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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

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

Plaintiffs and Petitioners,

vs.

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

Defendants and Respondents.

CASE NO. 10CECG02116

REPLY TO OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; SUPPLEMENTAL DECLARATION OF CLINTON B. MONFORT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date:	October 28, 2010
Time:	3:30 p.m.
Location:	Dept. 97E
Judge:	Hon. Jeff Hamilton
Date Action Filed:	June 17, 2010
Trial Date:	not set

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INTRODUCTION

Plaintiffs moving papers support their vagueness challenge to AB 962 with declarations from parties and experts, based on personal knowledge, stating they do not understand their obligations under the Challenged Provisions because they are unable to determine what ammunition is "principally for use in a handgun." Plaintiffs also provide evidence demonstrating the legislature is well aware of the vagueness problem, and attempted - but failed - to fix it. In short, there is ample evidence, even a consensus of sorts, that the Challenged Provisions are vague because they provide little or no notice of what ammunition they regulate. This subjects Plaintiffs to *criminal penalties* and administrative *license revocation* without due process for engaging in *constitutionally protected conduct*.

Defendants' answer to Plaintiffs' claim is that: "A statutory scheme need not identify and anticipate every precise activity that is intended to be prohibited. Reasonable certainty is all that is required to satisfy due process." (Opp'n, p.1:19-22) That, of course, is no answer at all. Plaintiffs' complaint is not that the Challenged Provisions fail to anticipate "every precise activity;" it is that the Challenged Provisions provide little or no guidance at all to those governed by or charged with enforcing those provisions.

So, while Defendants assert the Challenged Provisions provide reasonable notice of what ammunition is regulated, they do not explain how so, nor do they provide evidence to rebut Plaintiffs' claims and evidence that they do not. They fail to identify any ammunition that falls within the scope of the law, nor how individuals, vendors, or law enforcement are supposed to make such determinations. Defendants point to no guidelines whatsoever: no comprehensive list, no representative list, no list of features that might clarify what ammunition is subject to regulation, nothing. In sum, Plaintiffs explain in detail why the definition of "handgun ammunition" under the Challenged Provisions is fatally flawed. Defendants have not answered.

Defendants also ignore significant portions of Plaintiffs' irreparable injury claims, and offer no argument of how they will be harmed should an injunction issue. Instead, Defendants dismiss Plaintiffs' concerns about prosecution under the criminal statutes at issue by claiming they will not enforce those statutes while the case is pending. But Defendants have already begun enforcing AB962, as discussed below, and there is a presumption that state officials will obey and follow the law. Moreover, Defendants have provided no evidence, neither internal memoranda nor public pronouncements, to support their contention that state law enforcement at all levels know they are not to enforce the laws in question. Finally, in terms of the balance

of harm resulting from an injunction, if we are to believe Defendants' promise of non-enforcement, then Defendants cannot argue that they will be harmed by an injunction that insures that promise is kept.

For these reasons, and as described below, Defendants' Opposition is unpersuasive. The Court should preserve the status quo by granting Plaintiffs' Motion for Preliminary Injunction.

I. PLAINTIFFS HAVE ESTABLISHED IRREPARABLE INJURY, WHILE DEFENDANTS OFFER NO EVIDENCE OF HARM

Plaintiffs have alleged, in detail and with supporting declarations, the threat posed by the Challenged Provisions, the resulting irreparable harm, and the need for injunctive relief. Defendants respond, in general terms, that the Challenged Provisions pose no credible threat to Plaintiffs and thus no irreparable injury because two of the Challenged Provisions have yet to take effect, and the others are not being enforced. (Opp'n, p. 4:15-21.) But Defendants fail to address or rebut Plaintiffs specific allegations.

Defendants assert that Plaintiffs need not fear the Challenged Provisions will be enforced against them because no state officer has threatened to enforce AB 962 against them, nor even discussed it with them. (Opp'n, p. 5:6-11.) This is disingenuous. Defendants administer the licensing of firearm retailers, and enforce the law administratively and criminally against violators. And Defendants issued an "Information Bulletin" to California firearms dealers putting them on notice of the requirements of AB 962, and when each provision takes effect. (See Mot., p. 10, fn. 12; Exhibit 8.) Despite evidence of Defendants' own statements to ammunition vendors about the mandates of the Challenged Provisions that must be complied with, Defendants assert that Plaintiffs' fears of prosecution are unjustified because Defendants now claim they will not enforce the Challenged Provisions. Defendants however, offer no evidence that they have informed either the public or vendors that they will not enforce the Challenged Provisions. Defendants also fail to provide any evidence they have instructed local law enforcement not to enforce the Challenged Provisions. They did not because they *cannot*. Of course Defendants intend to enforce the law. In fact, they have an obligation to do so.

So Plaintiffs and ammunition vendors throughout the state have been advised to comply with AB 962 and have been provided no guarantees that Defendants will not enforce the Challenged Provisions and every indication they will. Plaintiffs risk criminal prosecution for inadvertent violations of the Challenged Provisions already in effect by local law enforcement who have not been instructed otherwise. And firearm retailer plaintiffs are subject to the loss of local, state, and federal firearms and business licenses for inadvertent violations of the Challenged Provisions. The irreparable harm that would befall these plaintiffs

by *the loss of their livelihood* cannot be understated. Accordingly, Plaintiffs' fears of prosecution are, contrary to Defendants assertions, *very real.*

With respect to the imminent enforcement of the Challenged Provisions that require the recording of all "handgun ammunition" transactions and prohibit internet sales of "handgun ammunition," Defendants summarily dismiss Plaintiffs' grounds for an injunction because these statutes have not yet taken effect.[1] (Opp'n, p. 4:15-18.) As Plaintiffs' note, however, they seek an injunction to prevent irreparable harm from ceasing all shipments of ammunition suitable for use in handguns to avoid risking prosecution for inadvertent violations of the Challenged Provisions. (Mot., p. 13:17-27.)

Defendants dismiss these serious concerns in a footnote, mis-characterizing Plaintiffs' harm as the mere "contemplation" of whether to alter their business practices.[2] (Opp'n., p. 5, fn. 4.) But Plaintiffs' contemplation of what they have to do to comply with the new laws is not the identified harm. Rather, in contemplating how to comply with AB 962, Plaintiffs realized there is no way for them to know what types of ammunition are "handgun ammunition" and, more importantly, what types of ammunition law enforcement will consider "handgun ammunition." (Declaration of Ray T. Giles ("Giles Decl.") at ¶¶ 3–7; Declaration of Randy Wright ("Wright Decl.") at ¶¶ 3–8.) Accordingly, Plaintiffs will be forced to discontinue transfers of all ammunition suitable for use in handguns and long guns, thereby resulting in the loss of massive profits and business goodwill, or risk criminal prosecution or administrative discipline for violating the Challenged Provisions – *that is the harm to Plaintiffs.* (Mot., p. 13:17-27.)

Plaintiffs seek a preliminary injunction because they must significantly alter their business practices and software infrastructure *well before* the February 1, 2011, effective date if they are to cease all transfers of

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[1] It is unclear whether Defendants will enforce the Challenged Provisions that take effect February 1, 2011. It appears they might not enforce the new provisions if they will not enforce the current provisions. But the public and ammunition vendors have no way of knowing the Challenged Provisions will not be enforced against them by either Defendants, local law enforcement, or local and federal licensing agencies – who are equally uninformed.

[2] Defendants also discredit Plaintiffs' reliance on *McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal.2d 595 for the proposition that irreparable harm exists where Plaintiff altered his business practices out of fear of arrest under an unconstitutional law. (Opp'n, p. 5, fn. 4.) Although the Supreme Court in *McKay* did not rule on the propriety of issuing injunctive relief, it confirmed the allegations that Plaintiffs "discontinued the method of conducting the businesses as alleged because of fear of arrest and prosecution" were "sufficient to show irreparable injury." (*McKay Jewelers, Inc. v. Bowron, supra,* 19 Cal.2d at p. 599.) In other words, if the allegations in the complaint were adjudged to be true, irreparable harm would exist and injunctive relief would be proper. Accordingly, the court's statements are instructive in determining irreparable harm to Plaintiffs in this case.

ammunition suitable for use in both handguns and long guns (virtually all ammunition other than shot). And once Plaintiffs alter their business operations to cease shipments to California, Plaintiffs will immediately suffer the loss of business goodwill and future profits of, *regardless of the outcome of this litigation on the merits*. Even if Plaintiffs ultimately prevail on the merits, *these losses will be unrecoverable*. Plaintiffs provide extensive testimony documenting this in the declarations of Ray T. Giles and Randy Wright filed in support of Plaintiffs' Motion. (Giles Decl. at ¶¶ 3–8; Wright Decl. at ¶¶ 3–10.) Conversely, Defendants offer *no* evidence to dispute this harm, and attempt to bury the issue by relegating it to an inaccurate footnote.

Defendants' contention that Plaintiffs' injunction request is premature because some of the Challenged Provisions take effect in less than four months warrants explanation of the procedural posture of this case to date. Plaintiffs filed their Complaint on June 17, 2010, and intended to file a summary judgment motion as soon as possible. (Supplemental Declaration of Clinton B. Monfort ("Suppl. CBM Decl.") at ¶ 2.) Plaintiffs granted Defendants' extension request to file an answer and were unable to secure a stipulation for a shortened briefing schedule on summary judgment because Defense counsel asserted the need to conduct discovery and take depositions. (Suppl. CBM Decl. at ¶¶ 3-4.) Plaintiffs then moved forward with a preliminary injunction to prevent the ongoing and imminent harm to Plaintiffs, but were forced to postpone filing to accommodate defense counsels' vacation, and because Defendant DOJ worked with the legislature to try and amend AB 962 and the Challenged Provisions via AB 2358. This forced Plaintiffs to standby to see if, and how, their claims might change. (Suppl. CBM Decl. at ¶¶ 5-6 .) When AB 2358 failed, Plaintiffs timely filed their Motion within one week, though waiting until defense counsel returned from vacation. (Suppl. CBM Decl. at ¶¶ 5-7.) Defendants then requested an extension to file its Opposition, and the parties worked with the Court to have Plaintiffs' Motion heard October 28, 2010. (Suppl. CBM Decl. at ¶¶ 8-9.) In light of these delays, and given Defendants have yet to propound *any* discovery or notice *a single* deposition, little suggests this case will be resolved prior to February 1, 2011. (Suppl. CBM Decl. at ¶11.) Accordingly, the procedure of this case to date, combined with the impending effective dates of the remaining Challenged Provisions, further supports a preliminary injunction to preserve the status quo while Plaintiffs' claims are litigated.

Although the extensive harm to Plaintiffs warrants a preliminary injunction, the Ninth Circuit Court of Appeal provides persuasive instruction when determining harm for constitutional violations, noting that "[such] violations cannot be adequately remedied through damages and generally constitute irreparable harm."

(*Nelson v. NASA* (9th Cir. 2007) 530 F.3d 865, 882.) Defendants try to discount this notion by distinguishing *Nelson* from this case. "Unlike Plaintiffs in *Nelson*, Plaintiffs here are unlikely to succeed on the merits and therefore are not likely to have their constitutional rights violated if a preliminary injunction is denied." (Opp'n, p. 5:22-24.) Defendants' argument is circular. In fact, Defendants' suggestion that the difference between the two cases is that "[p]laintiffs are not likely to succeed on the merits and therefore will not have their constitutional rights violated" acknowledges Plaintiffs *will have the their constitutional rights violated* should the Court find Plaintiffs are likely to succeed the merits. As set forth, *infra*, Plaintiffs are *very likely* to succeed on the merits.[3]

Finally, although the decision to grant a preliminary injunction requires a balancing of the harms to each party, Defendants fail to identify *any harm* to them should an injunction issue. Rather, Defendants summarily conclude that the relative balance of harms weighs heavily against issuing an injunction. (Opp'n, p. 6:1-2.) Defendants' failure to identify any harm is not surprising. Defendants repeatedly assert they will not enforce the Challenged Provisions. (Opp'n, p. 4:18-23; Defs.' Answer, ¶ 21.) Defendants cannot argue they have no intention to enforce the laws in question and then claim they will be harmed by not enforcing them. Thus, while the harm to Plaintiffs is great, the harm to Defendants is *nonexistent*.

In light of the foregoing, the balance of harms weights heavily in Plaintiffs' favor.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Pen. Code §12061(a)(1)-(2) is Vague as Applied to Herb Bauer Sporting Goods

Defendants' Opposition argues solely that Plaintiffs' as applied challenge is not ripe for judicial consideration. (Opp'n, pp. 10:24-13:10.) Although Plaintiffs' claims for injunctive relief are not dependent on Plaintiff Bauer's as applied challenge because the Challenged Provisions are vague in all of their applications as set forth below, Plaintiffs *have* demonstrated a controversy and threat of enforcement as identified in the DOJ Bulletin filed concurrently with Plaintiffs' Motion. (Exhibit 8.)[4]

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[3] Although Plaintiffs will suffer extensive harm, where Plaintiffs are very likely to succeed on the merits, a lesser showing of harm is required to support preliminary injunction. (*Butt v. Cal.* (1992) 4 Cal.App.4th 668, 678.)

[4] Plaintiffs included their Petition for Writ of Mandate demand as remedy request. Though it does not form the basis for Plaintiffs' Motion, Defendants owe an affirmative ministerial duty to CA residents, including Plaintiffs, to uphold and enforce the constitution, which requires defendants to refrain from enforcing vague laws.

B. The Challenged Provisions are Vague in all of their Applications

1. Defendants cannot save the Challenged Provisions from vagueness by misdirecting the Court's focus to whether sections 12323 or 12316 are vague in all applications

Plaintiffs allege that *Penal Code sections 12060, 12061, and 12318* are vague in all of *their* applications; and they are. Plaintiffs need not establish that any provision of law that might reference section 12323(a) or use the words included in that statute are vague in all applications of *those* statutes.

Regardless, Defendants' Opposition makes the reaching argument that Plaintiffs are not likely to succeed on their claim that the Challenged Provisions, Penal Code sections 12060, 12061, and 12318, are unconstitutionally vague because Plaintiffs have not challenged Penal Code section 12323(a). (Opp'n, p. 7:9-28.) This is apparently because section 12323(a) is referenced by section 12060 to define what "handgun ammunition" is under section 12060, and thus subject to the remainder of the Challenged Provisions. Defendants' argument, however, misses the point. Defendants attempt to twist Plaintiffs' claims into a challenge to section 12323(a), which is solely a "definitional" statute, in order to assert that the definition provided in that section cannot fail for vagueness because it is referenced in another Penal Code section that has a non-vague application. As Plaintiffs note, Penal Code section 12316(a)(1)(B) also uses the 12323(a) definition of "handgun ammunition,"[5] which, taken by itself, *is* unconstitutionally vague, and Plaintiffs never suggest otherwise. (See Mot., p. 9, fn. 10.) Section 12323(a) is used to define "handgun ammunition," (along with additional statutory language) in both sections 12060 and 12316(a)(1)(B). The difference is that section 12316 saves itself from the inherent vagueness of section 12323(a) because it allows the retailer to determine whether a particular type of ammunition is "handgun ammunition" based on the retailer's interpretation of the purchaser's subjective intended usage. Conversely, the Challenged Provisions provide no guidance other than whether the ammunition is used more often in a handgun.

Ultimately, the Challenged Provisions are vague in all of their applications, regardless of whether Penal Code section 12316 is vague in all of its applications. The fact that they both reference a vague statutory

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[5] Penal Code section 12316(a)(1)(B) prohibits any person, corporation, or dealer from selling "any ammunition or reloaded ammunition designed and intended for use in a handgun to a person under 21 years of age. As used in this subparagraph, "ammunition" means handgun ammunition as defined in subdivision (a) of Section 12323. *Where ammunition or reloaded ammunition may be used in both a rifle and a handgun, it may be sold to a person who is at least 18 years of age, but less than 21 years of age, if the vendor reasonably believes that the ammunition is being acquired for use in a rifle and not a handgun.*"

Defendants falsely assert that section 12316 was enacted as part of AB 962. Although parts of 12316 were amended in AB 962, section 12316, including subsection(a)(1)(B), was enacted years prior to AB 962.

definition, which is clarified somewhat in 12316, but not in the Challenged Provisions, does not change this. While Section 12316 might be saved by operative language which gives that statute enough clarity to avoid constitutional vagueness, this potentially saving language does not – and cannot – apply to the Challenged Provisions. (See Mtn at p. 9:24-27, fn. 10.) That section 12316 may not be vague in all applications does not change the fact that the Challenged Provisions *are*. Defendants argument is a red herring included to confuse the Court.

2. The Challenged Provisions Fail To Provide Reasonable Notice as to What Types of Ammunition they Regulate

Defendants' Opposition concludes the Challenged Provisions are sufficiently clear to guide law enforcement, retailers, and individuals, but they *fail* to identify which types of ammunition are "handgun ammunition." (Opp'n, pp. 8:9-10:23.) Nor do Defendants explain *how* one is supposed to determine whether any of the thousands of types of hybrid ammunition are "principally for use in," or used more often in, a handgun. Instead, Defendants baldly assert that reasonable persons are able to determine whether a particular type of ammunition is "principally for use in a handgun." (Opp'n, p.8:12-17.) Rather than demonstrating how, or which, certain types of ammunition the Challenged Provisions regulate, Defendants' Opposition largely raises issues that are either inaccurate or inapplicable to the Court's determination, or both.[6]

Defendants fail to provide *any* legislative history clarifying the Challenged Provisions and ignore the history cited by Plaintiffs that expressly acknowledges the vagueness of the definition of "handgun ammunition" at issue. (Mot., pp. 8:19-9:7.) Instead, Defendants suggest that testimony provided by the author of the Challenged Provisions is not instructive. (Opp'n, p. 10:4-19.) Plaintiffs concede that such statements generally are not used to "clarify the meaning" of a statute. Yet Assemblyman De Leon's testimony during the Senate Public Safety hearing nonetheless shows that everyone, even the *Legislature itself*, acknowledges the vagueness of the Challenged Provisions. Defendants' suggestion that statements about the laws' vagueness by the *author of the legislation himself* are not helpful to the Court defies logic.

Next, Defendants suggest Plaintiffs' proffered declarations offer improper opinion testimony, yet another mis-characterization of Plaintiffs' claims and evidence. Plaintiffs wholeheartedly acknowledge that

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[6] Defendants attempt to raise Plaintiffs' burden by characterizing the injunction sought as "mandatory." (Opp', p. 3:26-28.) Although Plaintiffs present ample evidence and authority supporting a mandatory injunction, the injunction sought by Plaintiffs is prohibitory in its effect. Defendants admitted their relative position will not be effected by an injunction because they are not enforcing the Challenged Provisions. (Opp'n, p. 3:21-23.)

opinion evidence about the meaning of a statute is inadmissible. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46.) But Plaintiffs do not offer such testimony to determine the "meaning" of the Challenged Provisions. Rather, such testimony demonstrates that individuals, retailers, law enforcement, and experts alike are unable to determine what ammunition is "handgun ammunition" *under* those provisions. (Mot., p. 6:12-28.)[7]

It seems apparent that "handgun ammunition," for purposes of the Challenged Provisions, means ammunition that is used 51% of the time or more in a handgun. Plaintiffs provide case law supporting that interpretation, and Defendants do not dispute it. (See Mot., pp. 5:11-6:11.) Instead, Defendants make much over the fact that the words "primarily" and "principally" are used without problem in other statutes. (Opp'n, pp. 9:10-10:3) Again, Plaintiffs *could not agree more*. In fact, Plaintiffs provide an example in their own moving papers of a challenge to a statute that relied on the word "principally" that was held constitutional. (Mot., p. 6:7-11.) Plaintiffs do not contend the word "principally" will be vague in all of its applications; nor must they. Plaintiffs allege that whether ammunition is "principally for use in a handgun" under the Challenged Provisions is an unconstitutionally vague standard.

Defendants' Opposition relies principally on two cases for the premise that the Challenged Provisions are not void for vagueness, *Bone v. State Board of Cosmetology* (1969) 275 Cal.App.2d. 851 and *United States v. Harriss* (1954) 374 U.S. 612. (Opp'n, p. 9:10-18.) These cases demonstrate precisely the point Plaintiffs wish to clarify for the Court. They provide compelling illustrations of the differences between standards that *can be applied by an individual* to determine prohibited conduct, and statutes like the Challenged Provisions, that *make such a determination impossible*.

In *Bone*, the Court considered an attempt to stop the State Board of Cosmetology's enforcement of a statute that prevented persons who held a cosmetologist's license (as opposed to a barber's license) from cutting hair in businesses that were "'primarily' engaged in the business of hair cutting" (*i.e.*, barbering). (*Bone, supra*, 275 Cal.App.2d. at p. 857.) The court found that "plaintiff suffer[ed] from no uncertainty as to his own classification for, by *his own statement*, his shops specialize in styling and cutting the hair.'" (*Ibid.* (emphasis added).) Plaintiffs in *Bone* went into business with full knowledge of whether they were engaging in the practice of barbering or cosmetology. (*Id.* at 852.) Thus, those plaintiffs could easily comply with the

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[7] Defendants suggest Plaintiffs claim experts are required to determine that ammunition is principally for use in a handgun. (Opp'n, p. 8:12) However, *even experts* are unable to make such determination. (Mot., 6:20-23.)

statute by determining if their own businesses were primarily engaged in "hair cutting," a determination they were fully capable of making because it involved an analysis of information that was *available to them.* In stark contrast, Plaintiffs here have *no way to determine* whether particular ammunition is used "principally" in a handgun, nor is there any place for them to *acquire* information necessary to make such a determination.

Similarly, *Harriss* involved a challenge to The Federal Regulation of Lobbying Act, which requires disclosures of lobbying activities. (*Harris, supra*, 374 U.S. at pp. 614-617.) The Act applies to any person who solicits, collects, or receives monies used "principally" to aid in the passage or defeat of legislation. (*Id.* at 619.) Although Harriss dealt mainly with the confusion as to what activities constitute lobbying, the case further illustrates the difference between the statutes referenced by Defendants and the Challenged Provisions. Whether or not an individual receives monies for the purpose of lobbying is something that *can be determined by the individual himself.* So long as the law is clear as to what activities constitute lobbying, the individual can make the determination as to whether their particular activities are "lobbying activities." Much like the Plaintiffs in *Bone*, the *Harris* plaintiffs could easily determine whether they were in compliance with the law by *examining their own conduct* along with other readily available information. But Plaintiffs in this case cannot examine their own conduct to determine whether ammunition is principally used in handguns, nor do they have information to assist them in that determination. For example, where a retailer knows a particular ammunition sale will have to be recorded if, and only if, that ammunition is used more often in a handgun by everyone, he is still *unable to make that determination.*[8]

In addition, Plaintiffs recently discovered a ruling that provides for excellent comparative analysis. Although the case was decided by the Tennessee Chancery Court, and accordingly is not binding on this Court,

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[8] Defendants cite the 1975 decision of *Cranston v. City of Richmond* for the proposition that vendor Plaintiffs should be held to a slightly higher standard. (Opp'n, p. 9:24-28.) But there is no delineation in the firearms community as to whether each of the thousands of types of ammunition are principally for use in handguns. (Mot., p. 6:20-23.) And the face-to-face requirement is not limited to any vocation – it applies to anyone who wishes to purchase, transfer, or ship "handgun ammunition." (Cal. Pen. Code § 12318.) Finally, the more important test has become whether guidelines exist to prevent arbitrary application by *law enforcement.* (*Kolender,* 461 U.S. 352, 358.) Although Defendants' reliance is misplaced, United States Supreme Court instruction on the *certainty* required of statutes like the Challenged Provisions is compelling. (See *Coluati v. Franklin* (1979) 439 U.S. 379, 391(**The Constitution demands the greatest clarity where the certainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights**); see also *Balagget v. Bullitt* (1964) 277 U.S. 360, 372 (**The vice of constitutional vagueness is further aggravated where a statute inhibits the exercise of constitutional freedoms.**)) And statutes that restrict the ability to transact in ammunition, which is a necessary component of a firearm, impact the exercise of the fundamental right to keep and bear arms.

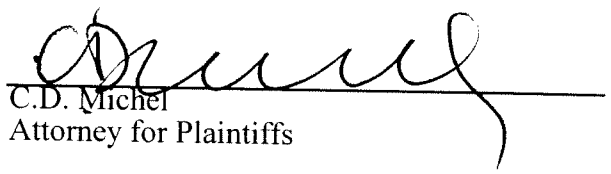
the application and analysis provided by the Court is directly on point and persuasive. That case, *State of Tennessee ex rel. Rayburn v. Cooper*, involved a challenge to a Tennessee state law authorizing firearms to be carried by patrons in establishments where "the serving of meals" is the "principle business conducted" – as opposed to the serving of alcohol.[9] (Compl., ¶ 2; Bench Ruling, p. 24:20-25.) In that case, plaintiffs argued it would be extremely difficult for an individual to determine whether they were in a bar or a restaurant. (Compl., ¶¶ 93, 97, 99.) The Court ruled the statute was unconstitutionally vague because whether the serving of meals is the principle business is *not something that can be known* to the ordinary citizen. (Bench Ruling, pp. 12:24-13:5) The Court added that *inquiry would not be satisfactory*. (Bench Ruling, p. 13:6.) And the prospect for Plaintiffs in this litigation is much more dire; whereas patrons can inquire with the restaurant whether the principle business conducted was the "service of meals," Plaintiffs have no such luxury. Apparently Defendants believe vendors, individuals, and law enforcement can determine whether each of the thousands of types of hybrid ammunition are used more often in a handgun. Where Plaintiffs are supposed to obtain such information, however, remains a mystery.

CONCLUSION

In light of the irreparable harm to Plaintiffs if an injunction does not issue and the complete absence of harm to defendants if one does, and because Plaintiffs are *very likely* to succeed on the merits, the Court should grant Plaintiffs' Motion for Preliminary Injunction. The need for an injunction to issue is further underscored by opposing counsel's request that two separate challenges to AB 962 filed in federal court be stayed pending resolution of this case. An injunction will maintain the *status quo* while the Courts resolve the issues in these cases, and determine whether they will be stayed.[10]

Dated: October 7, 2010

MICHEL & ASSOCIATES, P.C.



C.D. Michel
Attorney for Plaintiffs

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[9] Defendants discovered *State of Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, on September 29, 2010. A copy of the Complaint and Bench Ruling are attached to the Request for Judicial Notice filed herewith.

[10] A certified copy of the Complaints and the State's Motions to Dismiss (including the requests for stay) in *OOIDA v. Lindley*, Case No. 10-CV-02010-MCE-KJN ,and *State Ammuntion v. Lindley*, Case No.10-CV–1864-MCE-KJN, filed in the United States District Court for the Eastern District of California (Sacramento Division) are attached to Plaintiffs' request for Judicial Notice filed concurrently herewith.

DECLARATION OF CLINTON B. MONFORT

I, Clinton B. Monfort, declare as follows:

1. I am over the age of eighteen and not a party to this action. 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., attorneys of record for Plaintiffs in this action.

2. On or about June 17, 2010, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief with the intention of filing a Motion for Summary Judgment as early as possible to resolve this case on the merits before Penal Code sections 12061(a)(3)-(7) and 12318 take effect, as Plaintiffs' business decisions greatly rely on the enforcement of these sections and as Plaintiffs will be subject to prosecution for inadvertent violations of these laws should this case not be resolved before those sections take effect. Further, Plaintiffs seek speedy resolution of this matter to prevent further risk of prosecution for inadvertent violations of Penal Code section 12061(a)(1)-(2) which has already taken effect.

3. In or about July 2010, counsel for all parties conferred regarding the merits of the present litigation. At this time, counsel for Defendants sought an extension of time to file Defendants' Answer to [Plaintiffs'] Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate. Out of professional courtesy, Plaintiffs granted this request.

4. On or about August 5, 2010, our office contacted counsel for Defendants via e-mail, inquiring as to whether Defendants would stipulate to a shortened briefing schedule to resolve this case on the merits via summary judgment before Penal Code sections 12061(a)(3)-(7) and 12318 take effect on February 1, 2011, and to prevent inadvertent violations of those sections already in effect. The parties were unable to agree to a shortened briefing schedule for Plaintiffs' Motion for Summary Judgment, as Defendants asserted the need to conduct discovery and depose Plaintiffs' expert witnesses. Accordingly, Plaintiffs informed Defendants of their intention to proceed with a Motion for Preliminary Injunction and continued preparing that motion.

5. In or about August, 2010, Plaintiffs sought to file a Motion for Preliminary Injunction, but, out of professional courtesy, postponed filing to accommodate opposing counsel's scheduled vacation from August 27, 2010, to September 7, 2010.

6. On or about August 19, 2010, Plaintiffs' counsel learned that Assembly Bill 2358, a bill

introduced in 2010 to amend Penal Code sections 12061, 12077, 12318, and 12323, had been amended to include a list of ammunition calibers that would be considered handgun ammunition. This knowledge led Plaintiffs to postpone filing the Motion for Preliminary Injunction until it could be determined whether and how AB 2358 would impact the shape of Plaintiffs' arguments in this case. On or about August 31, 2010, AB 2358 died on the floor of the Senate. (Exhibit 4.)

7. On or about September 7, 2010, Plaintiffs filed a Motion for Preliminary Injunction.

8. On or about September 8, 2010, Defendants sought an extension of time to file their Opposition to [Plaintiffs'] Motion for Preliminary Injunction. Plaintiffs granted this request, but sought the Court's involvement to protect Plaintiffs' interests and ensure that a mutually agreeable hearing date for Plaintiffs' Motion for Preliminary Injunction could be determined.

9. On or about September 14, 2010, the Court and counsel for Plaintiffs and Defendants participated in a teleconference during which it was decided that Plaintiffs' Motion for Preliminary Injunction would be heard on October 28, 2010.

10. On or about September 30, 2010, Defendants filed their Opposition to [Plaintiffs'] Motion for Preliminary Injunction.

11. As of the date of the filing of Plaintiffs' Reply, our office has yet to receive any notice of deposition of Plaintiffs or Plaintiffs' expert witnesses. Likewise, Defendants have not propounded any form of written discovery on Plaintiffs.

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

Dated this 7th day of October, 2010 at Long Beach, California.

Clinton B. Monfort

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Valerie Pomella, 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 October 7, 2010, I served the foregoing document(s) described as

REPLY TO OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; SUPPLEMENTAL DECLARATION OF CLINTON B. MONFORT

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

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General (185098)
1300 I Street, Suite 125
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 October 7, 2010, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on October 7, 2010, at Long Beach, California.

_X_ (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on October 7, 2010, California.

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

VALERIE POMELLA