

1 KAMALA D. HARRIS  
Attorney General of California  
2 ZACKERY P. MORAZZINI  
Supervising Deputy Attorney General  
3 PETER A. KRAUSE  
Deputy Attorney General  
4 State Bar No. 185098  
1300 I Street, Suite 125  
5 P.O. Box 944255  
Sacramento, CA 94244-2550  
6 Telephone: (916) 324-5328  
Fax: (916) 324-8835  
7 E-mail: Peter.Krause@doj.ca.gov  
*Attorneys for Defendants and Respondents*  
8 *State of California, Kamala D. Harris, and the*  
*California Department of Justice*

*Exempt from fees pursuant to  
Government Code § 6103*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF FRESNO  
11

12 **SHERIFF CLAY PARKER, et al.**

13 Plaintiffs and Petitioners,

14 v.

15  
16 **THE STATE OF CALIFORNIA;  
KAMALA D. HARRIS, IN HER  
17 OFFICIAL CAPACITY AS ATTORNEY  
GENERAL FOR THE STATE OF  
18 CALIFORNIA; THE CALIFORNIA  
DEPARTMENT OF JUSTICE, AND DOES  
19 1-25,**

20 Defendants and Respondents.

Case No. 10CECG02116

(1) **MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
THE STATE'S MOTION TO TAX  
COSTS; and**

(2) **DECLARATION OF PETER A.  
KRAUSE IN SUPPORT THEREOF**

**BY FAX**

Date: May 3, 2011  
Time: 3:30 p.m.  
Dept: 402  
Judge: Hon. Jeffrey Hamilton  
Action Filed: June 17, 2010

21  
22 Defendants State of California, Attorney General Kamala D. Harris, and the California  
23 Department of Justice, and (collectively, the "State") respectfully file this memorandum in  
24 support of their motion to tax the costs claimed by plaintiffs Clay Parker, Herb Bauer Sporting  
25 Goods, Inc., the California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG  
26 Collectibles, LLC, and Steven Stonecipher (collectively, "Plaintiffs").  
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## INTRODUCTION

Plaintiffs obtained summary adjudication on one cause of action in their complaint and voluntarily dismissed the other two. They now request \$11,355.63 in litigation costs from the State. A review of the costs that Plaintiffs seek, however, reveals that they are unnecessary, unsupported, excessive, or simply unrecoverable as a matter of law. The Court should tax Plaintiffs' costs to a reasonable level.

First, the Court should tax the filing fee associated with Plaintiffs' preliminary injunction motion, which motion was deemed defective by the Court and *withdrawn* by Plaintiffs in the face of certain denial. Plaintiffs' deposition costs also should be disallowed. The Court declined to consider any evidence on summary judgment and ruled that the case presented a pure question of law, thus Plaintiffs' deposition costs do not meet the standard of being reasonably necessary to the litigation. Should the Court exercise its discretion to allow Plaintiffs to recover some deposition costs, the State should not bear the cost of rush transcripts. Plaintiffs put off discovery until the eleventh hour and readily accepted the truncated briefing schedule that made expedited transcription necessary – a schedule that inured only to Plaintiffs' benefit. The State likewise should not have to pay deposition-related travel costs for three attorneys from the same law firm, two of whom were mere spectators at the proceedings.

Plaintiffs' vaguely-identified service of process costs should be itemized, substantiated, and taxed to a reasonable amount. And finally, Plaintiffs seek court reporter fees and motion-related travel costs that simply are not recoverable under the code. For these reasons, the State respectfully requests that the Court grant its motion and tax Plaintiffs' costs.

## FACTUAL AND PROCEDURAL HISTORY

On June 17, 2010, Plaintiffs filed a complaint against the State alleging that three statutes adopted as part of Assembly Bill 962 were void for vagueness under the due process clause of the Fourteenth Amendment. (Complaint, ¶¶ 1-2.) The complaint asserted causes of action for (1) Due Process Vagueness – Facial, (2) Due Process Vagueness – As Applied, and (3) a Petition for Writ of Mandate. (Complaint, ¶¶ 88-109.) The State answered Plaintiffs' complaint on August 4, 2010. (Declaration of Peter A. Krause [“Krause Decl.”], ¶ 2.)

1 On September 7, 2010, Plaintiffs filed a Motion for Preliminary Injunction. (Krause Decl.,  
2 ¶ 2.) At the November 17, 2010 hearing, however, the Court told Plaintiffs that their preliminary  
3 injunction motion was defective, unsupported, and would be denied. (*Id.*) Rather than let their  
4 motion be denied, Plaintiffs opted to *withdraw* it. (*Id.* & Exh. "A.") At the case management  
5 conference held the same day, the Court proposed a summary judgment hearing on January 18,  
6 2011, with an opening brief due from Plaintiffs on December 4, 2010 – dates which Plaintiffs  
7 readily accepted because the hearing would take place before the effective date of the challenged  
8 statutes. (*Id.*)

9 On December 1 and 2, 2010, Plaintiffs deposed Special Agent Supervisor Blake Graham,  
10 who verified the State's written discovery responses. (Krause Decl., ¶ 3.) On December 7, 2010,  
11 Plaintiffs filed a Motion for Summary Judgment or, in the Alternative, Summary Adjudication,  
12 along with eleven supporting declarations, almost sixty exhibits, and 240 undisputed facts. (*Id.*)  
13 Given the voluminous testimony, declarations, and exhibits submitted by Plaintiffs, the State  
14 defensively took four depositions (three plaintiffs and their expert witness), just in case the Court  
15 found factual matters to be relevant. (*Id.*) One of those depositions, that of Herb Bauer Sporting  
16 Goods, was taken to flesh out the company's as-applied vagueness cause of action; a claim that  
17 ultimately was dismissed by Plaintiffs. (*Id.*)

18 Plaintiffs' summary judgment motion was heard on January 18, 2011. (Krause Decl., ¶ 4.)  
19 The Court verbally granted summary adjudication Plaintiffs' first cause of action, and Plaintiffs  
20 voluntarily dismissed the second and third. (*Id.*) On January 31, the Court issued an Order  
21 Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part  
22 Plaintiffs' Motion for Summary Adjudication. (*Id.* & Exh. "B" thereto.) On February 23, 2011,  
23 the Court entered Judgment in favor of Plaintiffs on the first cause of action in the Complaint.  
24 (*Id.*) Plaintiffs served Notice of Entry of Judgment on March 2, 2011. (*Id.*) On March 11, 2011,  
25 Plaintiffs served their Memorandum of Costs. (*Id.*) Plaintiffs' cost bill claims a total of  
26 \$11,355.63 in costs under the following five categories: (1) Filing Fees, (2) Deposition Costs, (3)  
27 Service of Process, (4) Court Reporter Fees, and (5) Other.

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1 Plaintiffs seek recovery of a \$40.00 fee paid to file their Motion for Preliminary Injunction. But  
2 Plaintiffs voluntarily *withdrew* that motion (which the Court deemed defective and unsupported)  
3 on November 17, 2010 rather than allow it to be denied. (Krause Decl., ¶ 2.) The effect of  
4 withdrawing a motion is to place the record where it stood prior to the filing of the motion; in  
5 other words, as though it had not been made. (*Hammons v. Table Mountain Ranches Owners*  
6 *Ass'n, Inc.* (Wyo. 2003) 72 P.3d 1153, 1157 ["A motion withdrawn leaves the record as it stood  
7 prior to the filing of the motion, i.e., as though it had not been made"]; *Altsman v. Kelly* (Pa. 1939)  
8 9 A.2d 423, 488 [same].)

9 The State should not be made to bear the cost of filing a preliminary injunction motion that  
10 was withdrawn before it was decided – by definition such a cost is not reasonably necessary to the  
11 litigation because it is as if the motion “had not been made.” The State therefore requests that the  
12 Court tax the \$40.00 motion filing fee.

13 **III. PLAINTIFFS’ DEPOSITION COSTS [ITEM NO. 4] ARE UNRECOVERABLE AND**  
14 **EXCESSIVE.**

15 **A. The Court Should Exercise its Discretion to Deny Recovery of Deposition**  
16 **Costs Given its Ruling that the Case Presented a Pure Question of Law.**

17 Plaintiffs seek deposition-related costs of \$8,331.96. Although section 1033.5(a)(3) permits  
18 the recovery of costs for “[t]aking, video recording, and transcribing necessary depositions,” the  
19 necessity for a deposition and related expenditures is a question for the trial court’s sound  
20 discretion. (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113.)

21 Here, according to the Court, the depositions for which Plaintiffs seek recovery were not  
22 necessary to the Court’s determination of whether the challenged definition was facially vague.  
23 In its Order Denying Plaintiffs’ Motion for Summary Judgment and Granting in Part and Denying  
24 in Part Plaintiffs’ Motion for Summary Adjudication, the Court noted that it “determines the issue  
25 of whether or not a statute is facially vague as a matter of law,” and that a “facial challenge to the  
26 constitutional validity of a statute or ordinance considers only the text of the measure itself.”  
27 (Krause Decl., Exh. “B,” pp. 3: 3-4, 5:16-17.) Hence, *the Court* found that depositions were not  
28 necessary to the litigation when it declined to consider any evidence in connection with Plaintiffs’  
summary judgment motion.



1 Because the deposition costs for which plaintiffs seek recovery were not reasonably  
2 necessary to the conduct of the litigation, the Court should deny Plaintiffs' deposition costs and  
3 tax the full amount sought - \$8,331.94.

4 **B. The Deposition Costs That Plaintiffs Seek are Excessive.**

5 **1. Plaintiffs seek unnecessary and excessive travel expenses.**

6 Should the Court exercise its discretion to award some deposition costs, it should tax the  
7 amounts sought to a reasonable level. Plaintiffs seek \$1,164.87 and \$644.37 in travel expenses,  
8 respectively, for three attorneys to attend the depositions of Stephen Helsley and Steven  
9 Stonecipher. (Krause Decl., ¶ 3.) There was no reason to have three attorneys from the same  
10 firm present at the depositions, much less for requiring the State to reimburse Plaintiffs for these  
11 expenses. Having two additional lawyers travel from Los Angeles to Fresno for depositions  
12 simply to watch the proceedings is the sort of duplication that is frowned upon by the courts.  
13 (See *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819 [downward adjustment in attorneys'  
14 fees award warranted for duplication of efforts when one counsel made bulk of presentation at  
15 hearings and others merely affirmed concurrence].)

16 Furthermore, it is unclear what type of travel expenses are even being requested. Plaintiffs'  
17 Memorandum of Costs does not show whether plaintiffs are seeking travel costs permitted under  
18 section 1033.5(a)(3), or if they are also seeking costs not statutorily allowed, such as meals. (See  
19 *Ladas*, 19 Cal.App.4th at pp. 774-775 [meal expenses cannot be justified as necessary to the  
20 conduct of the litigation since attorneys have to eat, whether they are conducting litigation or not];  
21 *Gorman v. Tassajara* (2009) 178 Cal.App.4th 44 [expert deposition fees are not recoverable  
22 under section 1033.5(a)(3)].)

23 For the foregoing reasons, the Court should require Plaintiffs at a minimum to substantiate  
24 their claimed costs and reduce the cost of the travel expenses by two-thirds.

25 **2. The Court should deny recovery of costs for expedited transcripts.**

26 Plaintiffs seek \$4,395.13 in transcription costs for the deposition of Special Agent  
27 Supervisor Blake Graham, and \$1258.53 for the deposition of Stephen Helsley, but fail to provide  
28 any detail on these expenditure or an explanation why the claimed costs are so high. The State

1 suspects that Plaintiffs are seeking costs of expedited transcription and overnight shipping; the  
2 Court should exercise its discretion to disallow these costs under the circumstances of this case.

3 Although standard transcription fees for necessary depositions are recoverable, the extra  
4 cost for expediting transcripts are only allowed in the exercise of the trial court's discretion. (*Hsu*  
5 *v. Semiconductor Sys. Inc.* (2005) 126 Cal.App.4th 1330, 1342.) Here, expediting the Graham  
6 and Helsley transcripts was not necessary to the conduct of the litigation because, as explained  
7 above, the Court found depositions to be irrelevant to its analysis of the legal issues in the case.  
8 Furthermore, as the State has maintained throughout this litigation, the opinion of experts has  
9 little to no relevance to the legal question of whether or not a statute is vague. (*People v. Torres*  
10 (1995) 33 Cal.App.4th 37, 45-46; *County of Yolo v. Los Rios Community College Dist.* (1992) 5  
11 Cal.App.4th 1242, 1257 [opinion evidence about the meaning of a statute from an expert has long  
12 been held inadmissible].)

13 Plaintiffs might argue that expedited transcripts were necessary in light of the abbreviated  
14 summary judgment briefing schedule that the Court set at the November 17, 2010 case  
15 management conference. (Krause Decl., ¶¶ 2-3.) This argument, however, rests upon the false  
16 premise that Plaintiffs could not have filed their summary judgment motion sooner, and that they  
17 were forced to accept a briefing schedule that gave them only two weeks to file their opening  
18 brief. Neither proposition is true.

19 Plaintiffs filed their complaint in June 2010, but opted not to take any discovery or file a  
20 summary judgment motion. Instead, they filed a preliminary injunction motion that ended up  
21 being withdrawn. Plaintiffs then expressly *agreed* to the Court's proposed briefing schedule in  
22 order to have their summary judgment motion heard before the challenged statutes took effect on  
23 February 1, 2011. (Krause Decl., ¶ 2.) Plaintiffs had to understand that this shortened schedule  
24 would mean that any depositions they chose to take would have to be completed and transcribed  
25 under very tight timeframes. The State should not bear the cost of rush transcript and overnight  
26 mail costs when it was Plaintiffs who delayed seeking discovery and agreed to a truncated hearing  
27 and briefing schedule that inured to their benefit. Should the Court allow recovery of any  
28 depositions costs, the transcription costs Plaintiffs seek should be taxed to a reasonable amount.

1     **IV. THE SERVICE OF PROCESS FEES [ITEM NO. 5] ARE EXCESSIVE AND UNSUPPORTED.**

2             Plaintiffs seek \$781.04 for service of process costs, but fail to identify what documents  
3     were served or even on what dates. Of this amount, a reasonable cost of \$160.56 appears to be  
4     for service of the complaint on the three defendants. (See Memorandum of Costs, Item Nos. 5(a)-  
5     5(c).) But Attachment 5d to the cost memorandum seeks another \$620.47 in “Registered Process  
6     Server” costs. Because Plaintiffs fail to provide any detail about these purported costs, the State  
7     can only speculate that they comprise overnight mail fees for service of motions or other  
8     pleadings. But service costs are only allowed if they are necessary and reasonable.  
9     (§ 1033.5(c)(2).)

10            Because of the ambiguity regarding what pleadings were served and when, Plaintiffs’  
11     alleged service costs should be itemized, substantiated, and taxed to an amount reasonable for the  
12     service of the complaint upon the defendants. (See *Nelson v. Anderson* (1999) 72 Cal.App.4th  
13     111, 132 [since the “memorandum of costs does not state how the subpoenas were served, it  
14     cannot be determined from the face of the cost bill whether the items are proper. The verified  
15     cost bill was therefore insufficient, [the prevailing party] had the burden to establish the necessity  
16     and reasonableness of the service costs, but did not do so”].)

17     **V. THE COST OF HEARING TRANSCRIPTS [ITEM NO. 12] ARE NOT RECOVERABLE.**

18            Plaintiffs seek \$121.50 in court reporter fees, presumably for a copy of the transcript of the  
19     January 18, 2011 summary judgment hearing. But transcripts of court proceedings not ordered by  
20     the court are not allowed under section 1033.5(b)(5). (See *Walton v. Bank of Cal., Nat’l Ass’n*  
21     (1963) 218 Cal.App.2d 527 [since there was no order from the court requiring the preparation of  
22     the transcript, court should disallow the transcript fee].) Because this transcript was not  
23     ordered by the Court, the Court should tax this claimed cost.

24     **VI. TRAVEL COSTS FOR MOTION HEARINGS [ITEM NO. 13] ARE NOT RECOVERABLE.**

25            Finally, Plaintiffs seek \$1,226.00 in purported costs for travel relating to their withdrawn  
26     preliminary injunction motion, as well as the January 18, 2011 summary judgment hearing. Such  
27     costs, even if they were reasonable, are not recoverable under section 1033.5. (*Ladas*, 19  
28     Cal.App.4th at p. 775 [“The only travel expenses authorized by section 1033.5 are those to attend

1 depositions”].) Plaintiffs chose to file their complaint in the County of Fresno rather than a  
2 jurisdiction closer to their attorneys (or instead choosing counsel located in Fresno). As such, the  
3 Court should tax the cost of motion-related travel for Plaintiffs’ attorneys.

4 **CONCLUSION**

5 For all the foregoing reasons, the State respectfully requests that the Court grant this motion  
6 and tax Plaintiffs’ claimed costs as requested above.

7  
8 Dated: April 1, 2011

Respectfully Submitted,

9 KAMALA D. HARRIS  
10 Attorney General of California  
11 ZACKERY P. MORAZZINI  
12 Supervising Deputy Attorney General

13 

14 PETER A. KRAUSE  
15 Deputy Attorney General  
16 *Attorneys for Defendants and Respondents*  
17 *State of California, Kamala D. Harris, and*  
18 *the California Department of Justice*  
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**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, Kamala D. Harris, 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.

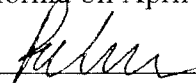
2. The State answered Plaintiffs' complaint and verified petition for writ of mandate on August 4, 2010. On September 7, 2010, Plaintiffs filed a Motion for Preliminary Injunction. After several continuances, the Court scheduled Plaintiffs' preliminary injunction motion for hearing on November 17, 2010. At the hearing, the Court informed Plaintiffs that their preliminary injunction motion was defective insofar as only one of eight declarations was properly verified and there was little showing of irreparable harm. Accordingly, the Court indicated that it would deny the motion, but offered to allow Plaintiffs to withdraw it from the calendar. Counsel for Plaintiffs accepted the Court's offer and the motion was taken off calendar. (A true and correct copy of the Court's 11/17/10 Minute Order is attached hereto as Exhibit "A".) At the Status Conference held the same day, the Court set a January 18, 2011 summary judgment hearing date, with Plaintiffs' opening brief due on December 4, 2010. (The State extended this date at Plaintiffs' request to December 7.) Plaintiffs' counsel accepted these dates in order to have the motion heard prior to the challenged statutes' February 1, 2011 effective date.

3. On December 1 and 2, 2010, Plaintiffs deposed Special Agent Supervisor Blake Graham. On December 7, 2010, Plaintiffs filed a Motion for Summary Judgment or, in the Alternative, Summary Adjudication, along with eleven supporting fact declarations, almost sixty exhibits, and 240 undisputed facts. In light of the voluminous testimony, declarations and exhibits lodged by Plaintiffs, the State defensively took four depositions (three plaintiffs and expert witness Stephen Helsley), just in case the Court found factual matters to be relevant. One of those depositions, that of Herb Bauer Sporting Goods, was taken primarily to flesh out the

1 company's as-applied vagueness cause of action, a claim that was voluntarily dismissed by  
2 Plaintiffs. Three attorneys from Plaintiffs' law firm – Clinton Monfort, Sean Brady, and Joshua  
3 Dale – attended every deposition, though only Mr. Dale took an active role. Mr. Monfort and Mr.  
4 Brady observed the proceedings.

5 4. Plaintiffs' summary judgment motion was heard on January 18, 2011. On January 31,  
6 2011, the Court issued an Order Denying Plaintiffs' Motion for Summary Judgment and Granting  
7 in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication. (A true and correct  
8 copy of excerpts of the January 31, 2011 Order are attached hereto as Exhibit "B.") On February  
9 23, 2011, the Court entered Judgment in favor of Plaintiffs on the first cause of action in the  
10 Complaint. Plaintiffs served Notice of Entry of Judgment on March 2, 2011. On March 11, 2011,  
11 Plaintiffs served their Memorandum of Costs.

12 I declare under penalty of perjury under the laws of the State of California that the  
13 foregoing is true and correct. Executed in Sacramento, California on April 1, 2011.

14 

15 Peter A. Krause

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<b>SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO</b> <b>Civil Department - Non-Limited</b>	entered by:
TITLE OF CASE: <b>Sherrif Clay Parker vs. State of California</b>	Case Number: <b>10CECG02116 JH</b>
<b>LAW AND MOTION MINUTE ORDER</b>	

Hearing Date: **NOVEMBER 17, 2010**

Department: **97A**

Court Clerk: **M.Santana**

Hearing Type: **Status Conf,CMC,Mtn. Prelim Injunction**

Judge/Temporary Judge: **Jeff Hamilton**

Reporter/Tape: **Stacy Obel-Jorgensen**

**Appearing Parties:**

Plaintiff:

Defendant:

Counsel: **Clinton Monfort, Sean Brady, C.D. Michel,**

Counsel: **Peter Krause, Zackery Morazzini,**

☒ Motion Preliminary Injunction- OFF Calendar  
 Motion Judgment on Pleadings and Summary Judgment 12/16/10 ordered vacated. Opening to be filed 12/03/10.  
 Opposition due 01/03/2011. Reply due 01/07/2011. All Depositions due 12/16/10. Stipulation/Order to be submitted in writing  
 to the court for signature.

☐ Continued to ☒ Set for 01/18/11 at 8:30a.m Dept. 402 for Court Trial

☒ **Must have at least 2 witnesses ready to go on  
01/18/2011**

☐ Matter is argued and submitted.

☐ Upon filing of points and authorities.

☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.

☐ Taken under advisement

☐ Demurrer ☐ overruled ☐ sustained with \_\_\_\_\_ days to ☐ answer ☐ amend

☐ Tentative ruling becomes the order of the court. No further order is necessary.

☐ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

☐ Service by the clerk will constitute notice of the order.

☐ Time for amendment of the complaint runs from the date the clerk serves the minute order.

☐ Judgment debtor \_\_\_\_\_ sworn and examined.

☐ Judgment debtor \_\_\_\_\_ failed to appear.  
 Bench warrant issued in the amount of \$ \_\_\_\_\_

**Judgment:**

☐ Money damages ☐ Default ☐ Other \_\_\_\_\_ entered in the amount of:  
 Principal \$ \_\_\_\_\_ Interest \$ \_\_\_\_\_ Costs \$ \_\_\_\_\_ Attorney fees \$ \_\_\_\_\_ Total \$ \_\_\_\_\_

☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to \$ \_\_\_\_\_ per \_\_\_\_\_

**Further, court orders:**

☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.

☐ \$ \_\_\_\_\_ to be released to judgment creditor and balance returned to judgment debtor.

☐ Levying Officer. County of \_\_\_\_\_, notified. ☐ Writ to issue

☐ Notice to be filed within 15 days. ☐ Restitution of Premises



<b>SUPERIOR COURT OF CALIFORNIA COUNTY OF FRESNO</b> Civil Department, Central Division 2317 Tuolumne Street Fresno, CA 93721 (559) 497-4100	FOR COURT USE ONLY
TITLE OF CASE: <b>Sherrif Clay Parker vs. State of California</b>	
<b>CLERK'S CERTIFICATE OF MAILING</b>	CASE NUMBER: <b>10CECG02116 JH</b>

Name and address of person served:

**Peter Andrew Krause**  
**Office of the Attorney General**  
**1300 I Street, Ste 125**  
**Sacramento, CA 95814**

---

**CLERK'S CERTIFICATE OF MAILING**

I certify that I am not a party to this cause and that a true copy of the 11/17/10 Minute Order was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California, on:

Date: **November 18, 2010**

Clerk, by **MARIA G. SANTANA**, Deputy  
**M. Santana**

C. D. Michel, 180 East Ocean Blvd., Suite 200, Long Beach CA 90802  
**Peter A. Krause, Office of the Attorney General, 1300 I Street, Ste 125, Sacramento CA 95814**



FILED

JAN 31 2011

FRESNO SUPERIOR COURT

By \_\_\_\_\_ DEPT. 402 - DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO  
CENTRAL DIVISION

Sheriff Clay Parker, et al.,        ) No. 10 CECG 02116  
  )  
Plaintiffs,                            )  
  )  
v.                                        )  
  )  
State of California, et al.,        ) ORDER DENYING PLAINTIFFS'  
  ) MOTION FOR SUMMARY JUDGMENT  
  ) AND GRANTING IN PART AND  
Defendants.                            ) DENYING IN PART PLAINTIFFS'  
  ) MOTION FOR SUMMARY  
  ) ADJUDICATION  
  )

A hearing on Plaintiffs Sheriff Clay Parker's, Herb Bauer Sporting Goods, Inc.'s, California Rifle and Pistol Association Foundation's, Able's Sporting, Inc.'s, RTG Sporting Collectibles, LLC's, and Steven Stonecypher's motion for summary judgment, or, in the alternative, for summary adjudication was held in this court on January 18, 2011. Appearances by counsel were noted on the record. After argument by counsel, the Court orally denied PLAINTIFFS' motion for summary judgment, denied Plaintiff Herb Bauer Sporting Goods, Inc.'s motion for summary adjudication of its second cause of action for declaratory and injunctive relief - as applied vagueness challenge, and granted PLAINTIFFS' motion for summary adjudication of their first cause of action for

1 declaratory and injunctive relief - facial vagueness challenge.  
2 The Court now issues the following written decision and rules as  
3 follows:

- 4  
5 1. PLAINTIFFS Sheriff Clay Parker's, Herb Bauer Sporting  
6 Goods, Inc.'s, California Rifle and Pistol Association  
7 Foundation's, Able's Sporting, Inc.'s, RTG Sporting  
8 Collectibles, LLC's, and Steven Stonecypher's First  
9 Cause of Action for Declaratory and Injunctive Relief -  
10 Facial Vagueness Challenge

11 PLAINTIFFS Sheriff Clay Parker, Herb Bauer Sporting Goods,  
12 Inc., California Rifle and Pistol Association Foundation, Able's  
13 Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven  
14 Stonecypher have filed a motion for summary judgment of their  
15 complaint and summary adjudication of their first cause of action  
16 for declaratory and injunctive relief - due process vagueness -  
17 facial. In PLAINTIFFS' first cause of action, the PLAINTIFFS  
18 allege that an actual controversy has arisen and now exists  
19 between PLAINTIFFS and all DEFENDANTS because the PLAINTIFFS  
20 contend that Penal Code §§ 12060, 12061, and 12318 that regulate  
21 "handgun ammunition" as defined in Penal Code §§ 12060(b) and  
22 12323(a) are void for vagueness on their face and the DEFENDANTS  
23 contend that the statutes are not unconstitutionally vague and  
24 that they can be constitutionally enforced. In order to establish  
25 a cause of action for declaratory relief, a plaintiff must prove:  
26 (1) a proper subject of declaratory relief within the scope of  
27 Code of Civil Procedure § 1060, and (2) an actual controversy  
28 involving justiciable questions relating to the rights or  
obligations of a party. (See 5 Witkin, California Procedure (5<sup>th</sup>  
ed.) § 853.) Injunctive relief is a type of damage or relief and  
order - Parker, et al. v. State of California, et al. (10CECG02116)

1 is a derivative cause of action, not a stand-alone cause of  
2 action.

3 The Court determines the issue of whether or not a statute is  
4 facially vague as a matter of law. (*People v. Cole* (2006) 38 Cal.  
5 4th 964, 988 ["Ultimately, the interpretation of a statute is a  
6 question of law for the courts to decide."].)

7 Penal Code 12060(b) states:

8 "Handgun ammunition" means handgun ammunition as defined  
9 in subdivision (a) of Section 12323, but excluding  
10 ammunition designed and intended to be used in an  
11 "antique firearm" as defined in Section 921(a)(16) of  
Title 18 of the United States Code. Handgun ammunition  
does not include blanks.

12 Penal Code § 12323(a) provides:

13 "Handgun ammunition" means ammunition principally for  
14 use in pistols, revolvers, and other firearms capable of  
15 being concealed upon the person, as defined in  
subdivision (a) of Section 12001, notwithstanding that  
the ammunition may also be used in some rifles.

16 Penal Code § 12001(a) states:

17 (a)(1) As used in this title, the terms "pistol,"  
18 "revolver", and "firearm capable of being concealed  
19 upon the person" shall apply to and include any device  
20 designed to be used as a weapon, from which is expelled  
21 a projectile by the force of any explosion, or other  
22 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.

23 (2) As used in this title, the term "handgun" means any  
24 "pistol," "revolver," or "firearm capable of being  
concealed upon the person."

25 In their first cause of action, the PLAINTIFFS contend that  
26 Penal Code §§ 12060, 12061, and 12318 that regulate "handgun  
27 ammunition" as defined in Penal Code §§ 12060(b) and 12323(a) are  
28 facially void for vagueness because the statutes fail to provide

1 notice to persons of ordinary intelligence regarding which  
2 calibers of ammunition are "handgun ammunition" and thus subject  
3 to enforcement under Sections 12060, 12061, and 12318 and because  
4 the statutes encourage or invite arbitrary and discriminatory  
5 enforcement of the law. Specifically, the PLAINTIFFS contend that  
6 the entire statutory scheme envisioned by Sections 12060, 12061,  
7 and 12318 fail for vagueness because the definition of "handgun  
8 ammunition" -- the subject matter regulated by the statutes - is  
9 itself facially impermissibly vague. After careful consideration,  
10 the Court finds that the definition of "handgun ammunition" as  
11 established in Penal Code §§ 12060(b) and 12318(b)(2) is  
12 unconstitutionally vague and, because the definition of "handgun  
13 ammunition" is vague, Penal Code §§ 12060, 12061, and 12318, which  
14 define and regulate sales and transfers of "handgun ammunition"  
15 are also impermissibly vague.

16 Consequently, the Court grants the PLAINTIFFS' motion for  
17 summary adjudication of their first cause of action.

18 "The constitutional interest implicated in questions of  
19 statutory vagueness is that no person be deprived of 'life,  
20 liberty, or property without due process of law,' as assured by  
21 both the federal Constitution (U.S. Const., Amends. V, XIV) and  
22 the California Constitution (Cal. Const., art. I, § 7)."  
23 (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567.) While Penal  
24 Code § 12060 is simply a definitional statute, Penal Code §§ 12061  
25 and 12318 are criminal statutes. More specifically, Section  
26 12061(c)(1) provides that a violation of Section 12061(a)(3),  
27 (a)(4), (a)(6), and (a)(7) is a misdemeanor and Section 12318(a)  
28 provides that a violation of Section 12318 is a misdemeanor.

1 "Under both Constitutions, due process of law in this context  
2 requires two elements: a criminal statute must "be definite enough  
3 to provide (1) a standard of conduct for those whose activities  
4 are proscribed and (2) a standard for police enforcement and for  
5 ascertainment of guilt." (*Williams v. Garcetti* (1993) 5 Cal. 4th  
6 561, 567 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112,  
7 141].)

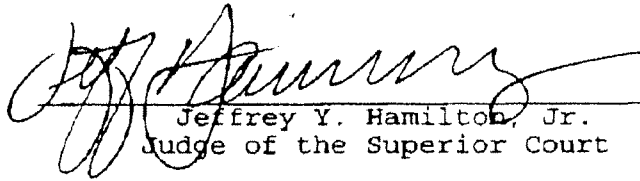
8 Although the doctrine focuses both on actual notice to  
9 citizens and arbitrary enforcement, [the U.S. Supreme  
10 Court] ha[s] recognized recently that the more important  
11 aspect of the vagueness doctrine "is not actual notice,  
12 but the other principal element of the doctrine - the  
13 requirement that a legislature establish minimal  
14 guidelines to govern law enforcement." [Citation.]  
15 Where the legislature fails to provide such minimal  
16 guidelines, a criminal statute may permit "a  
17 standardless sweep [that] allows policemen, prosecutors,  
18 and juries to pursue their personal predilections."  
19 (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-58 [quoting *Smith v.*  
20 *Goguen* (1974) 415 U.S. 566, 574-75].)

21 "A facial challenge to the constitutional validity of a  
22 statute or ordinance considers only the text of the measure  
23 itself, not its application to the particular circumstances of an  
24 individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069,  
25 1084.)

26 The California Supreme Court has not articulated a  
27 single test for determining the propriety of a facial  
28 challenge. [Citation.] Under the strictest test, the  
statute must be upheld unless the party establishes the  
statute "inevitably pose[s] a present total and fatal  
conflict with applicable constitutional prohibitions."  
[Citation.] Under the more lenient standard, a party  
must establish the statute conflicts with constitutional  
principles "in the generality or great majority of  
cases." [Citation.] Under either test, the plaintiff  
has a heavy burden to show the statute is  
unconstitutional in all or most cases, and "cannot  
prevail by suggesting that in some future hypothetical

1 Sporting Goods, Inc.'s motion for summary adjudication of its  
2 second cause of action for declaratory and injunctive relief - due  
3 process vagueness - as applied.

4  
5 DATED this 31<sup>st</sup> day of January, 2011.

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8 Jeffrey Y. Hamilton, Jr.  
9 Judge of the Superior Court  
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<b>SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO</b> Civil Department - Non-Limited 1130 "O" Street Fresno, CA 93724-0002 (559)457-1900		FOR COURT USE ONLY
TITLE OF CASE: <b>Sherrif Clay Parker vs. State of California</b>		
<b>CLERK'S CERTIFICATE OF MAILING</b>		CASE NUMBER: <b>10CECG02116 JH</b>


Name and address of person served:

**Peter Andrew Krause**  
**Office of the Attorney General**  
**1300 I Street, Ste 125**  
**Sacramento, CA 95814**

### CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the 01/31/11 minute order and copy of Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California, on:

Date: **February 1, 2011**

Clerk, by , Deputy  
**M. Santana**

**C. D. Michel, 180 East Ocean Blvd., Suite 200, Long Beach CA 90802**  
**Peter A. Krause, Office of the Attorney General, 1300 I Street, Ste 125, Sacramento CA 95814**