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9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF FRESNO  
12

13  
14 **SHERIFF CLAY PARKER, TEHAMA**  
15 **COUNTY SHERIFF; HERB BAUER**  
16 **SPORTING GOODS; CALIFORNIA**  
17 **RIFLE AND PISTOL ASSOCIATION;**  
**ABLE'S SPORTING, INC.; RTG**  
**SPORTING COLLECTIBLES, LLC; AND**  
**STEVEN STONECIPHER,**

18 Plaintiffs and Petitioners,

19 v.

20 **THE STATE OF CALIFORNIA; XAVIER**  
21 **BECERRA<sup>1</sup>, IN HIS OFFICIAL**  
22 **CAPACITY AS ATTORNEY GENERAL**  
23 **FOR THE STATE OF CALIFORNIA; THE**  
**CALIFORNIA DEPARTMENT OF**  
**JUSTICE, AND DOES 1-25,**

24 Defendants and  
25 Respondents.

Case No. 10CECG02116

**OPPOSITION TO PLAINTIFFS'**  
**MOTION FOR ATTORNEYS' FEES ON**  
**APPEAL**

Date: June 22, 2017  
Time: 3:30 p.m.  
Dept: 402  
Judge: The Hon. Jeffrey Y. Hamilton  
Action Filed: June 17, 2010

26  
27 <sup>1</sup> Xavier Becerra has succeeded Kamala Harris as Attorney General for the State of  
28 California.

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## INTRODUCTION

Plaintiffs won a judgment from the Fifth District Court of Appeal affirming this Court's prior judgment that certain statutes regulating "handgun ammunition" were unconstitutionally vague and failed to inform persons of ordinary intelligence what ammunition is regulated. Plaintiffs now seek more than \$335,000 in attorneys' fees for an appeal in which they were respondents and filed one brief. Among other things, they claim to have spent 311 billable hours on the oral argument.

For several reasons, Plaintiffs' request should be denied.

First, Plaintiffs have not met their burden of establishing that their litigation costs transcend their personal interest under Code of Civil Procedure section 1021.5. By their own admissions in the trial court, four of the six plaintiffs in this case stood to gain financially if they prevailed in the litigation. Despite the filing of new declarations that seek to minimize their financial interest, Plaintiffs have failed to meet their burden to show that the cost of litigation was disproportionate to their economic interest, thus barring a fee award. This is the same conclusion this Court reached when it earlier denied Plaintiffs' motion for trial court fees.

Should the Court allow Plaintiffs to recover any fees under section 1021.5, the amount should be substantially reduced due to duplicative and excessive billing, and the hourly rates should be lowered to those found in the Fresno County market. Although Plaintiffs assert that the appeal required attorneys with specialized knowledge of firearms, in fact the appeal applied vagueness law to a settled factual record. The appeal did not require any particular firearms expertise.

On top of their inflated fee claim, Plaintiffs make an unjustified request for a lodestar multiplier of 1.5. If the Court is inclined to apply a multiplier, it should be a *reducing* multiplier of .5 to account for the excessive hours and redundant work.

For these reasons, as explained more fully below, the Court should deny the motion, or at least reduce the claim to a level commensurate with the work that was reasonably required.

## STATEMENT OF FACTS

### I. MERITS LITIGATION

In June 2010, the former Tehama County Sheriff, Herb Bauer Sporting Goods, Inc., the California Rifle and Pistol Association Foundation (“CRPA Foundation”), Able’s Sporting, Inc., RTG Sporting Collectibles, LLC, and Stephen Stonecipher (collectively “Plaintiffs”) filed a complaint for declaratory and injunctive relief alleging that former Penal Code sections 12060, 12061 and 12318 were void for vagueness under the Due Process Clause of the Fourteenth Amendment. Named as defendants were the State, the Attorney General, and the Department of Justice (collectively “the State”). The gist of the complaint was that the then statutory definition of “handgun ammunition”—“ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person”—failed to inform a person of ordinary intelligence of what ammunition is regulated. On January 31, 2011, this Court found the challenged statutes facially vague and enjoined their enforcement.

On November 6, 2013, a divided panel of the Fifth District Court of Appeal issued a published opinion affirming the judgment. (*Parker v. State* (2013) 221 Cal.App.4th 340, *review granted and opinion superseded* (Cal. 2014) 167 Cal.Rptr.3d 658.)

On February 9, 2014, the California Supreme Court granted the State’s petition for review, which automatically depublished the Court of Appeal’s opinion. (6/9/17 Decl. of George Waters, Exh. 1.) After the case was fully briefed, the parties filed a joint letter informing the Supreme Court that the appeal had become moot in light of the enactment of Senate Bill 1235 (2015-16 Reg. Sess.) and the approval of Proposition 63 (Nov. 8, 2016), which adopted a regulatory regime applicable to all ammunition, thus making the definition of “handgun ammunition” irrelevant. (6/9/17 Decl. of George Waters, Exh. 2.)

On December 14, 2016, the Supreme Court dismissed the appeal as moot. (6/9/17 Decl. of George Waters, Exh. 3.) Plaintiffs then filed a motion asking that the Court of Appeal opinion be republished. The motion was denied. (6/9/17 Decl. of George Waters, Exh. 4.) As a result, the Court of Appeal opinion remains unpublished and uncitable.

1     **II.   ATTORNEYS' FEES CLAIMS**

2             **A.    Plaintiffs' Previous Unsuccessful Claim for Trial Court Fees**

3             On May 16, 2011, Plaintiffs filed a claim for trial court fees under C.C.P. section 1021.5.  
4     Plaintiffs claimed to have spent 1,760.6 hours on trial court work, and sought a total of  
5     \$625,048.75. (Plaintiffs' Memorandum in Support of Fees [5/16/11], 9:17-23.) This Court  
6     denied the fees claim, stating:

7             the Court is unable to determine if the Plaintiffs' financial burden of attorneys' fees is  
8             out of proportion to their personal stake in litigating the case because the Plaintiffs  
9             have failed to provide the Court with evidence establishing what the private financial  
              or pecuniary interest each Plaintiff had, or did not have, in the litigation at the time  
              that the vital litigation decisions were made which eventually produced the successful  
              outcome.

10            (6/9/17 Decl. of George Waters, Exh. 5, pp. 18-19.)

11             **B.    Plaintiffs' Present Claim for Appellate Fees (the Claim at Issue in this**  
12             **Hearing)**

13             In the present motion, plaintiffs seek an award of \$335,731 for appellate fees allegedly  
14     incurred during the appeal to the Fifth District Court of Appeal. Plaintiffs seek a total of  
15     \$294,161 for the appeal itself and an additional \$41,780 for preparing the attorneys' fees motion.  
16     The chart below summarizes the number of hours and the amount of fees claimed.

SUMMARY OF FEE CLAIM									
TIME KEEPER	RATE	CASE MGMT	JOINT APP.	RESP. BRIEF	ORAL ARG.	POST HRG.	FEE MOTION	TOTAL HOURS	TOTAL FEES
Barcenil	\$125	0.0	0.0	40.7	0.0	0.0	0.0	40.7	\$5,088
Barvir	\$225	17.1	20.8	198.3	71.5	5.4	136.4	449.5	\$101,13
Brady	\$250	1.1	0.0	10.5	36	0.1	0.0	47.7	\$11,925
Klapper	\$125	0.0	0.0	0.0	16.9	0.0	0.0	16.9	\$2,113
Michel	\$450	4.0	0.0	0.0	5.8	0.5	0.2	10.5	\$4,635
Monfort	\$325	34.2	5.4	82.0	97.9	10.5	33.2	263.2	\$85,540
Nunez	\$125	9.3	19.6	14.9	27.1	3.4	0.0	74.3	\$9,288
Poteet	\$125	3.9	0.0	76.5	0.0	0.0	0.0	80.4	\$10,050
Zajac	\$125	6.0	0.0	0.0	56.6	0.0	0.0	62.5	\$7,813
<b>Total</b>		75.6	45.8	422.9	311.7	19.9	169.8	1,045.7	\$237,67

Raw Merits <sup>2</sup>	\$196,108
Multiplier	1.5
Total Merits	\$294,161
Fee Motion	\$41,570
<b>Grand Total</b>	<b>\$335,731</b>

(3/27/17 Declaration of Anna M. Barvir, Exh. C.)

## ARGUMENT

### I. PLAINTIFFS HAVE NO ENTITLEMENT TO FEES UNDER CALIFORNIA'S PRIVATE ATTORNEY GENERAL STATUTE, C.C.P. § 1021.5.

#### A. A Party Seeking Fees under Section 1021.5 Bears the Burden of Establishing Each Element of its Claim.

Code of Civil Procedure section 1021.5 codifies the "private attorney general" doctrine by which attorneys' fees may be awarded to certain successful litigants. (*Woodland Hills Residents*

<sup>2</sup> The number on this line (\$196,108) is the amount Plaintiffs seek for work on the appeal, before the requested 1.5 multiplier is added. As set forth immediately below, Plaintiffs seek an additional \$41,570 for preparing the fee motion. The two numbers are set forth separately because Plaintiffs seek the multiplier for work done on the appeal, but not for work done on the fee motion.



1 *Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.) There are three elements to a claim for  
2 fees under section 1021.5. It must be shown that the litigation:

- 3 1. Resulted in the enforcement of an important right affecting the public interest;
- 4 2. Conferred a significant benefit, whether pecuniary or nonpecuniary, on the general  
5 public or a large class of persons; and
- 6 3. Imposed a financial burden on plaintiffs such as to make an award appropriate.

7 (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214 (*Whitley*).)

8 The burden is on the moving party to establish each of these elements. (*Ebbetts Pass*  
9 *Forest Watch v. California Dept. of Forestry and Fire Protection* (2010) 187 Cal.App.4th 376,  
10 381. If any one of the elements required for an award under section 1021.5 is absent, that alone  
11 will suffice to deny a fee request. (*Satrap v. Pacific Gas & Elec. Co.* (1996) 42 Cal.App.4th 72,  
12 81.) The decision whether to award fees lies within the discretion of the trial court and will not  
13 be disturbed on appeal absent a prejudicial abuse of discretion. (*Baggett v. Gates* (1982) 32  
14 Cal.3d 128, 142-43.)

15 As will be shown below, the focus of this brief is that Plaintiffs have not met their burden  
16 of proof as to the third element (financial burden).

17 **B. Plaintiffs Have Not Met Their Burden of Showing that the Cost of Private**  
18 **Enforcement Outweighed Their Personal Stake in the Outcome.**

19 An award of attorneys' fees is appropriate under Code of Civil Procedure section 1021.5  
20 only when the moving party has shown that the necessity for pursuing the lawsuit placed a burden  
21 on the plaintiff out of proportion to his individual stake in the matter. (*Whitley*, 50 Cal.4th at  
22 p. 1214;

23 The trial court must first fix—or at least estimate—the monetary value of the benefits  
24 obtained by the successful litigants themselves. . . . Once the court is able to put  
25 some kind of number on the gains actually attained it must discount these total  
benefits by some estimate of the probability of success at the time the vital litigation  
decisions were made which eventually produced the successful outcome . . . .

26 \* \* \* \* \*

27 The final step is to place the estimate value of the case beside the actual cost and  
28 make the value judgment whether it is desirable to offer the bounty of a court-  
awarded fee in order to encourage the litigation of the sort involved in this case.

1 (Whitley, 50 Cal.4th at pp. 1215-16 [internal citations and quote marks omitted].) The burden is  
2 on the moving party to establish that the financial burden of private enforcement warrants  
3 subsidizing the successful party's attorneys' fees. (*Consumer Cause Inc. v. Mrs. Gooch's Natural*  
4 *Foods* (2005) 127 Cal.App.4th 387, 401; *Beach Colony II v. California Coastal Comm'n* (1985)  
5 166 Cal.App.3d 106, 114-115 (*Beach Colony II*).

6 Section 1021.5 is intended as a "bounty" for pursuing public interest litigation, not a reward  
7 for litigants motivated by their own interests who coincidentally serve the public. (*California*  
8 *Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570 ("CLFA").) "If  
9 the enforcement of the public interest is merely 'coincidental to the attainment of . . . personal  
10 goals' [citation] . . . then [the financial burden] requirement is not met." (*California Common*  
11 *Cause v. Duffy* (1987) 200 Cal.App.3d 730, 750-751.)

#### 12 **1. Sheriff Clay Parker and Steven Stonecipher**

13 Plaintiff Clay D. Parker was the duly elected Sheriff for the County of Tehama, California.  
14 (Complaint, ¶ 11.) Plaintiff Steven Stonecipher is an individual resident of Fresno County who  
15 reloads ammunition and mails it to friends and family, and sometimes receives ammunition in the  
16 mail from out-of-state shippers of ammunition. (*Id.*, ¶ 16.)

17 In their March 2017 declarations, these two plaintiffs disclaim any pecuniary interest in the  
18 outcome of the litigation, but the State has never contended that either Sheriff Parker or Mr.  
19 Stonecipher had any discernible financial interest in the outcome. At the same time, however,  
20 there is no evidence that they paid any attorneys' fees or costs. In a press release describing this  
21 Court's judgment, counsel for Plaintiffs explained that the litigation was funded by the CRPA  
22 Foundation and the NRA. (6/9/17 Decl. of George Waters, Exh. 6, p. 4 ["Funding for this case  
23 was provided by the Legal Action Project, a joint effort between the NRA and the CRPA  
24 Foundation"].)

#### 25 **2. Herb Bauer Sporting Goods, Inc.**

26 Herb Bauer Sporting Goods, Inc. is a brick and mortar store that sells ammunition directly  
27 to the public. (Complaint, ¶ 12.) In 2010, the owner of Herb Bauer Sporting Goods submitted a  
28 declaration in support of Plaintiffs' summary judgment motion testifying to the cost and burden,

1 of compliance with the recordkeeping requirements of the challenged statutes. (12/7/10 Decl. Of  
2 Barry Bauer in Support of Motion for Summary Judgment, ¶¶ 6-7 [“Ammunition sales usually  
3 account for a significant portion of the profit made by Herb Bauer’s Sporting Goods., Inc. . . . It  
4 is *costly and burdensome for Herb Bauer’s Sporting Goods, Inc. to intake and store records* for  
5 transfers of ammunition as required by [the challenged statutes]”] [emphasis added].)

6 Mr. Bauer has now submitted a new declaration that equivocates on his 2010 declaration.  
7 He states that he “cannot say that Herb Bauer realized any pecuniary interest as a result of this  
8 litigation.” (Id., ¶ 5.) He now estimates that, had the challenged statutes gone into effect, Herb  
9 Bauer would have incurred record-keeping costs of about \$2,000 annually, but also would have  
10 experienced an annual increase of profits of about \$4,000 due to decreased competition from on-  
11 line ammunition sellers. (Ibid.) Whatever the real story is, this plaintiff also has submitted no  
12 evidence that it paid any money out of pocket to fund the litigation, so a small pecuniary interest  
13 in the outcome is unremarkable.

### 14 **3. Able’s Sporting, Inc. and RTG Sporting Collectibles**

15 Able’s Sporting is an Internet ammunition distributor that ships dozens of different calibers  
16 of firearm ammunition directly to California residents through orders placed on its website. (See  
17 Complaint, ¶ 14.) RTG Sporting Collectibles is also an out-of-state ammunition distributor that  
18 ships firearm ammunition directly to residents of California. (Complaint, ¶ 15.)

19 In the Verified Complaint, Able’s and RTG alleged that if they were forced to cease all  
20 shipments of ammunition to customers in California, it would cause “a significant decrease in  
21 sales and lost profits.” (Complaint, ¶ 77.) They have now changed their tune.

22 Able’s Sporting, Inc. Randy Wright, the President of Able’s Sporting, has submitted three  
23 declarations regarding profits. The declarations are widely different. In a 2010 declaration in  
24 support of preliminary injunction, he testified that “to avoid overstocking and prepare for [the  
25 challenged statutes] to take effect, I will reduce the amount of all ammunition . . . that Able’s  
26 Sporting, Inc. keeps in stock. . . . *This will cause a significant decrease in profits and result in*  
27 *higher costs for Able’s Sporting, Inc.* because the loss of California customers means [it] will buy  
28 less bulk from manufacturers.” (8/31/2010 Wright Decl., ¶ 10 [italics added].) In a 2011

1 declaration in support of an award of fees, Mr. Wright estimated that Able's had made "less than  
2 \$35,000 in profit, before taxes, from ammunition sales to California since the date of the ruling in  
3 its favor in this action." (9/21/11 Wright Decl., ¶ 4.) This testimony is speculative and lacks  
4 foundation, but even putting that aside, \$35,000 in profit for an 8-month period [2/1/11 through  
5 9/30/11) is significant. Assuming another \$12,000 in profit for the remaining four months of a  
6 calendar year, Able's financial incentive was at least \$47,000 a year.

7 Mr. Wright now has a much lower estimate. He testifies that based on his "review" of  
8 business records, he "estimates" that this litigation will produce a "financial benefit" of about  
9 \$97,920 from February 1, 2011 thorough the end of 2017. (3/23/17 Wright Decl., ¶ 9.)

10 Mr. Wright's various declarations appear to have been written to whatever conclusion  
11 seemed helpful at the time. All the declarations are speculative and lack foundation, but putting  
12 that aside, and using his 9/30/11 estimate of \$47,000 a year, he alone had a \$282,000 financial  
13 incentive over the six-year duration of the injunction in this case.

14 RTG Sporting Collectibles. In February of 2011, the owner of RTG Sporting Collectibles,  
15 Ray Giles, gave a declaration in support of a preliminary injunction motion in which he stated  
16 that if "this litigation is not resolved prior to February of 2011, RTG Sporting Collectibles, LLC  
17 *will lose significant profits* because it relies on the California market for much of the sales of its  
18 unique product—collectible ammunition [and] cannot just simply find buyers elsewhere."  
19 (8/28/2010 Decl. of Ray T. Giles, ¶ 8 [italics added].)

20 In a September 2011 declaration in support of Plaintiffs' motion for trial court fees, Mr.  
21 Giles went another direction. He stated in 2011 that he "does not track ammunition sales by  
22 state," but "estimate[d]" based on a review of "annual profits and its UPS shipping records," that  
23 "RTG Sporting Collectibles made approximately \$3,000 in profit, before taxes, from ammunition  
24 sales to California" during the eight months the injunction had been in effect. (9/21/2011  
25 Declaration of Ray T. Giles, ¶¶ 3, 15.) This testimony was again curiously speculative and  
26 lacking in foundation, but assuming another \$1,500 in profits for the remaining four months of a  
27 calendar year, RTG's "estimated" annual profits would be approximately \$4,500 beginning  
28 January 31, 2011.

1 In his most recent declaration in support of Plaintiffs' motion for appellate fees, Mr. Giles  
2 makes a still lower estimate of profits. Based on his review of "RTG Sporting Collectibles"  
3 annual profits and its UPS shipping records," he estimates that RTG Collectibles generated about  
4 \$17,760 in pre-tax profits from California ammunition sales during the six-year duration of the  
5 injunction in this case. (3/3/17 Declaration of Ray T. Giles, ¶ 6.)

6 Again, the various declarations appear to have been written to whatever conclusion seemed  
7 helpful at the time. All the declarations are speculative, and lack foundation and credibility. In  
8 any case, there is no evidence that Mr. Giles paid any fees or costs to fund this litigation.

#### 9 **4. California Rifle and Pistol Association Foundation**

10 CRPA Foundation, the entity that according to Plaintiffs' counsel did fund this litigation,  
11 alleges that it "represents the interests of the tens of thousands of its supporters who reside in the  
12 State of California and who are too numerous to conveniently bring this action individually, and  
13 whose interests include their desire to purchase and transfer ammunition." (Complaint, ¶ 113.) It  
14 further alleges that "[l]icensed business enterprises, including Plaintiffs ABLE's, RTG, and those  
15 represented by CRPA FOUNDATION" will be harmed by the challenged statutes. (*Id.*, ¶ 77  
16 [emphasis added].) And in a September 2011 declaration, CRPA's President admitted that the  
17 association was "established with the mission of *promoting the interests of its donors*["  
18 (9/21/2011 Declaration of Tony Montanarella, ¶ 12.) These sworn allegations clearly allege that  
19 CRPA represented ammunition vendors who have a financial stake in the outcome of the action.

20 Plaintiffs now submit the declaration of Stephen H. Dember, who is a Trustee for the CRPA  
21 Foundation and a Director and the Treasurer of California Rifle and Pistol Association,  
22 Incorporated ("CRPA Inc."). (3/27/17 Declaration of Steven H. Dember, ¶¶ 1-2.) He states that  
23 CRPA Foundation and CRPA Inc. are separate corporate entities, and that the Foundation (the  
24 plaintiff in this action) received only 0.075% of its donations from "retail businesses" from the  
25 year 2000 to the present. (*Id.*, ¶¶ 7-9.) However, the separate corporate status of the two entities  
26 is of little importance because, as CRPA Inc.'s website admits, "Many of CRPA's efforts are  
27 funded through CRPA's sister organization, The CRPA Foundation (CRPAF). CRPAF is a  
28

1 501(c)(3) organization, so contributions to the CRPAF are tax deductible.”<sup>3</sup> In other words,  
2 CRPA Foundation is a tax-deductible vehicle to support the efforts of CRPA Inc. As for CRPA  
3 Inc.’s financing, Mr. Dember’s declaration has much less detail. He simply states that retail  
4 businesses are only a “fraction of a percentage” of CRPA Inc.’s paid membership. (Id., ¶ 11.) He  
5 does not state how much the business members pay in membership to CRPA Inc.

6 CRPA Foundation’s own verified complaint states that its motive here was, at least in part,  
7 to represent and protect the financial interests of its members who are “in the business of shipping  
8 ammunition.” CRPA Foundation’s recent efforts to minimize the role of ammunition vendor  
9 members is ambiguous and unconvincing.

### 10 **C. Plaintiffs Have Not Met Their Burden of Producing Evidence.**

11 The burden rests squarely with Plaintiffs, as attorneys’ fee claimants, to present evidence  
12 establishing that the financial burden of pursuing the litigation was out of proportion to their  
13 personal stake in litigating the case. (*Beach Colony II, supra*, 166 Cal.App.3d at p. 113; *Planned*  
14 *Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691 (*Planned Parenthood*).)  
15 Plaintiffs’ showing on that issue is contradictory and equivocal. At the beginning of this action,  
16 up through the preliminary injunction phase, Plaintiffs asserted a significant financial interest in  
17 this case. During the attorneys’ fees phase, Plaintiffs’ minimized their financial interest in  
18 speculative and general declarations. And the available hard evidence, a press release from  
19 Plaintiffs’ counsel, suggests that all fees were paid by the NRA and Plaintiff CRPA, whose  
20 members had a financial stake in the outcome of the litigation. In this circumstance, the Court is  
21 justified in ruling that Plaintiffs have failed to meet their burden to show that the anticipated cost  
22 of the litigation was disproportionate to their economic interest in pursuing this litigation. (See  
23 *Planned Parenthood, supra*, 16 Cal.App.4th at p. 692.)

24  
25  
26  
27  
28 

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<sup>3</sup> See <http://crpa.org/about-crpa/>. (Last visited 6/5/17.)

1 **II. SHOULD THE COURT EXERCISE ITS DISCRETION TO AWARD ANY FEES, THE AWARD**  
2 **SHOULD BE SUBSTANTIALLY REDUCED.**

3 **A. Plaintiffs' Claim Should Be Discounted for a Huge Amount of Duplicative**  
4 **or Inefficient Work.**

5 Fee awards are calculated by the lodestar method, multiplying a reasonable hourly rate by a  
6 reasonable number of hours worked. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The  
7 reasonable number of hours is arrived at by calculating actual number of billed hours "less those  
8 that result from inefficient or duplicative use of time." (*Horsford v. Board of Trustees of*  
9 *California State Univ.* (2005) 132 Cal.App.4th 359, 395.) Duplicative charges are not  
10 recoverable. (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 64 [affirming reduction of fees  
11 for time spent by two attorneys on activities that could have been done by one]; *California*  
12 *Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 753-754 (*Duffy*) [fees reduced based on  
13 duplication of effort due to three attorneys working on the case]; *Levy v. Toyota Motor Sales,*  
14 *USA., Inc.* (1992) 4 Cal.App.4th 807, 815-816 (*Levy*) [affirming reduction of fees for duplicative  
15 efforts of four attorneys and five paralegals].) The party seeking fees has the burden of showing  
16 its fees are not duplicative. (*Levy*, 4 Cal.App.4th at p. 816 [party seeking fees "had the burden of  
showing that the fees incurred were 'allowable'"].)

17 Here, the padding in the number of hours claimed by Plaintiffs is patent. Plaintiffs' claim is  
18 for appellate fees only. They were respondents on appeal; they filed only one brief. They now  
19 seek fees for nine timekeepers who claim to have invested 875.9 hours in the appeal and 169.8  
20 hours in preparing the fee motion, for a grand total of 1,045.7 hours. The mere fact that so many  
21 legal professionals worked on this case made duplication unavoidable because they all had to  
22 learn the facts, read the cases, and understand the law and the issues. (*Duffy, supra*, 200  
23 Cal.App.3d at p. 753; [affirming court's reduction of fees based on "'some duplication' of effort  
24 due to there being three attorneys working on the case"]; *Levy, supra*, 4 Cal.App.4th at pp. 815-  
25 816 [affirming court's reduction of fees for duplicative efforts of four attorneys and five  
26 paralegals]; see also *Furtado v. Bishop* (1st Cir. 1982) 635 F.2d 915, 922-923 [reducing  
27 plaintiffs' hours by 50 percent where multiple attorneys worked on the same briefs].)

28 Although the entire claim is rife with duplicate work, the three categories below stand out.

1        Preparation of Respondents’ Brief—422.9 hours. Plaintiffs claim compensation for 422.9  
2 hours invested by six timekeepers in preparing respondents’ brief. (3/27/17 Declaration of  
3 Clinton Montfort, ¶ 34.) This is after they had briefed the same issues in the trial court. The  
4 principal drafter claims 198.3 hours for “researching, drafting, and preparing” respondents’ brief.  
5 (Id., ¶ 37.) A second drafter claims 82 hours for the same activities. (Id., ¶ 35.) Law clerks  
6 claim 117.2 hours for activities such as legal research and drafting legal memoranda. (Id., ¶ 35.)  
7 A paralegal claims 14.9 hours for “reviewing, revising, and preparing” respondents’ brief. (Id.,  
8 ¶ 39.) A third lawyer claims 10.5 hours for reviewing and analyzing respondents’ brief. (Id.,  
9 ¶ 36.)

10        Oral Argument—311.7 hours. Plaintiffs claim 311.7 hours invested by seven timekeepers  
11 in preparing for and conducting oral argument. (3/27/17 Declaration of Clinton Montfort, ¶ 41.)  
12 The claim includes 97.9 hours for the attorney who apparently did the oral argument (Id., ¶ 42),  
13 71.5 hours for a second attorney for activities such as “producing study notebooks and binders”  
14 (Id., ¶ 45), 36 hours for a third attorney for activities such as “reviewing and analyzing both the  
15 appellate record and briefing” (Id., ¶ 44), 5.8 hours for a fourth attorney (Id., ¶ 43), 73.4 hours for  
16 law clerks for activities such as “conducting legal research” (Id., ¶ 46), and 27.1 hours for a  
17 paralegal for activities such as “creating binders”. (Id., ¶ 47).

18        Fee motion—169.8 hours. Plaintiffs claim 169.8 hours for three timekeepers in preparing  
19 the attorneys’ fees motion. (3/27/17 Declaration of Clinton Montfort, ¶ 54.) The claim includes  
20 136.4 hours by the principal drafting attorney for activities such as “meetings to strategize,  
21 discuss arguments and evidence, assign tasks” (Id., ¶ 57), and 33.4 hours by two other attorneys  
22 for similar activities. (Id., ¶¶ 55-56).

23        With so many attorneys, clerks, and paralegals, it is understandable that duplicative and  
24 excessive work would occur, but that does not mean it is reasonable or recoverable. If Plaintiffs  
25 are awarded fees (and they should not be), the amount they claim should be reduced by fifty  
26 percent to correct for the excessive and duplicative billing.



1           **B.     Plaintiffs’ Attorneys Are Not Entitled to Home Market Rates Because**  
2           **They Have Not Met Their Burden to Show Impracticability of Retaining**  
3           **Local Counsel.**

4           The lodestar calculation requires an assessment of the reasonable hourly rate of each person  
5           claiming fees. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) The reasonable hourly rate is defined  
6           as the hourly amount to which attorneys of like skill in the court’s jurisdiction would typically be  
7           entitled. (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1133; *Nichols v. City of Taft* (2007) 155  
8           Cal.App.4th 1233, 1243 [Los Angeles and San Francisco attorneys’ fees reduced to reflect rates  
9           in Kern County].)

10          In the present case, Plaintiffs hired a Long Beach law firm and they seek fees at a Long  
11          Beach rate. They state that they are “unaware” of any attorney in Fresno with comparable  
12          experience, expertise, and resources. (Motion, p. 12:11-12.) But Plaintiffs have provided no  
13          evidence (as they must) to show that they made a good faith effort to find local counsel or to  
14          demonstrate that hiring them was impracticable. (*Nichols v. City of Taft, supra*, 155 Cal.App.4th  
15          at p. 1243 [where plaintiff showed a good-faith effort to find local counsel and demonstrated that  
16          hiring local was impracticable, trial court should have considered out-of-town counsel’s higher  
17          rates]; *Horsford v. Board of Trustees of Cal. State Univ., supra*, 132 Cal.App.4th at p. 399  
18          [declarations of local counsel unwilling to take plaintiffs case demonstrated impracticability of  
19          obtaining local attorneys].)

20          Because Plaintiffs have not met their burden to establish an entitlement to Long Beach rates,  
21          local Fresno County market rates apply. The United States District Court for the Eastern District  
22          of California recently concluded that the generally accepted rates are between \$250 and \$380 for  
23          experienced attorneys, with the highest rate reserved for attorneys with 20 or more years  
24          experience; that the accepted range for attorneys of less than ten years experience is between  
25          \$175 and \$300 per hour; and that the reasonable hourly rate for non-attorneys is \$75 to \$150.  
26          (*Rojas v. Zaninovich* (E.D. Cal., June 2015) 2015 WL 3657172, at \*23-\*24.) Using these figures,  
27          the Court should make the following adjustments to the hourly rates sought by plaintiffs. The rate  
28          for C.D. Michel, who has more than 25 years experience and is seeking \$450, should be adjusted  
29          to \$380. (See 3/27/17 Michel. Decl., ¶2.) The rate for Clinton Montfort, who has been practicing

1 for nine years and is seeking \$325, should be adjusted to \$275. (See 3/27/17 Montfort Decl., ¶ 3.)  
2 The rate for the four law clerks (Tammy Barcenilla, Rudy Klapper, Ryan Poteet, and Seth Zajac)  
3 should be adjusted from \$125 to \$100 because their positions are temporary and they come and  
4 go at will. (See 3/27/17 Montfort Decl., ¶ 18.)

5 **III. THE COURT SHOULD REJECT PLAINTIFFS' REQUEST FOR A LODESTAR MULTIPLIER**  
6 **AND INSTEAD APPLY A NEGATIVE MULTIPLIER TO ACCOUNT FOR EXCESSIVE AND**  
7 **REDUNDANT WORK.**

8 Once a reasonable lodestar figure is established, the lodestar may be adjusted upward or  
9 downward in light of a number of factors. (*Serrano v. Priest*, *supra*, 20 Cal.3d at p. 49; see also  
10 *Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1138.) The determination of a multiplier is separate  
11 and distinct from the determination of the lodestar. (*Ramos v. Countrywide Home Loans, Inc.*  
12 (2000) 82 Cal.App.4th 615, 626 [improper for trial court to consider the same factors twice, not  
13 only to calculate a reasonable hourly rate for purposes of awarding the lodestar award amount but  
14 also to enhance it].) A trial court should award a multiplier for exceptional representation only  
15 when the quality of representation far exceeds the quality of representation that would have been  
16 provided by an attorney of comparable skill and experience billing at the hourly rate used in the  
17 lodestar calculation. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1139.)

18 The factors a court may look to in deciding whether to apply a multiplier include the  
19 novelty and difficulty of the questions involved, the skill displayed in presenting them, the extent  
20 to which the nature of the litigation precluded other employment by the attorneys, the fact that an  
21 award against the State would ultimately fall upon the taxpayers, and the contingent nature of the  
22 fee award. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1139.) Plaintiffs ask the Court to apply a  
23 1.5 multiplier, but a fair application of these factors counsels against an upward multiplier.

24 First, the single issue presented in the appeal (whether the challenged statutory definition  
25 was vague) did not require specialized knowledge of firearms. The technical part of this case was  
26 resolved in the trial court; the appeal applied vagueness law to a settled factual record. Second,  
27 the “novel facial vagueness theory” for which Plaintiffs claim credit is now part of an  
28 unpublished decision; it is not citable. Third, the fact that plaintiffs faced “rigorous and  
competent opposition from the State” is unexceptional. The State routinely asserts a rigorous

1 defense when public safety statutes are challenged. Fourth, the claim that Plaintiffs' attorneys  
2 had only a contingent claim to fees is belied by Plaintiffs' counsel's post-judgment revelation that  
3 the litigation was funded by CRPA, as well as the NRA. (6/9/17 Decl. of George Waters, Exh. 6,  
4 p. 4.)

5 Plaintiffs have failed to satisfy their burden of proving that an upward multiplier is  
6 appropriate in this case. On the other hand, Plaintiffs' exorbitant billing (see § II.A above) makes  
7 this case appropriate for a negative multiplier. (*Thayer v. Wells Fargo Bank, N.A.* (2001) 92  
8 Cal.App.4th 819, 844 -845 [reversing fee award and holding that plaintiffs' fee award should be  
9 reduced by applying a negative multiplier due to duplication of work].) Should the Court award  
10 fees, the Court should impose a negative multiplier of .5.

### 11 CONCLUSION

12 The Court should deny plaintiffs' motion in its entirety or, alternatively, reduce any award  
13 substantially to account for unnecessary, excessive, and duplicative billing.

14 Dated: June 9, 2017

Respectfully Submitted,

15  
16 XAVIER BECERRA  
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17 MARK R. BECKINGTON  
Supervising Deputy Attorney General

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19  
20 */s/ George Waters*  
GEORGE WATERS  
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21 *Attorneys for Defendants/Respondents*  
22 *State of California, Xavier Becerra, and*  
*the California Department of Justice*

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**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

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

I declare:


I am employed in the Office of the 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. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the Oddessy electronic filing system. Participants who are registered with Oddessy will be served electronically. Participants in this case who are not registered with Oddessy will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On June 9, 2017, I electronically served the attached **OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES ON APPEAL** by transmitting a true copy via this Court's Oddessy system. Because one or more of the participants in this case have not registered with the Court's Oddessy system or are unable to receive electronic correspondence, on June 9, 2017, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Anna Barvir  
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180 East Ocean Blvd., Suite 200  
Long Beach CA 90802-4079

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 June 9, 2017, at Sacramento, California.

Tracie L. Campbell  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature