the Alternative Summary	
21	Adjudication / Trial Brief) at 115:18-116:2,	
22	116:17-117:6.]	
23	169. Defendants' expert does not have any	Undisputed.
24	information regarding what percentage of the	
25	total guns in circulation are represented by the	
26	records of handgun sales in the past five years.	
27	[Graham Deposition Vol. Two (Ex. 58 to	
28	Plaintiffs' Evidence in Support of Motion for	
29	Summary Judgment or in the Alternative	
30	Summary Adjudication / Trial Brief) at 118:4-	
31	10.]	
32	170. The DROS records relied upon by	Objection: Mischaracterizes the witness'
33	Defendants' expert combine firearms that	testimony.
34	utilize ammunition referred to by Defendants	Declaration of Blake Graham, ¶ 13.
35	as "handgun ammunition" and firearms that	
36	utilize ammunition referred to by Defendants	
37	as "rifle ammunition" under a single caliber	
38	listing.	
39	[Graham Deposition Vol. Two (Ex. 58 to	
40	Plaintiffs' Evidence in Support of Motion for	
41	Summary Judgment or in the Alternative	
42	Summary Adjudication / Trial Brief) at 12:18-	
43	14:2.]	

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<p>171. The DROS records relied upon by Defendants' expert are not precise in identifying the sales of handguns that use a specific cartridge.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 14:10-23.]</p>	<p>Objection: Mischaracterizes the witness' testimony.</p>
<p>172. The DROS system does not break down sales by guns as to every cartridge of ammunition sold and whether such ammunition is a "rifle cartridge," "handgun cartridge," or both.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 19:23-20:20.]</p>	<p>Undisputed.</p>
<p>173. The DROS records relied on by Defendants' expert does not contain a listing of all types of cartridges fired by a firearm of that caliber due to space limitations.</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 22:11-23:9.]</p>	<p>Undisputed.</p>
<p>174. Defendants' expert admitted that the DROS records relied on to inform his opinions contained categories of ammunition that could have been a mixture of what he considers "handgun ammunition" and "rifle ammunition."</p> <p>[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 91:18-92:6.]</p>	<p>Objection: Mischaracterizes the witness' testimony.</p>

175. The DROS records relied on by Defendants' expert include a number of entries in calibers Defendants' expert considers "common rifle caliber rounds."	Objection: Mischaracterizes the witness' testimony. Testimony also subject to objections made during the deposition concerning speculation and vagueness.
[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 189:10-192:18.]	
176. There is no record of total rifle sales in California in existence because Defendant DOJ is prohibited from retaining records on the sale of long-guns.	Undisputed.
[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 183:19-184:15.]	
177. Defendants' expert did not determine the total number of rifle sales in California as compared with the total number of handgun sales to inform his opinion as to whether a particular ammunition was principally used in a handgun.	Disputed. Objection: Mischaracterizes the witness' testimony. Declaration of Blake Graham, ¶¶ 15-17.
[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 93:17-24.]	
178. Defendants' expert was unable to compare the sales of handguns using a particular ammunition with rifle sales that use the same ammunition because he is admittedly unaware of any source of data regarding rifle sales.	Undisputed.
[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 93:6-24.]	
179. Defendants' expert admits his opinion as	Objection: Mischaracterizes the witness's

1 2 3 4 5 6	to which ammunition is “principally for use in handguns” may have been different had he been able to compare handgun sales with rifle sales. [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 95:13-20.]	testimony which merely says it may have been helpful to have that data. See also Declaration of Blake Graham, ¶¶ 15-17.
7 8 9 10 11 12 13 14	180. Defendants relied in part on the representations made by ammunition vendors on their websites to determine whether certain ammunition should be included in Defendants’ list of ammunition they consider “handgun ammunition” for purposes of the Challenged Provisions. [Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:18-20.]	Undisputed.
15 16 17 18 19 20 21	181. Defendants’ expert relied in part on the fact that ammunition vendor websites listed certain cartridges as “handgun ammunition” to inform his opinion as to whether specific ammunition was “principally for use in handguns.” [Graham Deposition Vol. Two (Ex. 58 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 44:1-14, 64:17-65:6.]	Undisputed.
22 23 24 25 26 27 28	182. Defendants’ expert testified that the fact that certain websites refer to some ammunition as “handgun cartridges” helped establish the DOJ’s list of calibers “principally for use in handgun.” [Graham Deposition Vol. One (Ex. 57 to Plaintiffs’ Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 93:5-95:13, 160:19-23, 166:21-167:6.]	Objection: Mischaracterizes the witness’s testimony. Declaration of Blake Graham, ¶¶ 10-17.

1	183. The four vendor websites that	Objection: Mischaracterizes the witness's
2	Defendants' expert relied to inform his opinion	testimony.
3	as to whether specific ammunition was	Declaration of Blake Graham, ¶¶ 10-17.
4	"principally for use in handguns" include:	
5	Cabela's, Cheaper Than Dirt, Inc., J & G Sales,	
6	and Midway USA.	
7	[Graham Deposition Vol. One (Ex. 57 to	
8	Plaintiffs' Evidence in Support of Motion for	
9	Summary Judgment or in the Alternative	
10	Summary Adjudication / Trial Brief) at 93:5-	
11	20, 148:23-149:4; Graham Deposition Vol.	
12	Two (Ex. 58 to Plaintiffs' Evidence in Support	
13	of Motion for Summary Judgment or in the	
14	Alternative Summary Adjudication / Trial	
15	Brief) at 37:8-13, 40:11-15, 43:4-10.]	
16		
17	184. In forming his opinion regarding whether	Objection: Mischaracterizes the witness's
18	ammunition was principally used in handguns,	testimony.
19	Defendants' expert gave some weight to	
20	whether the website listed the ammunition as	
21	"popular."	
22	[Graham Deposition Vol. Two (Ex. 58 to	
23	Plaintiffs' Evidence in Support of Motion for	
24	Summary Judgment or in the Alternative	
25	Summary Adjudication / Trial Brief) at 65:9-	
26	16.]	
27		
28	185. Defendants' expert did not contact the	Undisputed.
	relied-upon website vendors or do any	
	investigation as to what criteria the websites	
	relied upon to characterize the ammunition as	
	"popular" or what the websites'	
	characterization meant.	
	[Graham Deposition Vol. Two (Ex. 58 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at 44:15-	
	46:3.]	
	186. Defendants' expert admitted there is a	Objection: Mischaracterizes the witness's
	difference between "popular" ammunition for a	testimony.
	handgun and ammunition that is "principally	
	for use in a handgun."	
	[Graham Deposition Vol. Two (Ex. 58 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	

1	Summary Adjudication / Trial Brief) at 102:6-104:3.]	
2		
3	187. None of the relied-upon website vendors provided Defendants' expert with data regarding the total rounds of each type of ammunition sold.	Undisputed.
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6	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 46:4-16.]	
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9	188. The websites Defendants' expert relied upon to inform his opinions as to which ammunition is "principally for use in handguns" list as "handgun ammunition" ammunition that Defendants' expert does not consider to be principally used in handguns.	Undisputed.
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13	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 62:25-63:21.]	
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16	189. Defendants' expert's decision to exclude certain ammunition listed as "handgun ammunition" on the vendor websites he relied upon to inform his opinions as to which ammunition is "principally for use in handguns" was based on his experience in observing the use of that ammunition in the field.	Objection: Mischaracterizes the witness's testimony.
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21	Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 66:15-67:9.]	
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24	190. Michael Tenny, the party responsible for ensuring compliance with all applicable laws in the locations from and to which Cheaper Than Dirt, Inc., ships ammunition, does not know what ammunition is "handgun ammunition" and thus subject to the Challenged Provisions.	Objection: Relevance; Conclusory; Lacks Foundation. See Objections to Evidence Nos. 105-113 & 133.
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1	[Tenny Declaration at 1:6-11.]	
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3	191. Larry Potterfield, the party responsible	Objection: Relevance; Conclusory; Lacks
4	for ensuring compliance with all applicable	
5	laws in the locations from and to which	
6	Midway Arms, Inc.(dba Midway USA), ships	
7	ammunition, does not know what ammunition	Foundation. See Objections to Evidence Nos.
8	is “handgun ammunition” and thus subject to	87-95 & 132.
9	the Challenged Provisions.	
10	[Potterfield Declaration at 2:3-12.]	
11		
12	192. Brian Hall, the party responsible for	Objection: Relevance; Conclusory; Lacks
13	ensuring compliance with all applicable laws in	
14	the locations from and to which Chattanooga	
15	Shooting Supplies, Inc. (dba Natchez Shooters	
16	Supplies), ships ammunition, does not know	Foundation. See Objections to Evidence Nos.
17	what ammunition is “handgun ammunition”	27-37.
18	and thus subject to the Challenged Provisions.	
19	[Hall Declaration at 2:3-12.]	
20		
21	193. Michael Tenny, the party responsible for	Objection: Relevance; Conclusory; Lacks
22	ensuring compliance with all applicable laws in	
23	the locations from and to which Cheaper Than	
24	Dirt, Inc., ships ammunition, does not know	
25	what ammunition is “principally for use in a	Foundation. See Objections to Evidence Nos.
26	handgun” and is unaware of any source to	105-113 & 133.
27	which he can look to determine what	
28	ammunition suitable for use in both handguns	
	and rifles is “principally for use in a handgun.”	
	[Tenny Declaration at 1:12-14.]	
	194. Larry Potterfield, the party responsible	Objection: Relevance; Conclusory; Lacks
	for ensuring compliance with all applicable	
	laws in the locations from and to which	
	Midway Arms, Inc.(dba Midway USA), ships	
	ammunition, does not know what ammunition	Foundation. See Objections to Evidence Nos.
	is “principally for use in a handgun” and is	87-95 & 132.
	unaware of any source to which he can look to	
	determine what ammunition suitable for use in	
	both handguns and rifles is “principally for use	
	in a handgun.”	
	[Potterfield Declaration at 2:13-15.]	
	195. Brian Hall, the party responsible for	Objection: Relevance; Conclusory; Lacks

1	ensuring compliance with all applicable laws in the locations from and to which Chattanooga Shooting Supplies, Inc. (dba Natchez Shooters Supplies), ships ammunition, does not know what ammunition is “principally for use in a handgun” and is unaware of any source to which he can look to determine what ammunition suitable for use in both handguns and rifles is “principally for use in a handgun.”	Foundation. See Objections to Evidence Nos. 27-37.
2		
3		
4		
5		
6	[Hall Declaration at 2:13-15.]	
7		
8	196. Michael Tenny, the party responsible for ensuring compliance with all applicable laws in the locations from and to which Cheaper Than Dirt, Inc., ships ammunition, does not know what ammunition is exempt from the Challenged Provisions as ammunition that is “designed and intended to be used in antique firearms” manufactured before 1898, because many cartridges of ammunition used in firearms manufactured before 1898 are also used in firearms manufactured after 1898, including cartridges sold by Cheaper Than Dirt, Inc.	Objection: Relevance; Conclusory; Lacks Foundation. See Objections to Evidence Nos. 105-113 & 133.
9		
10		
11		
12		
13		
14		
15	[Tenny Declaration at 1:15-19.]	
16		
17	197. Larry Potterfield, the party responsible for ensuring compliance with all applicable laws in the locations from and to which Midway Arms, Inc.(dba Midway USA), ships ammunition, does not know what ammunition is exempt from the Challenged Provisions as ammunition that is “designed and intended to be used in antique firearms” manufactured before 1898, because many cartridges of ammunition used in firearms manufactured before 1898 are also used in firearms manufactured after 1898, including cartridges sold by Midway Arms, Inc.(dba Midway USA).	Objection: Relevance; Conclusory; Lacks Foundation. See Objections to Evidence Nos. 87-95 & 132.
18		
19		
20		
21		
22		
23		
24	[Potterfield Declaration at 2:16-20.]	
25		
26	198. Brian Hall, the party responsible for ensuring compliance with all applicable laws in the locations from and to which Chattanooga Shooting Supplies, Inc. (dba Natchez Shooters Supplies), ships ammunition, does not know what ammunition is exempt from the	Objection: Relevance; Conclusory; Lacks Foundation. See Objections to Evidence Nos. 27-37.
27		
28		

1	Challenged Provisions as ammunition that is	
2	"designed and intended to be used in antique	
3	firearms" manufactured before 1898, because	
4	many cartridges of ammunition used in	
5	firearms manufactured before 1898 are also	
6	used in firearms manufactured after 1898,	
7	including cartridges sold by Chattanooga	
8	Shooting Supplies, Inc. (dba Natchez Shooters	
9	Supplies).	
10	[Hall Declaration at 2:16-20.]	
11		
12	199. Cheaper Than Dirt, Inc., has announced	Objection: Relevance; Conclusory; Lacks
13	that it will cease shipping all ammunition to	Foundation. See Objections to Evidence Nos.
14	non-exempt California customers beginning	105-113 & 133.
15	January 1, 2011, to avoid risking criminal	
16	prosecution under Penal Code section 12328.	
17	[Tenny Declaration at 2:1-8.]	
18		
19	200. Midway Arms, Inc.(dba Midway USA),	Objection: Relevance; Conclusory; Lacks
20	has announced that it will cease shipping all	Foundation. See Objections to Evidence Nos.
21	ammunition to non-exempt California	87-95 & 132.
22	customers beginning January 1, 2011, to avoid	
23	risking criminal prosecution under Penal Code	
24	section 12318.	
25	[Potterfield Declaration at 3:1-9.]	
26		
27	201. It is the current intent of Chattanooga	Objection: Relevance; Conclusory; Lacks
28	Shooting Supplies, Inc. (dba Natchez Shooters	Foundation. See Objections to Evidence Nos.
	Supplies), to cease shipping all ammunition	27-37.
	that is suitable for use in both handguns and	
	long-guns to non-exempt California customers	
	beginning February 1, 2011, to avoid risking	
	criminal prosecution under Penal Code section	
	12318.	
	[Hall Declaration at 3:1-6.]	
	202. Defendants' expert knows of no specific	Undisputed
	trade magazine articles that he used to inform	
	his opinion regarding which ammunition is	
	"principally for use in handguns."	
	[Graham Deposition Vol. Two (Ex. 58 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at 34:8-	

1	35:14.]	
2		
3	203. Defendants' expert did not use any trade	Undisputed.
4	magazine articles regarding the amount of	
5	particular ammunition sold.	
6	[Graham Deposition Vol. Two (Ex. 58 to	
7	Plaintiffs' Evidence in Support of Motion for	
8	Summary Judgment or in the Alternative	
9	Summary Adjudication / Trial Brief) at 35:15-	
10	36:13.]	
11		
12	204. Defendants' expert's use of trade	Undisputed.
13	magazines to inform his opinion regarding	
14	ammunition "principally for use in handguns"	
15	is based solely upon his reading of trade	
16	magazines over the years, with no specific	
17	reference to a particular article or data from	
18	those trade magazines on the subject.	
19	[Graham Deposition Vol. Two (Ex. 58 to	
20	Plaintiffs' Evidence in Support of Motion for	
21	Summary Judgment or in the Alternative	
22	Summary Adjudication / Trial Brief) at 35:15-	
23	36:13, 36:14-37:6]	
24		
25	205. The DOJ's expert testified that he pulled	Undisputed, subject to objections in the
26	from his personal and professional experiences	deposition transcript.
27	to determine what ammunition should be	
28	considered "handgun ammunition" under the	
	Challenged Provisions.	
	[Graham Deposition Vol. One (Ex. 57 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at 81:24-	
	82:4, 91:1-4, 186:17-24; Graham Deposition	
	Vol. Two (Ex. 58 to Plaintiffs' Evidence in	
	Support of Motion for Summary Judgment or	
	in the Alternative Summary Adjudication /	
	Trial Brief) at 24:8-18, 28:4-29:2, 64:1-6,	
	72:25-73:10.]	
	206. Defendants' expert concluded that, based	Disputed.
	on his training and experience over the last	Objection: Mischaracterizes the witness's
	sixteen years or so, when added to experience	testimony.
	with handguns and other factors, he " <i>has a</i>	Declaration of Blake Graham, ¶¶ 10-17.
	<i>feeling</i> that there are certain calibers that are	
	more often than not handgun calibers."	

1	[Graham Deposition Vol. One (Ex. 57 to	
2	Plaintiffs' Evidence in Support of Motion for	
3	Summary Judgment or in the Alternative	
4	Summary Adjudication / Trial Brief) at 81:24-82:4, 206:22-207:2.]	
5	207. Defendants' expert's opinion regarding	Undisputed.
6	ammunition "principally for use in handguns"	
7	was not informed by information regarding the	
8	amounts and types of ammunition used by the	
9	military.	
10	[Graham Deposition Vol. Two (Ex. 58 to	
11	Plaintiffs' Evidence in Support of Motion for	
12	Summary Judgment or in the Alternative	
13	Summary Adjudication / Trial Brief) at	
14	109:14-18.]	
15	208. Defendants' expert's opinion regarding	Undisputed.
16	ammunition "principally for use in handguns"	
17	was not informed by specific information	
18	regarding the number of handguns and/or rifles	
19	used by military service members stationed in	
20	California.	
21	[Graham Deposition Vol. Two (Ex. 58 to	
22	Plaintiffs' Evidence in Support of Motion for	
23	Summary Judgment or in the Alternative	
24	Summary Adjudication / Trial Brief) at 109:8-13, 110:8-111:10.]	
25	209. Defendants' expert's opinion regarding	Objection: Mischaracterizes the witness's
26	ammunition "principally for use in handguns"	testimony. Evidence cited bears no relation to
27	was not informed by research studies regarding	facts asserted.
28	popular or prevalently used ammunition.	
	[Graham Deposition Vol. Two (Ex. 58 to	
	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at	
	118:19-24.]	
	210. Defendants' expert's opinion regarding	Undisputed subject to the objections raised
	ammunition "principally for use in handguns"	during the cited portion of the deposition.
	was not informed by existing polls regarding	
	the ammunition generally or the popularity of	
	certain cartridges.	

1	[Graham Deposition Vol. Two (Ex. 58 to	
2	Plaintiffs' Evidence in Support of Motion for	
3	Summary Judgment or in the Alternative	
4	Summary Adjudication / Trial Brief) at	
5	119:20-120:8.]	
6	211. Prior to forming his opinion as to	Undisputed subject to vagueness objections raised during the cited portion of the deposition.
7	ammunition prevalently used in handguns,	
8	Defendants' expert did not personally conduct	
9	any polls regarding the ammunition members	
10	of the general public use in their handguns.	
11	[Graham Deposition Vol. Two (Ex. 58 to	
12	Plaintiffs' Evidence in Support of Motion for	
13	Summary Judgment or in the Alternative	
14	Summary Adjudication / Trial Brief) at 120:9-	
15	16.]	
16	212. Defendants assert that the ammunition	Undisputed.
17	they have identified as "principally for use in	
18	handguns" is supported in part by the fact that	
19	those calibers are identified as "handgun	
20	ammunition" in <i>Cartridges of the World</i> .	
21	[Responses to Specially Prepared	
22	Interrogatories, Set One (Ex. 54 to Plaintiffs'	
23	Evidence in Support of Motion for Summary	
24	Judgment or in the Alternative Summary	
25	Adjudication / Trial Brief) at 7:18-21.]	
26	213. In its sections on rifle cartridges,	Objection: This "fact" is vague and ambiguous. It also is unclear to which portions of the cited exhibit Plaintiffs are relying upon.
27	<i>Cartridges of the World</i> identifies multiple	
28	cartridges in the calibers included in	
	Defendants' list of ammunition "principally for	
	use in handguns."	
	[Barnes, <i>Cartridges of the World: A Complete</i>	
	<i>and Illustrated Reference for Over 1500</i>	
	<i>Cartridges</i> (11th ed. 2006) "Selected Pages	
	from Chapter 2: Current American Rifle	
	Cartridges and Chapter 3: Obsolete Rifle	
	Cartridges " (Ex. 52 Plaintiffs' Evidence in	
	Support of Motion for Summary Judgment or	
	in the Alternative Summary Adjudication /	
	Trial Brief) <i>passim</i> .]	
	214. In its sections on handgun cartridges,	Undisputed.
	<i>Cartridges of the World</i> identifies multiple	
	cartridges in calibers not included in	

1	Defendants' list of ammunition "principally for use in handguns."	
2		
3	[Barnes, Cartridges of the World: A Complete and Illustrated Reference for Over 1500 Cartridges (11th ed. 2006) "Selected Pages from Chapter 6: Handgun Cartridges of the World" (Ex. 53 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) <i>passim</i> .]	
4		
5		
6		
7		
8	215. Defendants' expert admitted there are many ammunition cartridges that fall within the listed caliber classes that are not "principally for use in a handgun."	Undisputed subject to the objections raised during the cited portions of the deposition.
9		
10	[Graham Deposition Vol. One (Ex. 57 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 135:7-136:5, 137:8-22, 154:25-155:3, 155:21-156:2.]	
11		
12		
13		
14	216. Defendants have suggested that the Challenged Provisions apply to ammunition that is "used principally" in handguns.	Undisputed subject to the objections raised during the cited portions of the deposition. See also Graham Deposition transcript, Plaintiffs' Ex.54, p. 5:18 – 20.
15		
16	[Responses to Specially Prepared Interrogatories, Set One (Ex. 54 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 7:8-11.]	
17		
18		
19		
20	217. Defendants' expert suggested that the "principally for use in handguns" language relates to the total number of handguns in circulation that are chambered in a particular caliber versus the total number of rifles in circulation that are chambered in the same caliber.	Disputed.
21		Objection: Mischaracterizes the witness's testimony.
22		Declaration of Blake Graham, ¶¶ 10-17.
23		
24	[Graham Deposition Vol. Two (Ex. 58 to Plaintiffs' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication / Trial Brief) at 83:1-16.]	
25		
26		
27	218. Defendants' expert suggested that the "principally for use in handguns" language	Disputed.
28		

1 relates to a mix of factors, including “the
2 number of manufacturers that may have
3 produced a weapon in a particular caliber,”
4 “the length of time that a particular gun has
5 been available in a particular caliber,” and the
6 number of rifles in that caliber, if any.

7 [Graham Deposition Vol. Two (Ex. 58 to
8 Plaintiffs’ Evidence in Support of Motion for
9 Summary Judgment or in the Alternative
10 Summary Adjudication / Trial Brief) at 127:5-
11 128:25.]

Objection: Mischaracterizes the witness’s
testimony.

Declaration of Blake Graham, ¶¶ 10-17.

12 219. When asked whether the “principally for
13 use in a handgun” standard required a
14 consideration of whether any particular
15 ammunition was fired more often through a
16 handgun than a long-gun, Defendants’ expert
17 responded:

18 “I would say [its] not much of a factor because
19 principally for use really deals with the kind of
20 firearm its going to go into, in my – in my est-
21 -- in my understanding, so if you have one
22 weapon that can shoot a million rounds a
23 second and then you have 500,000 rounds – or
24 handguns out there that shoot ten rounds a
25 minute, that weapon is actually – or the
26 ammunition is principally for use in the larger
27 pool of – of weapons.”

28 [Graham Deposition Vol. Two (Ex. 58 to
Plaintiffs’ Evidence in Support of Motion for
Summary Judgment or in the Alternative
Summary Adjudication / Trial Brief) at 83:1-
16.]

Undisputed subject to the objections raised
during the cited portion of the deposition.

21 220. When asked to clarify whether he would
22 consider the numerosity of total weapons or the
23 numerosity of models of weapons to be the
24 determining factor determining whether certain
25 ammunition is “principally for use in
26 handguns,” Defendants’ expert stated:

27 “Given the available information in the amount
28 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.”

Undisputed subject to the objections raised
during the cited portion of the deposition. See
generally Graham Deposition transcript.

1	[Graham Deposition Vol. Two (Ex. 58 to	
2	Plaintiffs' Evidence in Support of Motion for	
3	Summary Judgment or in the Alternative	
4	Summary Adjudication / Trial Brief) at 128:8-25.]	
5	221. Firearms chambered in .22 are among the	Undisputed.
6	most popular weapons, as to both handguns	
7	and rifles.	
8	[Graham Deposition Vol. One (Ex. 57 to	Objection: Relevance. The State has not
9	Plaintiffs' Evidence in Support of Motion for	identified .22 caliber ammunition as handgun
10	Summary Judgment or in the Alternative	ammunition within the meaning of the
11	Summary Adjudication / Trial Brief) at	Challenged Definition.
12	185:21-186:5; Helsley Declaration at ¶¶ 29,	
13	33.]	
14	222. .22 Long Rifle is likely the most popular	Undisputed.
15	firearm cartridge in the world.	
16	[Helsley Declaration at ¶ 33.]	Objection: Relevance. The State has not
17		identified .22 caliber ammunition as handgun
18		ammunition within the meaning of the
19		Challenged Definition.
20	223. In December 2009, when Plaintiffs'	Objection: Relevance; Hearsay. See
21	counsel inquired as to whether ".22 rimfire"	Objections to Evidence Nos. 127-128. The
22	ammunition would be considered "handgun	State has not identified .22 caliber ammunition
23	ammunition" under the Challenged Provisions,	as handgun ammunition within the meaning of
24	Counsel for Defendant DOJ stated that she did	the Challenged Definition.
25	not know.	
26	[Public Records Act Request Sent to California	
27	Department of Justice Re: Assembly Bill 962,	
28	dated December 16, 2009 (Ex. 6 to Plaintiffs'	
	Evidence in Support of Motion for Summary	
	Adjudication / Trial Brief); Defendant	
	Department of Justice Response to Public	
	Records Act and Relevant E-mail Enclosures,	
	dated January 25, 2010 (Ex. 7 to Plaintiffs'	
	Evidence in Support of Motion for Summary	
	Judgment or in the Alternative Summary	
	Adjudication / Trial Brief) at AM0002,	
	AM0004, AM0006, AM0013.]	
	224. Defendants' expert suggests that, at this	Undisputed.
	time, .22 caliber is not "principally for use in	
	handguns," but that his opinion could change	
	based on future research.	

1	[Graham Deposition Vol. One (Ex. 57 to	
2	Plaintiffs' Evidence in Support of Motion for	
3	Summary Judgment or in the Alternative	
4	Summary Adjudication / Trial Brief) at	
	186:25-187:17.]	
5	225. Defendants expert stated he would only	Undisputed.
6	classify three .45 caliber cartridges to be	
7	"principally for use in a handgun": .45 ACP,	
8	.45 GAP, and .45 Long Colt.	
9	[Graham Deposition Vol. One (Ex. 57 to	
10	Plaintiffs' Evidence in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at	
	153:13-18.]	
11	226. <i>Cartridges of the World</i> includes	Undisputed.
12	numerous .45 cartridges in its section on	
13	handgun cartridges besides the .45 ACP, .45	
	GAP, and .45 Long Colt.	
14	[Barnes, <i>Cartridges of the World: A Complete</i>	
15	<i>and Illustrated Reference for Over 1500</i>	
16	<i>Cartridges</i> (11th ed. 2006) "Selected Pages	
17	from Chapter 6: Handgun Cartridges of the	
18	World " (Ex. 53 Plaintiffs' Evidence in	
	Support of Motion for Summary Judgment or	
	in the Alternative Summary Adjudication /	
	Trial Brief) <i>passim</i> .]	
19	227. There are multiple cartridges that can be	Undisputed.
20	used in firearms manufactured both before and	
21	after 1898, including but not limited to,	
	cartridges in the following calibers: 22, .32,	
	.38, .44, .45, and .50.	
22	[Helsley Declaration at ¶¶ 20-25.]	
23	228. Ammunition that can be used in a	Objection: Mischaracterizes the witness's
24	modern firearm chambered to fire that	testimony.
25	cartridge can also be used in an antique firearm	
26	chambered to fire that same cartridge.	
27	[Helsley Declaration at ¶¶ 20-25.]	
28		

1	229. Ammunition, when it is manufactured, is designed and intended to be used in any	Objection: Mischaracterizes the witness's
2	firearm that is chambered for that cartridge,	testimony.
3	regardless of when the firearm it will be used	
4	in was manufactured.	
5	[Helsley Declaration at ¶¶ 20-25.]	
6	230. The calibers Defendants claim to be	Undisputed, subject to vagueness objections
7	"handgun ammunition" include cartridges that	raised in response to Plaintiffs' special
8	are designed and intended to be used in	interrogatories.
9	"antique firearms," and thus should be exempt	
10	from the Challenged Provisions.	
11	[Helsley Declaration at ¶23.]	
12	231. Defendants' expert witness testified that	Undisputed.
13	.45 Long Colt is unequivocally "handgun	
14	ammunition" under the Challenged Provisions.	
15	[Graham Deposition Vol. One (Ex. 57 to	
16	Plaintiffs' Evidence in Support of Motion for	
17	Summary Judgment or in the Alternative	
18	Summary Adjudication / Trial Brief) at	
19	153:13-18.]	
20	232. 45 Long Colt is used in firearms	Undisputed.
21	manufactured prior to 1898.	
22	[Helsley Decl. at ¶ 23.]	
23	233. <i>State of Tennessee ex rel. Rayburn v.</i>	Objection: Relevance. Hearsay. The <i>Rayburn</i>
24	<i>Cooper</i> , involved a challenge to a state law	case has no bearing on any material fact before
25	authorizing firearms to be carried by patrons in	the Court, is not precedent, and is hearsay.
26	establishments where "the serving of meals" is	
27	the " <i>principle</i> business conducted" – as	See the State's Objections to Plaintiffs' Request
28	opposed to the serving of alcohol.	for Judicial Notice.
	[Amended Complaint for Injunctive and	
	Declaratory Relief in <i>Tennessee ex rel.</i>	
	<i>Rayburn v. Cooper</i> , Case No. 09-1284-I, filed	
	July 6, 2009 (Ex. A to Plaintiffs' Request for	
	Judicial Notice in Support of Motion for	
	Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief) at ¶ 2;	
	Order of Chancellor Claudia Bonnyman in	
	<i>Tennessee ex rel. Rayburn v. Cooper</i> , Case No.	
	09-1284-I, filed November 25, 2009 (Ex. D to	
	' Request for Judicial Notice in Support of	

1	Motion for Summary Judgment or in the	
2	Alternative Summary Adjudication / Trial	
3	Brief) at 24:20-2.]	
4	234. In <i>State of Tennessee ex rel. Rayburn v. Cooper</i> , plaintiffs argued it would be	Objection: Relevance. Hearsay. The <i>Rayburn</i>
5	extremely difficult for an individual to	case has no bearing on any material fact before
6	determine whether they were in a bar or a	the Court, is not precedent, and is hearsay.
7	restaurant.	
8	[Amended Complaint for Injunctive and	See the State's Objections to Plaintiffs' Request
9	Declaratory Relief in <i>Tennessee ex rel.</i>	for Judicial Notice.
10	<i>Rayburn v. Cooper</i> , Case No. 09-1284-I, filed	
11	July 6, 2009 (Ex. A to Plaintiffs' Request for	
12	Judicial Notice in Support of Motion for	
13	Summary Judgment or in the Alternative	
14	Summary Adjudication / Trial Brief) at ¶¶ 93,	
15	97, 99.]	
16	235. The court in <i>State of Tennessee ex rel.</i>	Objection: Relevance. Hearsay. The <i>Rayburn</i>
17	<i>Rayburn v. Cooper</i> found the statute	case has no bearing on any material fact before
18	unconstitutionally vague, reasoning that	the Court, is not precedent, and is hearsay.
19	whether the serving of meals is a business's	
20	principle business is <i>not something that can be</i>	See the State's Objections to Plaintiffs' Request
21	<i>known</i> to the ordinary citizen. The court added	for Judicial Notice.
22	that inquiry would not suffice to overcome the	
23	law's vagueness.	
24	[Order of Chancellor Claudia Bonnyman in	
25	<i>Tennessee ex rel. Rayburn v. Cooper</i> , Case No.	
26	09-1284-I, filed November 25, 2009 (Ex. D to	
27	Plaintiffs' Request for Judicial Notice in	
28	Support of Motion for Summary Judgment or	
	in the Alternative Summary Adjudication /	
	Trial Brief) at 12:24-13:6.]	
	236. Defendants in <i>State of Tennessee ex rel.</i>	Objection: Relevance. Hearsay. The <i>Rayburn</i>
	<i>Rayburn v. Cooper</i> argued that the law was not	case has no bearing on any material fact before
	vague because there were obvious instances	the Court, is not precedent, and is hearsay.
	where a patron could determine whether a	
	particular establishment was a "restaurant,"	See the State's Objections to Plaintiffs' Request
	pointing to establishments that only serve food	for Judicial Notice.
	– and no alcohol.	
	[Consolidated Memorandum of Law of	
	Defendant Attorney General Cooper in	
	Opposition to Plaintiffs' Motions for Partial	
	Summary Judgment and in Support of	
	Defendant's Cross-Motion for Judgment on the	
	Pleadings and/or for Summary Judgment in	
	<i>Tennessee ex rel. Rayburn v. Cooper</i> , Case No.	

1	09-1284-I, filed October 2, 2009 (Ex. I to	
2	Plaintiffs' Request for Judicial Notice in	
3	Support of Motion for Summary Judgment or	
4	in the Alternative Summary Adjudication /	
5	Trial Brief) at pp. 19-20.]	
6	237. In conjunction with Fish and Game Code	Objection: Relevance; otherwise undisputed.
7	section 3004.5, the Legislature granted the Fish	
8	and Game Commission the authority to certify	
9	and publish a list of nonlead ammunition	
10	suitable for use in regulated areas. The list of	
11	certified nonlead ammunition can be easily	
12	accessed at the Commission's website.	
13	[California Department of Fish and Game,	
14	Certified Nonlead Ammunition Information,	
15	http://www.dfg.ca.gov/wildlife/hunting/condor/	
16	certifiedammo.html (last visited Nov. 29,	
17	2010) (Ex. E to Plaintiffs' Request for Judicial	
18	Notice in Support of Motion for Summary	
19	Judgment or in the Alternative	
20	Summary Adjudication / Trial Brief).]	
21	238. On December 30, 2009, DOJ published an	Undisputed.
22	"Information Bulletin" providing a brief	
23	overview of AB 962.	
24	[Information Bulletin from California	
25	Department of Justice Re: New and Amended	
26	Firearm Laws, dated December 30, 2009 (Ex. 8	
27	to Plaintiffs' Evidence in Support of Motion	
28	for Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief).]	
	239. Defendant DOJ provided notice to all	Undisputed that DOJ published an Information Bulletin on or about December 30, 2009. Disputed that the bulletin constituted a "threat of enforcement." Plaintiffs mischaracterize the evidence. Objection: Secondary Evidence Rule (Evid. Code §§ 1521 & 1523.) The bulletin provides the best evidence of its content.
	California firearm dealers, including Plaintiffs	
	Herb Bauer Sporting Goods, Inc., that Penal	
	Code section 12061, subdivisions (a)(1) and	
	(2) took effect, and have been in force, since	
	January 1, 2010, effectively threatening all	
	California firearm dealers with enforcement of	
	those sections.	
	[Information Bulletin from California	
	Department of Justice Re: New and Amended	
	Firearm Laws, dated December 30, 2009 (Ex. 8	
	to Plaintiffs' Evidence in Support of Motion	
	for Summary Judgment or in the Alternative	
	Summary Adjudication / Trial Brief).]	

ISSUE NO. 2: THE STATE'S SUPPLEMENTAL UNDISPUTED MATERIAL FACTS IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

The State also submits the following statement of additional material facts that raise a triable issue with respect to Issue No. 2, together with references to supporting evidence, in opposition to Plaintiffs Motion.

The State's Supplemental Undisputed Material Facts and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
<p>8. Barry Bauer, president of plaintiff Herb Bauer Sporting Goods, testified that in his experience, the following cartridges of ammunition were chambered, or used, more often in a handgun than a rifle: .45 ACP, .45 GAP, 9mm Luger, 10mm Auto, .40 S&W, .25 ACP, and .380 ACP.</p> <p>[State's Compendium of Evidence, Exh. "A," B. Bauer Deposition, pp.36:18-37:3; 42:1-9; 42:19-43:2; 43:9-17; 43:18-44:2; 44:3-44:20; 49:8-49:19.]</p>	
<p>9. Plaintiffs' expert witness, Stephen Helsley, testified that the following cartridges of ammunition were handgun cartridges: .25 ACP, .45 GAP, 9mm Federal, 10mm Auto, .357 SIG, .44 Auto Mag, and .38 S&W.</p> <p>[State's Compendium of Evidence, Exh. "D," S. Helsley Deposition, pp. 129:12-17; 146:1-5; 155:22-156:7; 158:9-17; 159:24-160:1; 163:15-17; 165:2-4; 172:12-14.]</p>	
<p>10. Plaintiff Sheriff Clay Parker testified that, in his experience, the following calibers and cartridges of ammunition were used more often handguns: .45 ACP, .40 caliber, .25 ACP, .32 ACP, .38 Special, and .380 ACP.</p> <p>[State's Compendium of Evidence, Exh. "E," C. Parker Deposition, pp. 49:3-16; 54:25-55:7; 55:8-14; 55:15-22; 60:9-14; 61:7-20.]</p>	
<p>11. Plaintiff Steven Stonecipher testified that, in his experience, the following cartridges were chambered, or used, more often in handguns: .45 ACP, .380 ACP, 9mm Luger, 10mm, .40 S&W, .25 ACP, .32 ACP, .357 SIG, .454 Casull.</p> <p>[State's Compendium of Evidence, Exh. "F," S.</p>	

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Stonecipher Deposition, pp. 43:6-14; 43:18-22; 48:16-19; 52:1-24; 53:3-7; 53:11-15; 53:19-22; 54:1-5, 55:1-5; 56:23-57:1; 57:6-11.	
12. Barry Bauer, president of plaintiff Herb Bauer Sporting Goods, testified that no one from the California Department of Justice, federal Bureau of Alcohol, Tobacco, Firearms and Explosives, the Fresno County Sheriff's Office, the Fresno County District Attorneys' Office, or the Fresno City Police Department have enforced sections 12060, 12061, or 12318 of the Penal Code against the company, or threatened to do so. [State's Compendium of Evidence, Exh. "A," B. Bauer Deposition, pp.117:3-119:6.]	
13. Plaintiff Sheriff Clay Parker testified that he has never visited a gun dealer or ammunition vendor in Tehama County to determine compliance with California's gun laws, opting instead to allow the California Department of Justice handle such enforcement duties. [State's Compendium of Evidence, Exh. "E," C. Parker Deposition, pp. 42:6-15; 42:20-43:7.]	
14. Plaintiff Sheriff Clay Parker testified that he did not research, visited no websites, and read no books to try to determine what ammunition might be considered handgun ammunition or "antique ammunition" within the meaning of AB 962. [State's Compendium of Evidence, Exh. "E," C. Parker Deposition, pp. 44:20-23; 45:14-47:20.]	

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Dated: January 3, 2011

Respectfully Submitted,

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



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

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On January 3, 2011, I served the attached

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF

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

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

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

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

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

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

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

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

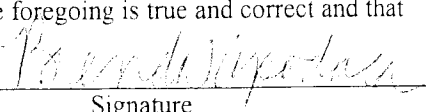
by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight courier service, addressed as follows:

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 3, 2011, at Sacramento, California.

Brenda Apodaca

Declarant


Signature

JA002241

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

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF FRESNO

14 **SHERIFF CLAY PARKER, et al.,**

16 Plaintiffs and Petitioners,

17 v.

18 **THE STATE OF CALIFORNIA; et al.,**

20 Defendants and Respondents.

Case No. 10CECG02116

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

Date: January 18, 2011
Time: 8:30 a.m.
Dept: 402
Judge: Hon. Jeff Hamilton

Action Filed: June 17, 2010

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 3, 2011, at Sacramento, California.

Brenda Apodaca

Declarant

Signature

JA002244

1 KAMALA D. HARRIS
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2 ZACKERY P. MORAZZINI
Supervising Deputy Attorney General
3 KIMBERLY J. GRAHAM
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7 Telephone: (916) 324-5328
Fax: (916) 324-8835
8 E-mail: Peter.Krause@doj.ca.gov
Attorneys for Defendants and Respondents
9 *State of California, Edmund G. Brown Jr., and the*
California Department of Justice

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF FRESNO

14 **SHERIFF CLAY PARKER, et al.,**
16 Plaintiffs and Petitioners,

17 v.

18 **THE STATE OF CALIFORNIA; et al.,**
19 Defendants and
20 Respondents.

Case No. 10CECG02116

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

Date: January 18, 2011
Time: 8:30 a.m.
Dept: 402
Judge: Hon. Jeff Hamilton

Action Filed: June 17, 2010

DECLARATION OF PETER A. KRAUSE

I, Peter A. Krause, declare as follows:

1. I am an attorney at law duly licensed to practice before all courts of the State of California. I am a Deputy Attorney General in the Office of the Attorney General, counsel for defendants and respondents the State of California, Edmund G. Brown Jr. (sued erroneously as "Jerry Brown"), and the California Department of Justice (collectively, the "State") in this action. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached as **Exhibits "B" & "C"** to the Defendants' Compendium of Evidence in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment or in the Alternative Summary Adjudication/Trial Brief, is a true and correct copy of excerpts from the certified transcripts of deposition of Blake Graham, taken on December 1, 2010 and December 2, 2010. I was present in the room when the depositions were taken and can state that the transcript accurately reflects the testimony provided.

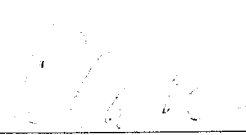
3. Attached as **Exhibit "D"** to the Defendants' Compendium of Evidence in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment or in the Alternative Summary Adjudication/Trial Brief, is a true and correct copy of excerpts from the certified copy of the transcript of deposition of Stephen Helsley, taken on December 16, 2010. I was present in the room when the depositions were taken and can state that the transcript accurately reflects the testimony provided.

4. Attached as **Exhibit "E"** to the Defendants' Compendium of Evidence in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment or in the Alternative Summary Adjudication/Trial Brief, is a true and correct copy of excerpts from the certified copy of the transcript of deposition of Clay Parker, taken on December 21, 2010. I was present in the room when the depositions were taken and can state that the transcript accurately reflects the testimony provided.

5. Attached as **Exhibit "I"** to the Defendants' Compendium of Evidence in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment or in the Alternative

1 Summary Adjudication/Trial Brief, is a true and correct copy of excerpts from *Cartridges of the*
2 *World*, 12th ed., 2009: Table of Rifle Cartridges, Table of Pistol and Revolver Cartridges.

3 I declare under penalty of perjury under the laws of the State of California that the
4 foregoing is true and correct.

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7 PETER A. KRAUSE
8 Deputy Attorney General
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DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

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Brenda Apodaca

Declarant

Signature

JA002248

1 KAMALA D. HARRIS
Attorney General of California
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Supervising Deputy Attorney General
3 KIMBERLY GRAHAM
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8 E-mail: Peter.Krause@doj.ca.gov
Attorneys for Defendants and Respondents
9 *State of California, Edmund G. Brown Jr., and the*
California Department of Justice

FILED

JAN 18 2011

CLERK OF SUPERIOR COURT

FRESNO COUNTY

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF FRESNO

14 **SHERIFF CLAY PARKER, et al.,**

15 Plaintiffs and Petitioners,

16 v.

18 **THE STATE OF CALIFORNIA, et al.,**

19 Defendants and
20 Respondents.

Case No. 10CECG02116

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

Date: January 18, 2011

Time: 8:30 a.m.

Dept.: Dept. 402

Judge: Hon. Jeffrey Hamilton

Trial Date: January 18, 2011

Action filed: June 17, 2010

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1 to identify ammunition and firearms for sale at the gun shows as part of these duties. As
2 part of my normal duties I also had to maintain proficiency with Department issued
3 handguns and long guns. During this time I learned what cartridges fit into my own
4 issued firearms and other Department issued firearms not specifically assigned to me. At
5 the time, I carried a Glock, Model 23, .40 caliber semi automatic pistol and a Heckler &
6 Koch, MP5 9mm submachine. At the gun shows, I reviewed different rifles and handguns
7 and ammunition and often would be involved in the seizure of guns and ammunition from
8 felons, parolees, and probationers.

9 5. From October 2002 to the present, I have been a Special Agent and Special
10 Agent Supervisor, for the DOJ's Bureau of Firearms (BOF). In my career I have attended
11 at least forty gun shows and have become very knowledgeable on current laws pertaining
12 to the sales of firearms in the State of California. The California DOJ BOF also maintains
13 the State's Assault Weapon Registry. If a person with registered assault weapons or other
14 firearms becomes prohibited from possessing firearms I am assigned to recover the
15 firearms. I also investigate prohibited people in possession of firearms, illegal trafficking
16 of firearms, manufacturing of assault weapons, machine guns, and illegal possession of
17 ammunition. I also investigate gun dealers suspected of illegal activities and continue to
18 monitor gun shows for illegal activities. While employed by the DOJ BOF I have carried
19 and qualified with 2 different .45 caliber semi automatic pistols, 2 different Glock .40
20 caliber, semi automatic pistols and a Colt, Model M-4, 5.56 mm machine gun. I have
21 access to other Department owned handguns, shotguns, submachine guns, machine guns,
22 rifles, shotguns and 40 mm "less lethal" launchers. I have trained other Special Agents
23 of DOJ's Bureau of Firearms on assault weapons identification, firearms identification. I
24 also have given firearms identification classes to members of the Sacramento and San
25 Joaquin DA's offices.

26 6. For the last two years, I have assumed responsibility for reviewing handguns
27 that are submitted by manufacturers for inclusion in California's roster of handguns
28 certified for sale. This involves breaking the weapons down into their smaller

1 components, looking at those, comparing them to ones already on the list, and helping to
2 make determinations about whether a handgun should be added to the roster or not. For
3 the weapons that I review as part of this function of my job, I have to identify specific
4 calibers marked on the guns that match the paperwork submitted by the manufacturers,
5 and as such, I gain an understanding of calibers common to handguns in California and I
6 gain an understanding of the calibers and weapons that are being submitted for the DOJ
7 roster. There are currently over 1300 handguns included in the roster. I have access to a
8 sample handgun for each gun on the roster. A true and correct copy of DOJ's current
9 Roster of Handguns Certified for Sale is attached as **Exhibit "H"** to the State's Evidence
10 in Support of its Opposition to Plaintiffs' Motion for Summary Judgment or, In the
11 Alternative, Summary Adjudication ("State's Compendium of Evidence").

12 **Relevant Training Courses**

13 7. During my career, I have completed the following firearms training courses:

14 a. 12/15/1994: I completed a 365 hour Peace Officer Standards and
15 Training (POST) recognized Basic Specialized Investigator Academy at the Yuba
16 Community College in Linda, CA. This included all the normal activities of a police
17 academy except traffic enforcement, including arrest and control, firearms, and legal
18 training. During the shooting range portion of this training, I received instruction on the
19 proper calibers and cartridges to use in various handguns and long guns.

20 b. 3/16/2000: I completed a 32 hour class in "Entry Weapons" taught by the
21 California Department of Justice, Advanced Training Center. At the time, I carried a
22 Heckler and Koch MP5 submachine gun which chambered a 9mm Luger pistol cartridge,
23 but I received training on other weapons including the Colt M4 and Bushmaster M4
24 variants chambered in .223 and 5.56 mm. During this course, part of the training involved
25 using a pistol when our machine guns had a malfunction.

26 c. 3/19/2000: I completed an 80 hour class in Advanced Tactical
27 Operations, Less Lethal Munitions & Chemical Agent Certification taught by the
28 California Department Of Justice, Advanced Training Center.

1 d. 1/20/2002: I completed a 24 hour class in Assault Rifle training, taught
2 by the California Department of Justice, Advanced Training Center. This training
3 included long range firing of a Colt M4 machine guns chambered in 5.56 mm and .223
4 caliber.

5 e. 11/08/2002: I completed a 40 hour California Peace Officer Standards
6 and Training (POST) approved Firearms Instructor/Rangemaster School. This included
7 training to become a range master and instruct others in the proper and safe use of
8 firearms, nomenclature regarding various weapons, shooting, how to set up classes and
9 how to instruct others. In this course I dealt with handguns, rifles, and shotguns. The
10 manual for this class dealt with cartridge composition, meaning the bullet itself, the
11 propellant, and the casing. We also covered common calibers that are used by law
12 enforcement, including the benefits of certain calibers over others. I also received training
13 on what rifle ammunition was and what handgun ammunition was. I was certified as a
14 Range Master after this training.

15 f. 9/18/2003: I completed a 24 hour class on Heckler & Koch MP5 trigger
16 groups and USP pistols. This class was taught by Heckler & Koch International Training
17 Division. This training course dealt with the repair, identification and some
18 modifications on the MP5 submachine gun trigger groups. A portion of the class dealt
19 with variants of the USP pistol produced by Heckler & Koch. I learned that the MP5 was
20 predominantly a 9mm submachine gun, but that 10mm and .40 caliber variants existed.

21 g. 5/14/2004: I attended an 8 hour ATF sponsored training class on the AK-
22 47 and SKS. This class consisted of both classroom and shooting range based training in
23 Dublin, California. It was taught by ATF special agents on the AK-47 machine gun, the
24 semiautomatic versions of that weapon and then the SKS rifle and some of the variants.
25 The AK-47 and the SKS predominantly are chambered in 7.62x39mm caliber
26 ammunition.

27 h. 9/13/2004: I was part of a DOJ BOF ballistic testing exercise conducted
28 in Grass Valley, CA. The substances used were ballistic gelatin and 2 car doors. The

1 purpose was to determine what certain rounds of ammunition would do upon impacting
2 ballistic gelatin and automobiles; including fragmentation and penetration depth.

3 i. 5/10/2005 & 5/11/2005: I attended and completed a 16 hour Armalite
4 AR-15 rifle armorer's course in Folsom, CA. This class was taught by trainers from
5 Armalite Corporation. This course instructed me how to disassemble an AR-15 style rifle,
6 put it back together, identify problems with the weapon system, including malfunctions
7 that may occur, how to clean them, and what ammunition is appropriate for use in AR-15
8 and AR-10 style rifles.

9 j. 3/16/2006: I completed a 16 hour Colt 1911 pistol armorers school in
10 Sunnyvale, CA. This course covered some of the different models that the .45 caliber
11 1911 comes in. We were instructed on how to identify problems with the weapon; make
12 repairs; make modifications, if necessary; disassembling and reassembling the weapon.

13 k. 5/11/2006: I completed a 24 hour Firearms/Rifle Instructor update class
14 in Ione, CA. This was refresher course for my Range Master training.

15 l. 7/27/2006: I co-taught a firearms identification class at the Sacramento
16 District Attorney's Office. This class was attended by Deputy District Attorneys and
17 District Attorney Investigators. The class covered firearms nomenclature, general
18 firearms, rifles, pistols, shotguns, and assault weapons. We gave some general
19 information on the weapons we had present in class. We also had sample weapons that we
20 passed around the room for them to handle as well as ammunition. This was to help the
21 attorneys understand what they might read about in the police reports that they saw.

22 m. 8/4/2006: I conducted follow up training with the Sacramento District
23 Attorney's Office staff. This class was at the California Highway Patrol Academy in
24 West Sacramento. The Attorney's and District Attorney Investigators were able to handle
25 and fire revolvers, semi automatic pistols, rifles, shotguns.

26 n. 1/17/2007: I attended a 4 hour class on the AK-47 assault rifle and the
27 MP-40 submachine gun. This was given by DOJ BOF SAS Ignatius Chinn. This
28

1 included classroom training and shooting with each type of firearm. The MP-40 was
2 chambered for a 9mm Luger cartridge.

3 o. 3/28/2007: I received training on the Tec 9 assault pistol and the SKS
4 rifle. This class was given by DOJ BOF Special Agents Matt Badgley and Jeff Aleman in
5 Newhall, California. The TEC-9 was a 9mm and the SKS rifle was 7.62x39mm caliber.

6 p. 12/16/2008: I completed an 8 hour Armorer's class on Glock pistols.
7 This class was held at the Galt Police Department. Through this class I came to better
8 understand the Glock pistol and its variants. I was taught how to disassemble and repair
9 the Glock. This course covered the many varieties of the Glock pistols sold currently.

10 8. During the course of my career and training I have become proficient in the use
11 and disassembly of various revolvers, pistols, submachine guns, shotguns, and rifles. I
12 have made or assisted in the arrest of at least thirty persons for violations involving illegal
13 weapons possession. In the course of my employment I have participated in an excess of
14 thirty search warrants which involved the illegal possession of firearms.

15 **Prior Expert Witness Testimony**

16 9. I have qualified as an expert witness in the following court cases:

17 a. On 02/15/2007, I qualified as an expert witness on Assault Weapons
18 identification, Assault Weapons registration, and the DOJ Automated Firearms System.
19 This was in Santa Clara County Superior Court in a preliminary hearing.

20 b. On 04/12/2007, I qualified as an expert witness on Assault Weapons
21 identification, Assault Weapons registration, and the DOJ Automated Firearms System in
22 the Santa Clara County Superior Court in a preliminary hearing.

23 c. On 06/09/2008, I qualified as an expert witness on Assault Weapons
24 identification and Assault Weapons registration. This was in Placer County Superior
25 Court during a preliminary hearing.

26 d. On 05/04/2009, I qualified as an expert witness on Assault Weapons
27 identification and Assault Weapons registration. This was in Placer County Superior
28 Court during a jury trial.

1 e. On 10/27/2010, I qualified as an expert witness on Assault Weapons
2 identification and Assault Weapons registration. This was in Placer County Superior
3 Court during a preliminary hearing.

4 f. On 11/04/2010, I qualified as an expert witness on Assault Weapons
5 identification. This was in San Mateo County Superior Court during a preliminary
6 hearing.

7 **Work on this Case**

8 10. In the course of my career, and in forming the opinions that I have and will
9 render in this case, I have read and consulted treatises that include Cartridges of the
10 World, Rifles of the World, Gun Traders Guide, and various firearms-related websites,
11 including those of firearms manufacturers like Winchester, Ruger, Heckler & Koch, and
12 Glock, as well as the Sporting Arms and Ammunition Manufacturers Institute (SAAMI)
13 website. SAAMI is an association of the nation's leading manufacturers of firearms,
14 ammunition and components. It creates and publishes industry standards for safety,
15 interchangeability, reliability and quality. Attached as **Exhibit "G"** to the State's
16 Compendium of Evidence is a true and correct copy of excerpts from the SAAMI
17 publication entitled *Voluntary Industry Performance Standards for Pressure and Velocity*
18 *of Centerfire Pistol and Revolver Ammunition for the Use of Commercial Manufacturers*.
19 This document was produced to the plaintiffs in this case before my deposition and I
20 relied upon it to help determine whether the cartridges identified in paragraph 12 below
21 are used principally in handguns. Each of the listed cartridges (except 10mm Auto which
22 was not being manufactured when the Performance Standards were published) are
23 identified as pistol and revolver ammunition by this respected manufacturer's trade group.

24 11. For background information on sales and how various calibers and cartridges
25 of ammunition are marketed for sale, I also reviewed ammunition vendor websites
26 including Cheaper Than Dirt, Cabela's, J&G Sales, and Midway USA. To expand my
27 knowledge base, I continually review new and different ammunition and firearms because
28 of the job that I hold at DOJ.

1 12. Based upon the foregoing training, research, and experience and the expertise
2 derived therefrom, I was asked to identify calibers and cartridges of ammunition that are
3 principally for use in pistols, revolvers, and other firearms capable of being concealed
4 upon the person, notwithstanding that the ammunition may also be used in some rifles. I
5 interpreted and applied this standard to mean ammunition that is chambered, or loaded,
6 more frequently in handguns than in rifles. The list I compiled included handgun
7 cartridges in the following calibers: .45, 9mm, 10mm, .40, .357, .38, .44, .380, .454, .25,
8 and .32. Within these general calibers, I have identified the following cartridges as
9 handgun ammunition within the meaning of the statutes challenged in this case:

- 10 a. .45 Automatic Colt Pistol (aka 45 ACP, 45 Auto, 45 Automatic +P)
- 11 b. .45 Glock Auto Pistol (45 GAP)
- 12 c. 9mm Luger (aka 9x19 mm, 9mm Parabellum, 9mm Luger +P)
- 13 d. 10mm Automatic
- 14 e. 40 S&W Automatic
- 15 f. .357 Magnum (aka 357 Smith & Wesson Magnum)
- 16 g. .357 SIG
- 17 h. .38 Special (aka 38 Special +P, 38 Smith & Wesson Special, 38 Colt Special)
- 18 i. .38 Super (aka 38 Super automatic, 38 Super Automatic +P)
- 19 j. .44 Remington Magnum (44 Magnum)
- 20 k. .44 Smith & Wesson Special
- 21 l. .44 Auto Mag
- 22 m. .380 Automatic Colt Pistol (aka 380 ACP, 380 Auto, 9mm Kurz, 9 x 17 mm)
- 23 n. .454 Casull
- 24 o. .25 Automatic Colt Pistol (aka 25 ACP, 25 Auto)
- 25 p. .32 Automatic Colt Pistol (aka 32 ACP, 32 Auto)

26 13. The starting point for my analysis was the DOJ's Dealer Record of Sale
27 (DROS) and Automated Firearm System databases, which contain information on all
28 handguns purchased or transferred in California each year. Specifically, I asked an

1 analyst to run a report for me from those databases that reflected how many handguns in
2 each particular caliber were sold over the last five years. The report that was generated
3 was used as a starting point to show which handgun calibers have been most common in
4 terms of handgun sales over the past several years. My experience and expertise was then
5 applied to the list to narrow the list of calibers down to those cartridges that are principally
6 used in pistols and revolvers. The list of handgun ammunition calibers and cartridges that
7 appears in the State's Response to Plaintiffs' Special Interrogatory No. 5 (and in
8 paragraph 12 above) is primarily the result of my work and analysis.

9 14. I was careful to consider during my analysis any calibers and cartridges of
10 ammunition that were clouded by "dual use" issues, meaning that the ammunition might
11 be used just as often in handguns as rifles. For instance, .22 caliber ammunition was left
12 off of this list at this time because, without further research and analysis, it was not
13 possible in the time available to determine whether .22 caliber ammunition is used
14 principally in handguns or in rifles. The same is true of certain other calibers.

15 **Rifles and Long Guns Chambered in Pistol Calibers Were Considered**

16 15. As part of my research into ammunition that is used principally in handguns, I
17 considered how many models of rifles, machine guns, submachine guns and other long
18 guns that chamber the cartridges listed in paragraph 12 I could find. In some instances the
19 non handguns chambered in a "listed" cartridge are illegal for the average California citizen
20 to possess. While there are legally registered assault weapons in California that chamber
21 some of the listed cartridges the handguns that shoot the same cartridge are far more
22 prevalent in my experience. A true and copy of a spreadsheet I prepared showing the
23 results of my research is attached as **Exhibit "J"** to the State's Compendium of Evidence
24 and was provided to the plaintiffs in this case prior to my deposition. Despite several
25 attempts to refer to that document during my deposition, I was never questioned about it.

26 16. My research into long guns that fire the same calibers or cartridges as
27 handguns revealed that very few, and in some cases no, long guns models were available
28 that chambered and fired the handgun calibers I have identified. I have listed those

1 longuns readily apparent to me during the time available. This list is not all inclusive of
2 every long gun ever made. There may be other long guns chambered in a listed cartridge
3 that I am unaware of at this time. The following is a summary of my research into long
4 guns that chamber the calibers or cartridges identified in paragraph 12, above:

5 a. **.45 Automatic Colt Pistol (ACP):** I found the following long guns that
6 chamber a .45 ACP cartridge; (1) the Marlin Camp Carbine, which is a self-loading
7 carbine that was discontinued in 1999; (2) Auto Ordinance Thompson (aka Tommy Gun);
8 (3) Hi-Point Firearms 995, the IMI UZI carbine, and the M3 "grease gun", a submachine
9 gun. Of these long guns only the Marlin is not an assault weapon or submachine gun
10 when in its factory configuration. There are nearly 400 variants of handguns chambered
11 for the .45 ACP cartridge presently for sale in California.

12 b. **9mm (Luger/Parabellum/9x19):** I found the following long guns
13 chambered for the 9mm Luger cartridge. These include: (1) Marlin (camp carbine) (2)
14 Kel Tec (Sub-2000); (3) Ruger (PC-9 carbine); (4) Hi-Point 995; (5) Heckler & Koch
15 MP5/HK94; (6) Heckler & Koch MP5; (7) UZI submachine gun and carbines; (8) the Colt
16 9mm Submachine Gun/carbine, the German MP-38/40 submachine gun. Of the above
17 long guns only the Marlin and Ruger are still legal for sale in California in their factory
18 configurations. The Kel Tec, Hi-Point, Heckler & Koch and UZI carbines are normally
19 assault weapons in their factory configurations. The Heckler & Koch MP5 submachine
20 gun, UZI submachine gun and MP38/40's are not generally in the hands of the California
21 citizenry. There are over 200 9mm handgun variants currently for sale in California and
22 countless others that have been sold over the past ten years.

23 c. **10mm Automatic:** I identified the following long guns that chamber
24 10mm rounds. These firearms are (or were) generally available only to law enforcement
25 and military users because of their assault weapon or machine gun status: (1) Armalon
26 PC carbine; (2) Auto Ordinance Thompson submachine gun; (3) D-Max (carbine); (4)
27 Goncz (GS carbine); (5) Heckler & Koch MP5 submachine gun; (6) Olympic Arms K10;

(7) LeMag Custom M1 carbine. There are over a dozen of 10mm handgun variants widely available for purchase to civilian users.

d. **.40 Smith & Wesson:** I identified five long guns that chamber this cartridge; (1) Beretta CX4 Storm (AW); (2) Kel Tec Sub 2000; (3) Ruger PC-40 Carbine; (4) Hi-Point 995; and (5) Olympic Arms K40-GL. Only the Ruger carbine is legal for sale in California when in its factory configuration. There are more than 150 handguns for sale in California that chamber this cartridge.

e. **.357 Magnum/.38 Special:** Although there are over two hundred individual handguns currently for sale in California that chamber these cartridges, which have historically been known as pistol cartridges, there are fewer than ten rifles available that chamber both the .357 Magnum and .38 Special cartridge, including the Winchester Model 1892, the Marlin Model 1894 CSS, and the Harrington and Richardson Handi-Rifle, the Puma Model 92; the Henry Big Boy; and the Marlin Model 1894CP lever action. Some manufacturers even describe these rifles as chambering "pistol calibers." (See www.winchesterguns.com/products/catalog/detail.asp?mid=534162&family=022C.)

f. **.357 SIG:** I was unable to find any long guns that chamber this cartridge.

g. **.44 Magnum:** I have identified the following long guns that chamber a .44 Magnum cartridge: (1) Henry Repeating Arms Big Boy; (2) Marlin 1894; (3) the Winchester 1892 short; (4) the Harrington and Richardson Handi Rifle; and (5) the Ruger .44 magnum carbine.

h. **.380 Automatic Colt Pistol:** I was unable to find any California legal long guns that chamber this cartridge.

i. **.454 Casull:** I identified only one rifle that chambers this cartridge, the Puma Lever Action.

j. **.25 Automatic Colt Pistol:** I was unable to find any long guns that chamber this cartridge.

k. **.32 Automatic Colt Pistol:** I was unable to find any California legal long guns that chamber this cartridge.

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On January 3, 2011, I served the attached

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF

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

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

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

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

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

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

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

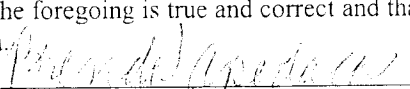
(1) DEFENDANTS' OBJECTIONS TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION/TRIAL BRIEF; (2) [PROPOSED] ORDER THEREON

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

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 3, 2011, at Sacramento, California.

Brenda Apodaca
Declarant


Signature

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 VIII, Pages JA001967-JA002262** 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.

J. Wong
Declarant

J Wong
Signature