BILL LOCKYER
Attorney General of the State of California
STACY BOULWARE EURIE
Senior Assistant Attorney General
CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General
DOUGLAS J. WOODS, State Bar No. 161531
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-4663
Fax: (916) 324-5567
E-mail: Douglas.Woods@doj.ca.gov

Attorneys for Defendants ATTORNEY GENERAL BILL LOCKYER, the STATE OF CALIFORNIA, and CALIFORNIA DEPARTMENT OF JUSTICE

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Case No. 01CECG03182

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

Date: February 1, 2007
Time: 3:30 p.m.
Dept: 72

Before the Honorable Alan Simpson

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INTRODUCTION

Defendants Attorney General Bill Lockyer, the State of California, and the California Department of Justice ("DOJ") hereby submit this memorandum in opposition to plaintiffs' motion for summary judgment or summary adjudication in this action. For the same reasons that defendants are entitled to judgment as a matter of law on the undisputed facts as set forth in *defendants'* motion for summary judgment, plaintiffs' unilateral attempt to set State assault weapon policy by their lawsuit and by their present motion must be rejected.

In denying plaintiffs' motion for preliminary injunction in this matter on April 16, 2002, this Court ruled: "The day may come when an actual criminal prosecution will present a court with vagueness challenges to the enforceability of the [Assault Weapons Control] Act (or specified regulations on which the prosecution depends) which the court will have to decide. *However, this is not that case.*" Order Denying Request for Preliminary Injunction, p. 5 (emphasis added).[1/] Time has not improved plaintiffs' claims, and now, more than four years later, this case remains "not that case."

In the Statement of Facts below, defendants set forth the relevant statutory and regulatory provisions at issue in this action and the nature of plaintiffs' claims that remain following defendants' demurrer. In the Argument, defendants address: (1) plaintiffs' statutory expansion claim alleged in the First Cause of Action; (2) the constitutional vagueness challenges alleged in the Second and Fifth Causes of Action; (3) the claims that defendants have failed to properly administer California's assault weapons law set forth in Claims 1, 2, and 3 in the Sixth Cause of Action; and (4) plaintiffs' new claims not alleged in their Amended Complaint.

Plaintiffs' lawsuit is simply another chapter in a long-running policy dispute with the Legislature and with DOJ as to the control of assault weapons. It is not truly a complaint about the clarity of the challenged law, or even truly a challenge to defendants' implementation of the law, but instead amounts only to a complaint that the law is not what plaintiffs want it to be. In all respects, notwithstanding the existence of *policy* disagreements, there is no dispute as to either the bases for the DOJ choices at issue or the bases for plaintiffs' criticism of such choices. Given the proper deference accorded DOJ's decisions, plaintiffs' policy criticisms are insufficient as a matter of law to support their motion and,

1. The Court's preliminary injunction order is attached as Exhibit G to the Declaration of Douglas J. Woods filed with defendants' summary judgment motion ("Woods Decl.").

indeed, their lawsuit. Accordingly, defendants respectfully request that the Court deny plaintiffs' motion for summary judgment or summary adjudication and instead grant summary judgment in favor of defendants.

STATEMENT OF FACTS

I. The Challenged Statutory and Regulatory Framework

In enacting California's Roberti-Roos Assault Weapons Control Act of 1989 (the "Act"), the Legislature stated:

> The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Penal Code section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings.

Penal Code § 12275.5. The Act identified as "assault weapons" certain rifles, pistols, and shotguns specified by manufacturer and model and established restrictions upon their possession, manufacture, distribution, transportation, and sale. Ten years later, in response to firearms manufacturers' attempts to circumvent the Act by use of alternative model names and numbers not listed among the models identified as assault weapons under the Act, the Legislature enacted Senate Bill 23, Chapter 129 of the Statutes of 1999 ("SB 23"). *See* SB 23, Ch. 129, St. of 1999, Sec. 12. Among other things, SB 23 created Penal Code section 12276.1, which for the first time defined assault weapons by reference to objective design characteristics, in addition to the existing list of assault weapons already identified by manufacturer and model.

The relevant portions of the applicable assault weapons Penal Code sections are as follows, with the terms that are the subjects of plaintiffs' various claims highlighted in italics for the Court's reference:

§ 12276.1. Assault weapon; further definition

(a) Notwithstanding Section 12276, "assault weapon" shall also mean any of the following:
(1) A semiautomatic, centerfire rifle that has the capacity to accept a *detachable magazine* and any one of the following:

* * *

(E) A *flash suppressor*.

* * *

(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.

* * *

(4) A semiautomatic pistol that has the capacity to accept a detachable magazine and any one of the following:

(A) A threaded barrel, capable of accepting a *flash suppressor*, forward handgrip, or silencer.

* * *

(D) The capacity to accept a *detachable magazine* at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

* * *

(7) A semiautomatic shotgun that has the ability to accept a *detachable magazine*.

* * *

(d) The following definitions shall apply under this section:

* * *

(2) "Capacity to accept more than 10 rounds" shall mean capable of accommodating more than 10 rounds, but shall not be construed to include a feeding device that has been *permanently altered* so that it cannot accommodate more than 10 rounds.

* * *

Penal Code § 12276.1.

The relevant portions of the assault weapons definitions contained in the California Code of Regulations are as follows:

§ 978.20. Definitions

The following definitions apply to terms used in the identification of assault weapons pursuant to Penal Code section 12276.1:

(a) "*detachable magazine*" means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool. Ammunition feeding device includes any belted or linked ammunition, but does not include clips, en bloc clips, or stripper clips that load cartridges into the magazine.

(b) "*flash suppressor*" means any device designed, intended, or that functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision.

* * *

California Code of Regulations, Title 11, § 978.20.[2/]

These provisions come into play by virtue of Penal Code section 12280, which generally prohibits the possession, manufacture, distribution, transportation, importation, sale, gift, or loan of assault weapons, except where the assault weapon is registered with DOJ or where a valid assault weapon permit has been issued by DOJ.

In addition, plaintiffs' lawsuit addresses an exception to another Penal Code provision established by SB 23. The relevant portions of the "large-capacity" magazine Penal Code prohibition are:

§ 12020. Manufacture, import, sale, supply or possession of certain weapons and explosives; punishment; exceptions; definitions

(a) Any person in this state who does any of the following is punishable by imprisonment in

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2. The history of the promulgation of the regulations in support of SB 23 (the "Regulations") is described at pages 4-5 of defendants' memorandum in support of their summary judgment motion and in the Declaration of Randy Rossi filed therewith ("Rossi Decl.").

a county jail not exceeding one year or in the state prison:

* * *

(2) Commencing January 1, 2000, manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, or lends, any large-capacity magazine.

* * *

(c)(25) As used in this section, "large-capacity magazine" means any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

(A) A feeding device that has been *permanently altered* so that it cannot accommodate more than 10 rounds.

* * *

(C) *A tubular magazine that is contained in a lever-action firearm.*

Penal Code § 12020.

II. Plaintiffs' Claims

A. Definition of "Flash Suppressor"

Plaintiffs make three distinct (albeit somewhat overlapping) claims in this lawsuit involving the definition of "flash suppressor" set forth in section 978.20(b) of the Regulations: (1) that the definition is an unlawful expansion of the statutory term (First Cause of Action); (2) that the definition is unconstitutionally vague (Second Cause of Action); and (3) that DOJ's determinations that two devices are *not* flash suppressors are inconsistent with the definition (Claim 1 in the Sixth Cause of Action).

Unlawful Expansion Claim: Plaintiffs claim that the term "flash suppressor" used by the Legislature has an established technical meaning that is contrary to the definition in the Regulations. Am. Compl., ¶ 39. In particular, plaintiffs disagree with the regulatory language that includes within the "flash suppressor" definition devices that *function* to suppress flash, complaining that such language has the effect of unlawfully enlarging the definition of "flash suppressor" to include devices labeled "compensators" and "muzzle brakes." Am. Compl., ¶¶ 40-42. Plaintiffs want the definition to include only devices *designed or intended* to suppress flash. Am. Compl., ¶ 46. Plaintiffs also complain that the definition should not include devices that *redirect* muzzle flash from the shooter's field of vision, but only devices that *reduce* muzzle flash. Am. Compl., ¶ 42.

Prior to the Legislature's enactment of Penal Code section 12276.1, though, there was no established technical definition of the term "flash suppressor" in the industry, and certainly no such definition categorically excluding devices labeled "muzzle brakes" and "compensators." Declaration of Ignatius Chinn filed with defendants' summary judgment motion ("Chinn Decl."), ¶ 13. According to

firearms reference materials reviewed by DOJ staff in the rulemaking process, including materials appended to plaintiffs' Amended Complaint, before DOJ defined "flash suppressor" in the Regulations there were varied, overlapping, and often conflicting definitions of the terms "flash suppressor," "flash hider," "muzzle brake" and "compensator" used in the industry. *Id.*, Ex. A; Am. Compl., ¶ 39, Exs. 6-15. DOJ's regulation established a single, industry-wide definition of the Legislature's "flash suppressor" term to encompass all devices that are designed or intended to, or that function to, suppress muzzle flash when a firearm is fired. *Id.*, ¶ 13.

Vagueness Claim: Plaintiffs claim that the definition of the term "flash suppressor" is unconstitutionally vague in various respects: it requires testing of the device which the ordinary rifle owner is unable to perform (Am. Compl., ¶¶ 48, 52-54); it does not include a list of devices identified as flash suppressors (Am. Compl., ¶ 49); it does not specify whether flash suppression function is determined by reference to shooting from the shoulder or from the hip (Am. Compl., ¶ 50); it does not specify whether flash suppression function is determined by reference to firearms with iron sights or with telescopic sights (Am. Compl., ¶ 51); it does not specify which ammunition characteristics to consider in determining flash suppression function (Am. Compl., ¶ 55); and it does not specify any flash measurement standards (Am. Compl., ¶ 55).

DOJ's understanding, though, is that the absence of measurement standards in the statute listing "flash suppressor" means the Legislature intended to include devices that reduce or redirect *any* amount of flash, and that DOJ is not at liberty to deviate from such intent by establishing some hypothetically permissible level of perceptible flash that would not render the device a flash suppressor. Chinn Decl., ¶ 6; Rossi Decl., Ex. A, p. 15. DOJ determines whether a particular feature or device is a flash suppressor as defined in section 978.20(b) by inspecting the device, reviewing material regarding the device provided by the manufacturer or otherwise, and/or consulting with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). Chinn Decl., ¶ 7-10. Correspondingly, others may ordinarily learn whether a particular device functions to suppress flash by the same means, and by consultation with DOJ. *Id.*, ¶ 11.

Inconsistent Determination Claim: Plaintiffs claim that two devices – the Springfield Muzzle Break and the Browning BOSS – *do* function to perceptibly reduce or redirect muzzle flash from the

shooter's field of vision and therefore *should* meet the definition of "flash suppressor" in the Regulations, but that DOJ has nonetheless determined the two devices are *not* flash suppressors. Am. Compl., ¶¶ 78-79. As a result, plaintiffs claim the definition in the Regulations should be invalidated. Am. Compl., ¶ 80. Beginning in approximately 2000, DOJ has confirmed in a variety of informal contexts that the Springfield Muzzle Break is not a flash suppressor, based on a determination by ATF. Chinn Decl., ¶ 15, Ex. B. In evaluating the Browning BOSS, DOJ has determined that the device redirects flash in a 360 degree arc around the barrel such that, on balance, it floods the shooter's field of vision with flash. *Id.*, ¶ 15. DOJ has thus determined that the Browning BOSS does not function to perceptibly reduce or redirect muzzle flash from the shooter's field of vision. *Id.*

B. "Permanently Altered" Exception to Large-Capacity Magazine Definition

Plaintiffs claim in their Fifth Cause of Action that DOJ should have issued a regulation to define the term "permanently altered" in the exception to the definition of "large-capacity magazine" established in Penal Code section 12020(c)(25).[3/] As the Regulations were originally noticed to the public, DOJ *did* propose that the statutory term "permanently altered" be defined to mean "any irreversible change or alteration." Chinn Decl., ¶ 17; Rossi Decl., Ex. A, p. 16. After consideration of public comment received during the initial comment period, however, DOJ determined that the proposed definition failed to provide any additional clarity to the term, and also that none of the alternative definitions proposed in the public comments provided additional clarity while maintaining legislative intent. Chinn Decl., ¶ 17; Rossi Decl., Ex. A, p. 16. DOJ thus determined that the term "permanently altered" would be sufficiently understood without further definition. Chinn Decl., ¶ 17; Rossi Decl., Ex. A, p. 16.

C. Detachable Magazine Enforcement

In Claim 2 of their Sixth Cause of Action, plaintiffs claim that DOJ has not fulfilled a duty to exercise supervisory power over district attorneys and law enforcement to assure that arrests and prosecutions are carried out in a manner consistent with section 978.20(a) of the Regulations, which defines the term "detachable magazine" to mean a magazine "that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required." In particular,

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3. Plaintiffs claim that DOJ likewise should have defined the term "permanently altered" in the exception to the term "capacity to accept more than 10 rounds" established in Penal Code section 12276.1(d)(2). Am. Compl., ¶ 71.

plaintiffs complain about a letter from DOJ dated February 22, 2001, responding to an inquiry from plaintiffs' counsel as to the legal effect under section 978.20(a) of a screw drilled through the receiver into the magazine. Am. Compl., ¶¶ 81-82, Ex. 28. DOJ confirmed in the letter, consistent with plaintiffs' counsel's understanding, that a magazine requiring either disassembly of the firearm action or use of a tool for removal (such as in the screw example) is not a detachable magazine under the regulatory definition. Am. Compl., Ex. 28.

D. Application of Large-Capacity Magazine Prohibition to Replica 19th Century Lever-Action Rifles

At the time this lawsuit was filed, the statutory definition of "large-capacity magazine" in Penal Code section 12020(c)(25) did not expressly exempt lever-action firearms. Plaintiffs charged in Claim 3 of their Sixth Cause of Action that DOJ had created confusion by authorizing members of the Single Action Shooting Society, Inc. ("SASS") to bring modern replicas of 19th Century lever-action rifles into California for the purpose of participating in SASS western style shooting competitions. Am. Compl., ¶¶ 84-85. Because plaintiffs claimed such firearms fell within the definition of "large-capacity magazines," plaintiffs requested that the prohibition against importation of large-capacity magazines be interpreted as limited to a prohibition against importation of the SASS rifles *for the purpose of sale*. Am. Compl., ¶¶ 84-85. The law was amended in 2001, however, expressly to exempt from the "large-capacity magazine" definition "[a] tubular magazine that is contained in a lever-action firearm." Penal Code § 12020(c)(25)(C).

E. New Claims in Plaintiffs' Summary Judgment Brief, but Not in Amended Complaint

Plaintiffs claim in their summary judgment memorandum that DOJ certified the performance and safety of Smith & Wesson's "Walther P22," but later determined that it qualified as an assault weapon under Penal Code section 12276.1(a)(4) based in part on its threaded barrel feature. *See* Pls.' SJM Mem. 18:7-28. This claim is not alleged in the Amended Complaint.[4/] Plaintiffs claim in their summary judgment memorandum that DOJ has taken the position that specialized assault weapons sales permits

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4. Plaintiffs did allege that the Legislature's listing of "threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer" as an assault weapon characteristic in Penal Code section 12276.1(a)(4)(A) was unconstitutionally vague, but this claim was properly dismissed with prejudice in the demurrer proceeding. *See* Am. Coml., ¶¶ 58-63; Order Re Defendants' Demurrer to First Amended Complaint, dated March 18, 2003, pp. 4:23-5:20.

issued to corporate dealers under Penal Code sections 12071, 12287, and 12277 apply only to the individual who signs the permit on behalf of the corporate dealer and those employees in his or her physical presence. *See* Pls.' SJM Mem. 19:1-14. This claim is not alleged in the Amended Complaint. Plaintiffs appear to claim in their summary judgment memorandum that DOJ agents mistakenly seized Robinson Armament Co. "M96" rifles, believing that they featured a "pistol grip" as referenced in Penal Code section 12276.1(a)(1)(A). *See* Pls.' SJM Mem. 19:15-22. This claim is not alleged in the Amended Complaint.[5/]

ARGUMENT

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Code Civ. Proc. § 437c(c). Certain material facts in this matter are undisputed, but they necessarily lead to summary judgment in favor of *defendants*, not *plaintiffs*. In any event, as identified in defendants' opposing Separate Statement, defendants' dispute of facts presented by plaintiffs as material to ostensible proof of their claims preclude summary judgment or summary adjudication in favor of plaintiffs.

I. DEFENDANTS, NOT PLAINTIFFS, ARE ENTITLED TO SUMMARY ADJUDICATION ON PLAINTIFFS' FIRST CAUSE OF ACTION FOR ALLEGED UNLAWFUL EXPANSION OF THE "FLASH SUPPRESSOR" TERM.

Plaintiffs' argument against the regulatory definition of "flash suppressor" (Pls.' SJM Mem. 3:7-5:10) simply requests improper substitution of plaintiffs' judgment for DOJ's.

As described at page 9 of defendants' summary judgment memorandum, administrative rulemaking is subject to judicial deference. *See Dabis v. San Francisco Redevelopment Agency*, 50 Cal. App. 3d 704, 706 (1975); *Californians for Political Reform Foundation v. Fair Political Practices Commission*, 61 Cal. App. 4th 472, 484 (1998); *California Labor Federation, AFL-CIO v. Industrial Welfare*

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5. Plaintiffs also attempt to interject their dissatisfaction with new "proposed regulations that expand the definition of 'assault weapons' beyond legislative intent" into their Claim 2 in the Sixth Cause of Action, which (as described above) addresses plaintiffs' fear that DOJ will not enforce the "detachable magazine" definition as written. *See* Pls.' SJM Mem. 15:26-28. The new proposed regulations address application of the "capacity to accept" language in Penal Code section 12276.1, and the separate question of whether a firearm with a magazine considered non-detachable (because it requires a tool for removal) nonetheless may have a "capacity to accept" a detachable magazine upon removal of the non-detachable magazine. *See* Pls.' Exs. IIII-MMMM. There is no claim in this regard alleged in the Amended Complaint, and it is therefore not subject to adjudication.

Commission, 63 Cal. App. 4th 982, 989 (1998). Review is ordinarily limited to whether the agency exceeded the scope of its delegated authority, whether it employed fair procedures, and whether the action is reasonable rather than arbitrary, capricious, or lacking in evidentiary support. *Brock v. Superior Court*, 109 Cal. App. 2d 594, 605 (1952).

The Legislature gave DOJ broad authority to promulgate regulations under the Act: "The Attorney General shall adopt those rules and regulations that may be necessary or proper to carry out the purposes and intent of [the Act]." Penal Code § 12276.5(i). "[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." Gov. Code § 11342.2. Within these parameters, any evaluation of the regulations challenged here must be highly deferential to DOJ's exercise of discretion.[6/]

Turning to the substance of plaintiffs' criticism, the claim here amounts simply to a policy dispute with DOJ (and indeed the Legislature) as to what the law should be, and falls well short of suggesting the "flash suppressor" definition is arbitrary, capricious, or lacking in evidentiary support. In particular, plaintiffs complain that DOJ's regulation defining the statutory term "flash suppressor" is contrary to an established technical meaning already existing in the industry, and has the effect of improperly including "compensators" and "muzzle brakes" within the definition. Am. Compl., ¶¶ 39, 42. Plaintiffs want the definition to include only devices *designed or intended* to *reduce* flash, without any consideration of how the device *functions*. Am. Compl., ¶¶ 40-41, 46; *see* Pls.' SJM Mem. 3:10-4:1.

Contrary to plaintiffs' threshold premise (Pls.' SJM Mem. 3:10-11), however, there was no common industry definition of "flash suppressor" as "a muzzle attachment designed to reduce flash" when the Regulations were promulgated. The undisputed evidence shows that, when SB 23 was passed, the terms "flash suppressor" and "flash hider" were given both similar and dissimilar meanings in

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6. In arguing against deference to DOJ (Pls.' SJM Mem. 4:10-5:5), plaintiffs quote *Yamaha Corp. of America v. State Board of Equalization*, 19 Cal. 4th 1 (1998), out of context. While courts should be deferential to an agency to the extent appropriate to the *situation* if the regulations at issue are "interpretive" as opposed to quasi-legislative, a regulation may also be both interpretive and quasi-legislative. *See id.* at 6-10; *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 800-802 (1999). Consistent with the California Supreme Court's analysis in *Ramirez*, even if the regulation at issue here were considered "interpretive" in addition to quasi-legislative, deference is required in these circumstances: the regulation was adopted pursuant to the Administrative Procedure Act after public notice and comment, it received the benefit of agency expertise and technical knowledge, and it was subject to careful consideration by senior agency officials. *See* Rossi Decl., ¶¶ 3-5.

reference materials and were interwoven with discussions of "muzzle brakes" and "compensators." Chinn Decl., ¶ 13, Ex. A; Am. Compl., ¶ 39, Exs. 6-15. It was the absence of any established industry-wide definition of "flash suppressor" that created the need to provide a definition by regulation. Given the varying definitions in the industry references, DOJ was left to define the term "flash suppressor" according to its terms, and the statutory purpose, as a device that suppresses flash. *See Great Lakes Properties, Inc. v. City of El Segundo*, 19 Cal. 3d 152, 155 (1977). Contrary to plaintiffs' critique, there was no basis for *limiting* the scope of the term to include only those devices "designed or intended" to suppress flash. An administrative regulation may not impair the scope of the statute it implements. Gov. Code § 11342.2. Moreover, if necessary to determine legislative intent, courts may compare statutes on related subjects and look to the presence or absence of common language for guidance. *Traverso v. People ex rel. Department of Transportation*, 6 Cal. 4th 1152, 1166 (1993). In Penal Code section 12020, which establishes the unlawful carrying and possession of weapons in California with extensive definitions, *in no less than seven instances* the Legislature expressly limited the definition of particular weapons or particular devices for weapons by reference to how the weapon or device was "designed" or "intended" to be used. *See* Penal Code § 12020(c)(1)(A), (c)(1)(B), (c)(1)(E), (c)(2)(E), (c)(4), (c)(9), and (c)(10). Where the Legislature intends to limit a weapon device's definition to how it is "designed" or "intended" to be used, as opposed to how it may function, section 12020 makes clear that the Legislature knows how to do so. No such limitation was expressed in Penal Code section 12276.1.[7]

Correspondingly, plaintiffs' contention that any proper definition of "flash suppressor" must exclude "muzzle brakes" and "compensators," even if such devices function to suppress flash, is incorrect as a matter of law and undisputed fact. Because the underlying purpose of SB 23 was to ban assault weapons, "regardless of their name, model number, or manufacture" (SB 23, Ch. 129, St. of 1999, Sec. 12), reading the term "flash suppressor" to exclude devices simply because a manufacturer may identify them differently would thwart the Legislature's intent.

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7. In any event, several of the existing definitions *did* in fact contemplate function, rather than design or intent. *See, e.g.*, Chinn Decl., Ex. A, p. 29 ("device attached to the muzzle of a weapon which reduces the amount of visible light or flash created by burning propellant gases"); *see also* Declaration of Torrey D. Johnson, ¶ 30; Declaration of Jess Guy, ¶ 38

There are many devices that are called muzzle brakes and compensators *that also suppress flash*, both intentionally and unintentionally. Chinn Decl., ¶ 13. Plaintiffs admit muzzle brakes and compensators can affect flash. Am. Compl., ¶ 41; Pls.' SJM Mem. 3:20-21. In one vivid example from among the reference materials, the author stated:

> [M]ost modern military and police rifles have flash suppressors (also called flash hiders) attached to their muzzles. . . . *Some modern systems try to combine both the muzzle brake and the flash hider to have the best of both systems*. . . . For maximum flash hiding, the open-prong flash hider is hard to beat. One modern version of this . . . is the Vortex offered by Western Ordnance International Corp. . . . Originally, the unit was designed just for hiding flash, but it was discovered that it also reduced the size of groups as well as recoil somewhat. . . . Because of all the enhancements the Vortex offers, *it's now being sold as a multipurpose device*. . . . For those wanting reduction of recoil, *Fabian Brothers' muzzle brake is most ideal*. . . . The original design, sold as the Mil/Brake, didn't do much to suppress flash, but it was revamped when it became the Muzzle Stabilizer; *now the birdcage-style slits at its front greatly reduce flash.*

Duncan Long, *The Complete AR-15/M16 Sourcebook* (Chinn Decl., Ex. A, pp. 66-67) (emphasis added). Plaintiffs' suggestion that any definition of "flash suppressor" must not have the effect of including "muzzle brakes" or "compensators" approaches the question from the wrong direction. The Legislature expressly included "flash suppressors" in the list of qualifying assault weapon characteristics; it did not *exclude* devices identified as "muzzle brakes" and "compensators" from such list. To exclude such devices categorically, even if they suppress flash, would impermissibly impair the scope of the statute. *See* Rossi Decl., Ex. A, p. 15.[8/]

The existence of the various "flash suppressor" definitions in the reference materials is undisputed, the bases for DOJ's decision are undisputed, and plaintiffs' policy criticisms[9/] cannot suggest that DOJ's judgment in establishing the "flash suppressor" definition was arbitrary, capricious, or lacking in evidentiary support.[10/] Defendants, not plaintiffs, are thus entitled to summary adjudication on this

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8. In the same vein, plaintiffs' suggestion (Pls.' SJM Mem. 4:2-9) that a device with any legitimate sporting use gets a free pass, even if it also has an assault weapon function, turns the analysis upside down. Muzzle brakes and compensators, if they suppress flash, are included in the "flash suppressor" definition.

9. If such policy criticism were sufficient to void a regulation, there would be no end to litigation. Indeed, DOJ's original draft definition was subject to criticism from the opposite perspective – that the language was too narrow in not capturing muzzle brakes and compensators that act as flash suppressors. *See* Rossi Decl., Ex. A, pp. 15, 30-31. Mere disagreement with DOJ's reconciliation of the competing policy considerations embodied in the definition ultimately adopted cannot render the definition arbitrary, capricious, or entirely lacking in evidentiary support.

10. Plaintiffs' footnote argument (Pls.' SJM Mem. 3:27-28) criticizing DOJ's decision to include in the "flash suppressor" definition devices that "redirect" muzzle flash from the shooter's filed of vision, as opposed to only devices that "reduce" flash, is of the same stripe. As explained at pages 11-12 of defendants' summary judgment

claim.[11/]

II. DEFENDANTS, NOT PLAINTIFFS, ARE ENTITLED TO SUMMARY ADJUDICATION ON PLAINTIFFS' VAGUENESS CLAIMS.

Plaintiffs' criticisms of two provisions as unconstitutionally vague (Pls.' SJM Mem. 5:11-13:9) are mere policy disagreements with DOJ, not a basis for striking down the provisions *on their face*.

A. Constitutional Due Process Vagueness Standard

Legislation will not be considered unconstitutionally vague unless it fails "to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Harrott v. County of Kings*, 25 Cal. 4th 1138, 1151 (2001). Plaintiffs do not and cannot make any contention that the words of the provisions challenged as uncertain are themselves not reasonably understandable.

Moreover, in evaluating a claim that legislation is unconstitutionally vague *on its face*, as is the case here, where First Amendment rights are not implicated, a court "should uphold the challenge *only if the enactment is impermissibly vague in all its applications.*" *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (emphasis added) (reversing judgment granting declaratory and injunctive relief in pre-enforcement facial challenge to drug paraphernalia ordinance). As the United States Supreme Court explained: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.* at 425. To illustrate, the Supreme Court observed: "The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine is of no due process significance unless the possibility ripens into a prosecution." *Id.* at 503, n.21 (citation omitted).

As one court has stated with respect to the Act, in particular:

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memorandum, DOJ replaced the word "conceals" in the original proposed definition in response to public comment to protect against an overly *broad* interpretation. *See* Rossi Decl., Ex. A, p. 15. The term "reduces" alone would have been insufficient because, as noted in a number of public comments, in one ultimate sense light is not reduced, but only redirected. *See id.*, Ex. A, p. 28. In any event, even one of the references cited by plaintiffs speaks in terms of flash suppressors "disrupting" flash, in addition to "reducing" it. Chinn Decl., Ex. A, p. 45; Am. Compl., Ex. 8.

11. Plaintiffs cite voluminous evidence from outside the administrative rulemaking record in ostensible support for their argument here. No such evidence would suggest that DOJ's "flash suppressor" definition is arbitrary, capricious, or lacking in evidentiary support. In any event, as this Court has already recognized, such evidence is inadmissible on this declaratory relief challenge to a regulation. *See* Gov. Code § 11350(d); Woods Decl., Ex. G, pp. 2-4. The same limitation applies to plaintiffs' Second Cause of Action and Claim 1 in the Sixth Cause of Action, to the extent such claims seek to challenge the regulatory definition of "flash suppressor," not just the statutory term.

> We have no quarrel with petitioner's assertion that many of the provisions of the AWCA at issue in this case are ambiguous in certain respects; but we are also aware that "[m]any, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear." Moreover, with the AWCA in mind, our Supreme Court recently stated that the fact "[t]hat a criminal statute contains one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face."

Jackson v. Department of Justice, 85 Cal. App. 4th 1334, 1355 (2001) (quoting *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1201 (1988), and *In re Jorge M.*, 23 Cal. 4th 866, 886 (2000)).

One fundamental error that infects all of plaintiffs' vagueness arguments is their failure to recognize the import of the mens rea requirement applicable to assault weapons prosecutions. The California Supreme Court has determined: "The People bear the burden of proving the defendant knew or reasonably should have known the firearm possessed the characteristics bringing it within the AWCA." *In re Jorge M.*, 23 Cal. 4th 866, 887 (2000). As a result of the existence of this mens rea requirement, if unknown circumstances that would technically make a firearm an assault weapon are sufficiently extraordinary that it would be unreasonable to expect knowledge of them, an element of the crime is not met, and the crime cannot be prosecuted. Plaintiffs' suggestion (Pls.' SJM Mem. 2:26-28; Am. Compl., ¶ 4) that the challenged provisions do not satisfy the mens rea requirement confuses the analytically independent inquiries of (1) whether the expectation is reasonable that the criminal provisions will be understood (constitutional vagueness analysis), and (2) whether the expectation is reasonable that a firearm owner would know what facts exist that would render his firearm an assault weapon pursuant to the criminal provision (mens rea requirement analysis at trial). A reasonable person can understand the law (no due process problem) without knowing obscure facts (no mens rea, and no prosecution). The mens rea requirement is a hurdle for a prosecutor and thus serves as a protection for a defendant from potential criminal liability, not a basis for arguing the challenged provisions are vague.

Notably, plaintiffs' predictions of unconstitutional application of the challenged provisions are remarkably unassured and mild: firearm owners *"may be* unable to determine" whether their devices suppress flash; law enforcement personnel *"may not be* able to determine" the legality of firearms; firearm owners need *"further public* clarification" of the "permanently altered" exception applicable to large capacity magazines. Pls.' SJM Mem. 6:3-7, 12:1-3 (emphasis added). Moreover, plaintiffs' dire predictions have proven hollow. Plaintiffs include among their ranks two district attorneys, a former

police chief, a law enforcement alliance, an association dedicated to preserving and expanding gun ownership rights, an association of California-based firearms dealers, distributors, and manufacturers' representatives, a firearms dealer, and four anonymous firearms owners, all of whom are urging this Court to prohibit enforcement of existing assault weapons law. Am. Compl., ¶¶ 6-16. Yet, collectively, over the six years that the challenged provisions have been in effect, plaintiffs cannot identify a single instance in which they have been applied to any firearm in a manner that in plaintiffs' view would demonstrate the allegedly constitutional shortcomings.[12/]

As described in the two following subsections, plaintiffs' facial vagueness claims are not trumpet calls for judicial intervention.

B. Plaintiffs' Second Cause of Action for Alleged "Uncertainty of 'Flash Suppressor'" is a Policy Disagreement with DOJ, Not a Basis for Invalidating the"Flash Suppressor"Definition.

Looking first at the actual text of the provisions challenged here (*see, e.g., Hoffman Estates*, 455 U.S. at 497-503), plaintiffs can identify no word or phrase in the statute or "flash suppressor" definition that would call into constitutional question the provisions at issue. Instead, plaintiffs resort to "facts" outside the text in attempting to make their claim. *See* Pls.' SJM Mem. 5:17-10:23; Am. Compl., ¶¶ 47-57. Even taking into account such attempt to import outside sources of ambiguity, none of the points raised suggests that a person of ordinary intelligence – whether firearm owner or law enforcement – does not have a reasonable opportunity to know what is prohibited, let alone in all applications.

Plaintiffs' complaint (Pls.' SJM Mem. 7:19-8:9; Am. Compl., ¶ 55) that the "flash suppressor" definition does not specify any flash measurement standards fails to recognize that the absence of measurement standards *in the statute* listing "flash suppressor" as a qualifying assault weapon characteristic means the Legislature intended to include devices that suppress *any* amount of flash. *See* Chinn Decl., ¶ 6; Rossi Decl., Ex. A, p. 15. DOJ is not at liberty to deviate from such intent by establishing some hypothetically permissible level of perceptible flash as preferred by plaintiffs. *See* Gov. Code § 11342.2. This complaint simply reflects plaintiffs' desire for a different definition. It does

12. Any such improper application, of course, would be centrally featured in plaintiffs' argument if it existed. Moreover, defendants requested that plaintiffs provide all facts concerning any contention that any prosecution had been improperly brought involving whether a device was a "flash suppressor" or whether a large-capacity magazine had been "permanently altered," but plaintiffs could identify none. *See* Plfs.' Resp. Sp. Int. 85-104 (Woods Decl., Ex. D).

not establish that plaintiffs lack a reasonable opportunity to know what is prohibited.[13/]

In regard to plaintiffs' complaint that the "flash suppressor" definition requires testing which the ordinary rifle owner is unable to perform (Pls.' SJM Mem. 8:13-27; Am. Compl., ¶¶ 48, 52-54), the gap in plaintiffs' logic is that there is no basis for plaintiffs' false assumption that a firearm owner must be able to perform comparison testing upon his particular firearm in order to reasonably know whether a device perceptibly reduces or redirects flash. Short of test-firing, ordinary methods available for determining whether a particular device functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision include inspection of the device, consultation with DOJ or ATF, review of product literature provided by the manufacturer or distributed by the industry, or any other credible, authoritative sources of information regarding the device, which may include dealers or even other firearms owners. *See* Chinn Decl., ¶ 11. If a firearms owner confirms by any of these methods that a device functions to perceptibly reduce or redirect flash from the shooter's field of vision, then such owner would fairly be subject to prosecution. But again, this point raises a mens rea issue for a prosecutor to address at a hypothetical trial – whether the criminal defendant should reasonably have known in the circumstances that the device's characteristics brought it within the "flash suppressor" definition; it is not a point addressing the vagueness issue of whether a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited, let alone in all applications.[14/]

Finally, plaintiffs' complaint (Pls.' SJM Mem. 7:2-18, 9:1-23; Am. Compl., ¶¶ 50, 51, 55) that the "flash suppressor" definition is vague due to possible variables as to firearm and ammunition characteristics and shooter usage is an artificial obfuscation of the law. If the selection of any variable would make a perceptible difference, determination of whether a device functions to perceptibly reduce or redirect flash from the shooter's field of vision assumes any typical shooting usage, and assumes the

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13. Plaintiffs' novel suggestion (Pls.' SJM Mem. 7:21-8:2) that an individual's extraordinary insensitivity to light could mean that a device owned by such individual might not function to suppress flash *as to that individual*, would be, at best, a mens rea question for a prosecutor to consider in that instance.

14. Plaintiffs' criticism of the guidance provided by DOJ to law enforcement and suggestion that DOJ should simply publish (indeed, rewrite the regulatory definition to be) a list of those devices identified as "flash suppressors" on the mechanism itself, its packaging, or its manual (Pls.' SJM Mem. 9:24-10:17, 7:26-28; Am. Compl., ¶ 49) is the same as suggesting that the fox guard the henhouse. It was the manufacturers' efforts to circumvent existing assault weapon provisions by virtue of self-definition of their products that led to enactment of SB 23 in the first place. This criticism is misplaced (*see* Rossi Decl., ¶ 6) and, in any event, is at most a criticism of degree and method, not a basis for voiding the provisions at issue.

characteristics of any commonly available firearms and ammunition. Chinn Decl., ¶ 12. The mens rea requirement would prevent prosecution for use of a device that may function to suppress flash if hypothetically used with some obscure type of ammunition.

The "flash suppressor" definition in the Regulations is not impermissibly vague, let alone in all applications, and thus defendants, not plaintiffs, are entitled to summary adjudication on this claim.

C. Plaintiffs' Fifth Cause of Action for Alleged "Uncertainty of 'Permanently Alter' In Relation To Large Capacity Feeding Devices" Is a Policy Disagreement with DOJ, Not a Basis for Requiring Adoption of Plaintiffs' Proposed Regulation.

Plaintiffs argue (Pls.' SJM Mem. 10:24-13:9) that DOJ should have issued a regulation to define the statutory term "permanently altered" in the exception to the definition of "large-capacity magazine" established in Penal Code section 12020(c)(25). Notably, plaintiffs do not even try to pretend that the phrase "permanently altered" is vague in all applications. Indeed, plaintiffs offer their own description of alteration methods they consider "permanent," and indeed by this action seek an order requiring that DOJ issue a new regulation or other formal communication adopting their description. *See* Am. Compl., ¶¶ 74-75; Pls.' SJM Mem. 12:21-13:9. Accordingly, plaintiffs' facial vagueness challenge to the "permanently altered" provision in the statute fails at the threshold.

As described at pages 15-16 of defendants' summary judgment memorandum, plaintiffs have no argument that defendants have failed in some obligation to issue a regulation defining "permanently altered" on the terms demanded by plaintiffs. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995) ("[There is no] basis for suggesting that [an administrative agency] has a statutory duty to promulgate regulations that . . . address every conceivable question . . ."); *Alfaro v. Terhune*, 98 Cal. App. 4th 492, 503-505 (2002) ("an agency decision not to institute rulemaking should be overturned only in the rarest and most compelling circumstances"). DOJ reached the conclusion in the rulemaking process that the term "permanently altered" would be sufficiently understood without further definition Chinn Decl., ¶ 17; Rossi Decl., Ex. A, p. 16.[15/] While DOJ agrees that plaintiffs' proposed specified means of altering a magazine so that it cannot accommodate more than 10 rounds (metalworking, machining, welding, brazing, soldering, or application of bonding agents or adhesives) *can* ordinarily be

15. Plaintiffs' characterization (Pls.' SJM Mem. 11:1-5) of DOJ's initial general statement of necessity for the proposed definitions in the Regulations as an "admission" is specious. Revisions to proposed regulations are a natural and desired result of public input in the rulemaking process. Rossi Decl., ¶ 5.

permanent (*see* Am. Compl., ¶¶ 74-75), of course DOJ cannot definitively classify such methods as "permanent" because non-permanent alterations using such methods are possible in given instances. Chinn Decl., ¶ 18.

The term "permanently altered" in the statute is not impermissibly vague, let alone in all applications, and thus defendants, not plaintiffs, are entitled to summary adjudication on this claim.

III. DEFENDANTS, NOT PLAINTIFFS, ARE ENTITLED TO SUMMARY ADJUDICATION ON PLAINTIFFS' CLAIMS THAT DEFENDANTS IMPROPERLY ADMINISTERED AND/OR FAILED TO ADMINISTER SB 23.

A. Plaintiffs' Claim 1 in the Sixth Cause of Action for Alleged "Inconsistency Regarding Springfield and Browning Products"

Plaintiffs' argument in support of their Claim 1 in the Sixth Cause of Action (Pls.' SJM Mem. 14:6-15:7) is a disagreement with two DOJ "flash suppressor" determinations, not a basis for invalidating the "flash suppressor" definition.

Plaintiffs cite no authority for the proposition that mere disagreement with an agency conclusion provides a basis for invalidation of the authority pursuant to which the conclusion is reached. *Cf.*, *e.g.*, *Maples v. Kern County Assessment Appeals Bd.*, 96 Cal. App. 4th 1007, 1015 (2002) (properly challenging directly tax board's valuation of development project). Plaintiffs complain that two devices – the Springfield Muzzle Break and the Browning BOSS – *do* function to perceptibly reduce or redirect muzzle flash from the shooter's field of vision and therefore *should* meet the definition of "flash suppressor" in the Regulations, but that DOJ has nonetheless determined the two devices are *not* flash suppressors. Am. Compl., ¶¶ 78-79. Plaintiffs present no persuasive evidence to support their claim that DOJ erred in its determination that these two devices are not flash suppressors.[16/] In any event, even if plaintiffs were correct in their view that DOJ should have classified these devices as flash suppressors under the definition in the Regulations, their remedy would be to challenge such ostensibly erroneous determinations by petition for writ of mandate or otherwise, *not* to seek wholesale invalidation of section 978.20(b). *See* Am. Compl., ¶ 80.

Plaintiffs cannot claim that DOJ is violating the law, express their approval, and then advocate for

16. As described in footnote 11 of defendants' summary judgment memorandum, plaintiffs have wavered on their purported certainty that the two devices are in fact flash suppressors, and plaintiffs have failed to address DOJ's explanation for its determinations to the contrary (described above, at pp. 5-6).

further such action. It is paradoxical for plaintiffs to suggest that an alleged failure by DOJ to enforce the law would support a judicial prohibition against enforcement of the law. Right or wrong, the determinations provide no basis for invalidating the flash suppressor regulation. Accordingly, defendants, not plaintiffs, are entitled to summary adjudication on this claim.

B. Plaintiffs' Claim 2 in the Sixth Cause of Action for Alleged "Inconsistency Re 'Detachable Magazine'"

Plaintiffs' argument in support of their Claim 2 in the Sixth Cause of Action (Pls.' SJM Mem. 15:8-17:5) assumes a dispute that does not exist.

"A plaintiff may bring an action for declaratory relief before an actual invasion of rights has occurred. However, the action must be based on an actual controversy with known parameters. If the parameters are as yet unknown, the controversy is not yet ripe for declaratory relief." *Sanctity of Human Life Network v. California Highway Patrol*, 105 Cal. App. 4th 858, 872 (2003).

Plaintiffs complain, based on speculation derived from a DOJ letter, that DOJ has not fulfilled a duty to exercise supervisory power over district attorneys to assure that the regulatory definition of the term "detachable magazine" as meaning a magazine "that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required" is observed. Am. Compl., ¶¶ 81-83. Contrary to plaintiffs' speculation, and in any event as confirmed in the letter cited by plaintiffs, DOJ does not consider a magazine attached to a receiver by a screw, requiring a screwdriver for removal, to be a detachable magazine. Chinn Decl., ¶¶ 20-21. Mere observation of the possibility that the 58 district attorneys in California would view the maneuver with skepticism (due to the immediate ability in such circumstances to detach the magazine from the firearm by removing the screw) and proceed with a prosecution in the circumstances does not create a justiciable controversy.[17/]

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17. One key flaw in plaintiffs' argument here is their claim (Pls.' SJM Mem. 15:23-25) that DOJ's letter warns that such a prosecution "may well succeed," which is not stated or even implied anywhere in the letter, and which is contrary to DOJ's view. Observations regarding possible district attorney activity are not a basis for a claim against the Attorney General. *See Pitts v. County of Kern*, 17 Cal. 4th 340, 368-369 (1998); *People v. Brophy*, 49 Cal. App. 2d 15, 28 (1942). As the California Supreme Court stated in *Pitts* in regard to district attorneys:

> "These officials are public officers, as distinguished from mere employees, with public duties delegated and entrusted to them, as agents, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which they, as agents, are active. Moreover . . . district attorneys are officers created by the Constitution. . . . [I]t is at once evident that 'supervision' does not contemplate control, and that . . . district attorneys cannot avoid or evade

Plaintiffs admit that DOJ "admits that the use of a screw as described renders the magazine non-detachable based on the regulation defining a 'detachable magazine.'" Pls.' SJM Mem. 15:20-21. This alone is sufficient to demonstrate the absence of a controversy. Moreover, there is no evidence of any prosecution involving improper application of the "detachable magazine" definition at all, let alone such a prosecution in which DOJ has improperly acquiesced.[18/]

Because there is truly no controversy in this regard, even in the abstract, defendants, not plaintiffs, are entitled to summary adjudication on this claim.[19/]

C. Plaintiffs' Claim 3 in the Sixth Cause of Action for Alleged "Inconsistency Regarding Importation of 'Large-Capacity' Magazine Rifles"

Plaintiffs' argument in support of their Claim 3 in the Sixth Cause of Action (Pls.' SJM Mem. 17:6-18:6) fails to recognize the claim is moot due to intervening legislation.

"[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court." *Wilson v. Los Angeles County Civil Service Comm.*, 112 Cal. App. 2d 450, 452 (1952) (quoting 1 C.J.S. *Actions*

> the duties and responsibilities of their respective offices by permitting a substitution of judgment." Indeed, because counties are political subdivisions of the state, they are frequently subject to state supervision; this does not nullify the responsibilities they bear or the autonomy they enjoy.

Pitts, 17 Cal. 4th at 368-369 (quoting *Brophy*, 49 Cal. App. 2d at 28) (citations omitted).

18. In response to defendants' discovery request that plaintiffs identify all facts in support of this claim, plaintiffs simply incorporated by reference their boilerplate interrogatory answer, which makes no reference to any evidence of disagreement as to the regulatory definition of "detachable magazine." *See* Plfs.' Resp. Sp. Int. 71, 2. (Woods Decl., Ex. D). Correspondingly, defendants requested that plaintiffs provide all facts concerning any contention that any prosecution had been improperly brought involving whether a device was a "detachable magazine" under the regulatory definition, but plaintiffs could identify none. Plfs.' Resp. Sp. Int. 105, 106.

19. Plaintiffs argue that the Attorney General "has also issued letter responses that conflict with previous statements and has proposed regulations that expand the definition of 'assault weapons' beyond legislative intent." Pls.' SJM Mem. 15:26-28. But the first letter referenced is simply another caution that the reader "should be aware that a local district attorney who believed you were manufacturing an assault weapon could file charges against you." *See* Pls.' Ex. CCCC. The remainder of the communications are either (1) unrelated to detachable magazines at all or (2) refer to application of the "capacity to accept" language in the statute, and the question of whether a firearm with a magazine considered non-detachable (because it requires a tool for removal) nonetheless may have a "capacity to accept" a detachable magazine upon removal of the non-detachable magazine, which is the subject of different proposed regulations and not a subject of this lawsuit. *See* Pls.' Exs. DDDD-OOOO. None of this offered evidence is contrary to the fact that DOJ does not consider a magazine attached to a receiver by a screw, requiring a screwdriver for removal, to be a detachable magazine.

§ 17a). Plaintiffs complain that DOJ allowed members of the SASS to bring modern replicas of 19th Century lever-action rifles with tubular magazines into California for SASS western style shooting competitions, even though such rifles would technically fall within the prohibition against importation of "large-capacity magazines" as the law originally read. Am. Compl., ¶¶ 25, 84-85. The law was amended in 2001, however, to expressly exempt from the "large-capacity magazine" definition "[a] tubular magazine that is contained in a lever-action firearm." Penal Code § 12020(c)(25)(C). As a result, plaintiffs' request for a limiting interpretation (Am. Compl., ¶ 85) is unnecessary, and their claim is moot. *See Southern California Gas Co. v. Public Utilities Commission*, 38 Cal. 3d 64, 66-67 (1985) (dismissing as moot claims that certain Commission rules lacked required legislative authorization, after Legislature passed new law expressly confirming required authorization). Accordingly, defendants, not plaintiffs, are entitled to summary adjudication on this claim.

D. Plaintiffs' New Claims in Summary Judgment Brief, but Not in Amended Complaint

As described above (pp. 7-8), plaintiffs allege in their summary judgment memorandum new claims in regard to Smith & Wesson's "Walther P22," assault weapons sales permits for corporate dealers, Robinson Armament Co. "M96" rifles, and new proposed regulations defining "capacity to accept" in connection with detachable magazines. *See* Pls.' SJM Mem. 18:7-19:22, 15:26-28. None of these claims, however, are alleged in the Amended Complaint. Accordingly, plaintiffs' motion for summary adjudication on these "claims" must be denied. *See Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 885 (1980), *rev'd on other grounds*, 453 U.S. 490 (1981).

CONCLUSION

Accordingly, defendants respectfully request that the Court deny plaintiffs' motion for summary judgment or summary adjudication and instead grant summary judgment in favor of defendants.

Dated: January 8, 2007

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

Douglas J. Woods

DOUGLAS J. WOODS
Deputy Attorney General
Attorneys for Defendants

BILL LOCKYER
Attorney General of the State of California
STACY BOULWARE EURIE
Senior Assistant Attorney General
CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General
DOUGLAS J. WOODS, State Bar No. 161531
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-4663
Fax: (916) 324-5567
E-mail: Douglas.Woods@doj.ca.gov

Attorneys for Defendants ATTORNEY GENERAL BILL LOCKYER, the STATE OF CALIFORNIA, and CALIFORNIA DEPARTMENT OF JUSTICE

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et al., Plaintiffs, **v.** **STATE OF CALIFORNIA, et al.,** Defendants.	Case No. 01CECG03182 PROOF OF SERVICE

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Hunt, et al. v. State of California, et al.**

No.: **01CECG03182**

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 8, 2007, I served the attached **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION; DEFENDANTS' NOTICE OF LODGING FEDERAL AUTHORITIES CITED IN DEFENDANTS' SUMMARY JUDGMENT BRIEFS, and DEFENDANTS' SEPARATE STATEMENT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION** by placing a true copy thereof enclosed in a sealed envelope with the Golden State and Federal Express, addressed as follows:

Don B. Kates, Esq
BENENSON & KATES
22608 North East 269th Avenue
Battleground, WA 98604
Attorney for Plaintiffs
(By Federal Express)

C.D. Michel, Esq.
Jason Davis, Esq.
Trutanich Michel, LLP
TUYET T. TRAN
BRUCE E. BARTRAM
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802
Attorney for Plaintiffs
(By Golden State)

Stephen P. Halbrook, Esq
Law Offices of Stephen P. Halbrook
10560 Main Street, Suite 404
Fairfax, VA 22030
Attorney for Plaintiffs
(By Federal Express)

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 8, 2007, at Sacramento, California.

Francina M. Stevenson
Declarant

Francina M. Stevenson
Signature

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