IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIFTH APPELLATE DISTRICT

SHERIFF CLAY PARKER; HERB BAUER SPORTING GOODS; THE CRPA FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; and STEVEN STONECIPHER, Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA; XAVIER BECERRA, in his official capacity as Attorney General for the State of California; and the CALIFORNIA DEPARTMENT OF JUSTICE, Defendants and Respondents.	Case No. F064510

APPELLANTS' OPENING BRIEF

Fresno County Superior Court, Case No. 10-CECG-02116
Honorable Jeffrey Hamilton, Judge

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIFTH APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: F064510
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 268728 NAME: Anna M. Barvir FIRM NAME: Michel & Associates, P.C. STREET ADDRESS: 180 E. Ocean Blvd., Ste. 200 CITY: Long Beach STATE: CA ZIP CODE: 90802 TELEPHONE NO.: (562) 216-4444 FAX NO.: (562) 216-4445 E-MAIL ADDRESS: abarvir@michellawyers.com ATTORNEY FOR (*name*): Plaintiffs-Appellants	SUPERIOR COURT CASE NUMBER: 10CECG02116
APPELLANT/ PETITIONER: Clay Parker, et al. RESPONDENT/ REAL PARTY IN INTEREST: State of California, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Plaintiffs-Appellants Parker, et al.

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain):*
(1) Barry Bauer	Herb Bauer Sporting Goods, Shareholder
(2) Reagan K. Bauer	Herb Bauer Sporting Goods, Shareholder
(3) Sheryle J. Bauer	Herb Bauer Sporting Goods, Shareholder
(4) Giles Family Partners, LTD	RTG Sporting Collectibles, LLC, Owner
(5) Ray T. Giles	Giles Family Partnership, LTD, Co-Owner

[X] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 28, 2017

Anna M. Barvir
(TYPE OR PRINT NAME)

/s/Anna M. Barvir
(SIGNATURE OF APPELLANT OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PARTIES
ATTACHMENT 2

7	Carolyn Giles	Giles Family Partners, LTD, Co-Owner
8	Greg Wright	Able's Sporting, Inc., Co-Owner
9	Randy Wright	Able's Sporting, Inc., Co-Owner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

Code of Civil Procedure section 1021.5[1] recognizes "that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional . . . provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will . . . frequently be infeasible." (*Woodland Hills Resids. Assn., Inc. v. City Council of L.A.* (1979) 23 Cal.3d 917, 933 (*Woodland Hills*).)

This lawsuit successfully challenged the State's enactment and enforcement of Assembly Bill 962, controversial legislation mandating the registration of all "handgun ammunition" sales and prohibiting mail-order and internet sales of such ammunition, as void for vagueness under the Fourteenth Amendment. After judgment was entered in Parker's favor, he brought a motion seeking attorneys' fees under section 1021.5. Because his private suit enforced important rights protected by the United States Constitution shared by all Californians, and because the record was clear that no plaintiff stood to gain any significant monetary benefit from the action, the trial court should have authorized a fee award.

Nonetheless, the court denied Parker's fee motion, holding that he had not established, with sufficient extra-record evidence, that the actual cost of litigation outweighed each plaintiff's personal, financial interest. Parker sought leave to supplement

[1] All further statutory references are to the Code of Civil Procedure unless indicated.

the record to immediately correct the evidentiary deficiencies perceived by the court, but those requests were also denied—even though both Parker and the court had taken all necessary precautions to prevent prejudicing the State.

Regarding the denial of Parker's fee motion, the court abused its discretion when it refused to make a "realistic assessment . . . of the gains which have resulted in a particular case" (*Woodland Hills*, *supra*, 23 Cal.3d at p. 940) based on the entire record and the evidence and arguments presented in support of Parker's fee motion and, instead, demanded further affirmative evidence regarding each plaintiff's interest.

The court compounded its error when it denied Parker's attempts to satisfy the court's heightened evidentiary standard absent any cognizable prejudice to the State, resulting in substantial injustice to Parker in the form of a "sanction" denying hundreds of thousands of dollars in fees.

The Court should reverse the trial court's order below and grant Parker a reasonable fee award or, alternatively, reverse and remand for further proceedings consistent with this Court's decision.

STATEMENT OF APPEALABILITY

This appeal is from the final order of the Fresno County Superior Court denying Parker's motion for attorneys' fees and subsequent motion for leave to file additional evidence. (Appellants' Appx. (A.A.) II 672-682.) It is authorized by Code of Civil Procedure, section 904.1, subdivision (a)(2).

STATEMENT OF THE FACTS AND CASE

I. THE UNDERLYING LAWSUIT

Assembly Bill 962 added sections 12060, 12061, and 12318 to the Penal Code,[2] implementing a statutory scheme for the transfer and handling of so-called "handgun ammunition." (Assem. Bill No. 962 (2009-2010 Reg. Sess.) ch. 628.) The law required vendors to: (1) preclude prohibited employees from accessing "handgun ammunition"; (2) store "handgun ammunition" beyond the reach of customers; and (3) record specific information about every transfer. (Former Pen. Code, § 12061.) Section 12318 further required that all transfers be conducted in a "face-to-face" transaction, largely barring online or mail-order purchases of such ammunition. (*Id.*, § 12318.)

After AB 962 passed, widespread confusion surfaced as to which ammunition was regulated by the law. (A.A.I 90-91.) That confusion, resulting from an unclear statutory definition of "handgun ammunition," was shared by individuals and ammunition vendors, who contacted plaintiffs' counsel for advice. (A.A.I 90-91; Case No. F062490 Joint Appx. (J.A.) VIII 2008 [incorporated into Appellants' Appendix by reference].) Two individuals, a brick-and-mortar retailer, two ammunition shippers, and a self-defense civil rights organization sued, challenging the laws as unconstitutionally vague. (J.A.I 14.) Parker sought declaratory and injunctive relief. (J.A.I 34-35.)

[2] The laws were reorganized in 2010 without substantive change. (Deadly Weapons Recodification Act of 2010, Sen. Bill 1080 (2009-2010 Reg. Sess.).)

On January 31, 2011, the trial court granted Parker's motion for summary adjudication, declaring the challenged laws unconstitutionally vague on their face and permanently enjoining their enforcement. (J.A.XIV 4032.) The Court entered judgment in Parker's favor and issued a permanent injunction barring the enforcement of the stricken laws. (J.A.XIV 4271.) The State's appeal followed. (J.A.XIV 4271.)

Almost three years later, this Court affirmed, striking down the challenged laws as void for vagueness. (*Parker v. California* (2013) 221 Cal.App.4th 340, review granted Feb. 19, 2014, S215265, review dism. as moot Dec. 14, 2016 (*Parker*).) Notably, this Court adopted, in its entirety, Parker's novel legal theory that a heightened level of certainty is constitutionally required of criminal laws that abut upon the rights enshrined in the Second Amendment and lack a scienter requirement—an issue that was unexamined by the trial court's order. (*Id.* at pp. 355-365.)

II. THE PLAINTIFFS

A. The Individual Plaintiffs: Parker and Stonecipher

Plaintiffs Sheriff Clay Parker and Steven Stonecipher are individuals participating in this lawsuit because they required clarification as to what types of ammunition are "handgun ammunition" under the challenged laws to carry on their responsibilities as law-abiding citizens.

Parker has been a law enforcement officer since 1981. (J.A.I 16.) When he joined this lawsuit, Parker was responsible

for determining the policies of the Tehama County Sheriff's Department, including establishing which types of ammunition are "handgun ammunition." (J.A.I 16.) But because the law's definition of "handgun ammunition" was unconstitutionally vague, he could not determine which ammunition the challenged laws were meant to regulate and so could not effectively or justly enforce them. (J.A.I 16.)

Stonecipher is an individual who mails ammunition to friends and family, and he sometimes receives ammunition in the mail from out-of-state shippers. (J.A.I 18.) He is not engaged in the business of selling ammunition. (J.A.I 18.) Stonecipher participated in this lawsuit because he did not know whether his actions would subject him to prosecution for unknowingly violating California law. (J.A.VIII 2055).

Both men have, on several occasions, attested that they had no financial interest in the outcome of this lawsuit. (A.A.II 271-272, 290-291, 489-490, 502-503.) They have also attested that their goals were wholly non-pecuniary and that they, in fact, reaped no financial benefit from participating in this case. (A.A.II 271-272, 290-291, 489-490, 502-503.)

B. The Shipper Plaintiffs: Able's Sporting and RTG Sporting Collectibles

Plaintiffs Able's Sporting, Inc., and RTG Sporting Collectibles, Inc., are ammunition retailers that ship ammunition directly to California residents. (J.A.I 17-18.)

Randy Wright is the president of Able's. (J.A.VIII 2063.) He is responsible for ensuring compliance with all applicable laws in the locations from which, and to which, Able's ships ammunition.

(J.A.VIII 2063.) Similarly, as the owner of RTG Sporting Collectibles, Ray Giles is responsible for determining the policies and operating procedures of RTG. (J.A.VIII 2058.) Because the challenged laws did not provide notice as to which ammunition was "handgun ammunition," and thus regulated by the new law, these businesses participated in this lawsuit for clarification so they could carry out their obligations under the law. (J.A.I 17-18.)

Both Wright and Giles have declared that their business' profits from ammunition sales to California, discounted by the likelihood of success at the outset of this case, were far outweighed by the costs of pursuing litigation. (A.A.II 244, 280-281, 285-287, 479-481, 484-485.)[3] They have both also explained that any indirect financial benefit they might have realized was, at all relevant times, quite impossible to quantify due to several unforeseeable factors, including the economy, political climate, shipping costs, legislative compliance and operating costs, and fluctuations in the cost of ammunition. (A.A.II 244, 280, 285, 479, 484.)

C. The Brick-and-Mortar Retailer Plaintiff: Herb Bauer Sporting Goods

Herb Bauer Sporting Goods, Inc., is an ammunition retailer in Fresno, California, that carries a variety of ammunition suitable for use in both rifles and handguns. (J.A.I 16; J.A.VIII 2067.) Agents from various law enforcement agencies, including

[3] In 2011, Wright and Giles estimated that their business' annual profits from California ammunition sales to be about $35,000 and $2,200, respectively. (A.A.II 244, 280, 285-286, 479-480, 484.)

the Bureau of Alcohol, Tobacco, Firearms, & Explosives, the California Department of Justice, and the Fresno Police Department, regularly visit the Fresno store to assure that Herb Bauer complies with all applicable laws (J.A.VIII 2068.) Herb Bauer participated in this lawsuit because the challenged laws did not provide adequate notice of which ammunition was regulated, subjecting its agents and employees to a threat of prosecution for unknowingly violating the challenged laws. (J.A.I 16; J.A.VIII 2068.)

Herb Bauer's president, Barry Bauer, has declared that he anticipated a pecuniary *loss* related to the victory in this case. (A.A.II 275, 493.) For absent the relief sought here (i.e., overturning the face-to-face sales requirement), online and mail-order ammunition sellers that compete with Herb Bauer would no longer be able to sell in California. (A.A.II 275, 493.) Had the litigation been unsuccessful, Bauer estimates a $4,000 annual profit increase from additional sales attributable to the elimination of that competition. (A.A.II 275-276, 493-494.) And while Herb Bauer did save some money associated with the cost of compliance with the challenged laws, Bauer estimated those savings to be just $2,000 annually. (A.A.II 276, 494.) The projected result of the plaintiffs' victory was thus an annual net loss of $2,000 for Herb Bauer. (A.A.II 276, 494.)

D. The Associational Plaintiff: The CRPA Foundation

The CRPA Foundation is a non-profit entity incorporated under California law, with headquarters in Fullerton, California. (J.A.I 17.) The CRPA Foundation seeks to raise awareness about

unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment, promote firearms and hunting safety, protect hunting rights, enhance the marksmanship skills of those participating in shooting sports, and educate the public about firearms. (J.A.I 17.)

Representatives of the organization have attested that the CRPA Foundation does not represent the economic interests of ammunition retailers—or anyone. (A.A.II 294-295, 498-499, 561-563, 567-569, 612, 653-655, 658-660). Rather, it is a civil rights organization formed to protect and preserve the Second Amendment and the shooting sports. (A.A.II 294, 498, 561, 567, 653, 658.) It *primarily* represents the thousands of individual firearm owners who are supporters of the Foundation or members of the California Rifle & Pistol Association, Inc., by fighting for their constitutional rights. (A.A.II 294, 498, 561, 567, 653, 658). In this suit, the CRPA Foundation represented the interests of the tens of thousands of its supporters whose interests included their desire to purchase and transfer ammunition and otherwise exercise their rights to keep and bear arms without being subject to criminal prosecution for violating unconstitutionally vague laws. (A.A.II 294-295, 498-499, 561-563, 567-569, 612, 653-655, 658-660; J.A.I 17.)

III. PARKER'S MOTION FOR ATTORNEYS' FEES AND ATTEMPTS TO SUPPLEMENT THE RECORD

While Parker's victory on the merits was on appeal, the plaintiffs, as the prevailing party in the trial court, timely moved for an award of attorneys' fees under section 1021.5. (A.A.I 21-

22.) The State opposed, arguing that plaintiffs had not carried their burden to prove that Plaintiffs Herb Bauer, RTG, Able's, and the CRPA Foundation lacked a disqualifying pecuniary interest in this lawsuit. (A.A.I 149-151.) On reply, plaintiffs provided further argument and evidence aimed at clarifying that, contrary to the State's claims, these four plaintiffs harbored no such interest. (A.A.II 228-231, 240-241, 244.) For instance, they provided evidence that shipper plaintiff RTG made only $2,190 in profits from California sales in 2010—nowhere near the $435,596.45 in actual litigation costs. (A.A.II 229, 244.)

On September 20, 2011, the trial court issued a tentative ruling indicating that it would deny Parker's motion for failure to present sufficient evidence establishing that *no* plaintiff held a pecuniary interest outweighing the costs of litigation. (A.A.II 247-251.) Specifically, the court reasoned that plaintiffs had failed to present any evidence regarding the monetary interests of Parker, Stonecipher, Herb Bauer, Able's, and the CRPA Foundation. (A.A.II 250.) And it further held that the evidence submitted regarding RTG's California ammunition sales was insufficient because it did not "provide the [c]ourt with any estimate of the financial benefits that success in this action yielded for Plaintiff." (A.A.II 250.)

Considering the court's reasoning, Parker scrambled to file a declaration from each plaintiff, further attesting to facts establishing the absence of a disqualifying pecuniary interest, before the September 21st fee hearing. (A.A.II 252-268.) At the hearing, the State objected to the filing of additional evidence and

urged the court to reject Plaintiffs' Offer of Proof in Support of Motion for Attorneys' Fees. (Reptr.'s Tr. (R.T.) IV 306:11-24.) After hearing argument regarding the need for the new evidence and the propriety of deferring ruling pending its review (R.T.IV 304:19-316:1), the court took Parker's fee motion under submission (A.A.II 297).

On November 9, 2011, notwithstanding the objections made by the State at the fee hearing, the court ordered the parties to prepare supplemental briefing addressing the sufficiency of Parker's new evidence. (A.A.II 358-359.)[4] The court thus effectively rejected the State's oral objections when it issued an order accepting the declarations and ordering additional briefing.

But that same day, the State's "renewed objections" came to the court's attention. (A.A.II 342-357, 364.) The court immediately considered the State's "renewed objections" and issued an amended order directing Parker to file a response. (A.A.II 363-364.) The "amended" order noted that the court initially agreed with the State and would sustain its objections and adopt the September 20th tentative, unless persuaded

[4] That order also directed Parker to file copies of counsel's billing records—unaltered in any way, even precluding redaction of any privileged information. (A.A.II 359.) Parker timely complied (A.A.II 369-393), even though a fee claimant is not generally required to submit actual billing records to fully document a fee claim. (2 Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2014 supp.) § 9.83, p. 9-70 (hereafter Pearl) ["The California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done."]; see, e.g., *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 fn. 4 (*PLCM*) [upholding fee award based on detailed reconstruction of time spent by in-house counsel].)

otherwise by Parker's response. (A.A.II 364.) In that case, the court held, it would notify the parties "immediately" and remove the briefing and hearing dates from the calendar. (A.A.II 364.) "Otherwise, the parties [were] ordered to comply with the court's" first November 9th order. (A.A.II 364.)

Parker timely filed a response in compliance with the court's "amended" order. (A.A.II 516-521.) The court made no ruling and, instead, allowed supplemental briefing on the sufficiency of Parker's evidence to commence. In fact, both parties filed merits briefs in accordance with the court's first November 9th order. (A.A.II 523-541, 606-617.)

Parker also filed two motions for leave to supplement the record, seeking permission to file declarations establishing that no plaintiff harbored a disqualifying pecuniary interest. (A.A.II 394-504, 544-605.)[5] Those motions included extensive declarations from Parker's counsel explaining why he had not initially included the evidence with Parker's moving papers. (A.A.II 414-420, 556-558.) The State opposed. (A.A.I 662-671.) But it did not argue that it would be prejudiced in any cognizable way by the admission of such evidence. (See A.A.I. 663-664, 667, 670.)

[5] A third request to supplement the record was filed on October 27, 2011, but was withdrawn after the trial court issued its November 9th order regarding the State's renewed objections. (A.A.II 299-341.)

IV. THE TRIAL COURT ORDER ON APPEAL

On January 17, 2012, the trial court issued another tentative telegraphing its intention to sustain the State's renewed objections, adopt the September 20th tentative, deny Parker's fee motion, and deny Parker's November 16, 2011 Motion for Leave to File Additional Evidence. (A.A.II 673-675.) The court also tentatively ordered the removal of the hearing on Parker's December 28, 2011 request to supplement the record from the calendar, effectively denying that motion as well. (A.A.II 673.)

In denying Parker's fee motion, the court held that it remained convinced by the State's objection "that the additional materials submitted to the [c]ourt were untimely, and that no reasonable explanation was presented for not providing them in the original filing save for Plaintiffs' counsel's judgment call." (A.A.II 674-675.) The court continued: "[t]he [c]ourt has discretion to disallow the submission of late-filed evidence. (Citations omitted). The [c]ourt exercises that discretion in disallowing the filing of Plaintiffs' untimely evidence." (A.A.II 674, citing Cal. Rules of Court, rule 3.1300(d); *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.)

And, for the same reason, the court denied Parker's then-pending motions for leave to file additional evidence. (A.A.II 675.) The court gave no other reason for denying those motions. (A.A.II 675.) Indeed, the relevant part of the order reads in full:

> As the [c]ourt will be adopting its tentative ruling signed and posted on September 20, 2011 and denying the Plaintiffs' motion for attorneys' fees, the [c]ourt denies the Plaintiffs' motion for

> leave to file additional evidence, or, in the alternative, to deny Plaintiffs' motion for attorneys' fees without prejudice.
>
> Additionally, for the same reason, the [c]ourt takes the March 1, 2012 hearing on the Plaintiffs' additional motion for leave to file additional evidence/offer of proof off calendar.

(A.A.II 675.)

At the hearing on January 18, 2012, Parker's counsel asked the court to clarify its basis for denying his motions for leave to supplement the record. (R.T.VI 508:24-509:3.) The court responded:

> *The court already allowed you to supplement the record*. I'm denying that request to supplement the record yet again.
>
> . . . .
>
> I considered your supplemental after your strategic decision not to submit, and then submitting roughly 6 inches of documents the day of the hearing regarding support for your request for attorney's fees.[6] *So I did consider your supplemental information*, and in my tentative rulings, or the most recent ones, I've explained to you why I'm not using those.

(R.T.VI 509:4-14, italics added.) That is, the court claimed that it *had* considered Parker's September 2011 declarations—even as it simultaneously sustained the State's objections to their introduction, thereby *not* considering them. (Compare R.T.VI 509:4-14, with A.A.II 674-675.) And because the court was not

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[6] The "roughly six inches of documents" that Parker filed before the September 21st hearing was a request for leave to file supplemental evidence and a continuance and a declaration from each plaintiff comprising just 29 total pages of content. (A.A.II 252-296.)

considering those declarations (or because it had considered them), it also denied Parker's motions to supplement the record. (A.A.II 674-675.)

The September 20, 2011 and January 17, 2012 tentative orders became the final orders of the court after the hearing. (A.A.II 672.) Parker now appeals the trial court's denial of his fee motion and his motions for leave to supplement the record. (A.A.II 682.)

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PARKER'S MOTION FOR ATTORNEYS' FEES UNDER SECTION 1021.5

A party is entitled to fees under the "private attorney general doctrine," as codified at section 1021.5, if four conditions are met. (1) The moving party must be the "prevailing party"; (2) the action must have enforced an "important public interest"; (3) the action must have conferred a "significant benefit" on the public or a large class of persons; and (4)(i) the necessity and (ii) financial burden of private enforcement must make an award "appropriate." (Code Civ. Proc., § 1021.5.)

As to the first three factors and the first prong of the fourth, there is little dispute that Parker readily satisfied these requirements. But, as to the second prong of the fourth factor, the trial court abused its discretion when it held that Parker had not met his burden to establish that the "financial burden of private enforcement" justified a fee award. The court failed to appreciate the strength of the law-, logic-, and evidence-based arguments Parker presented and instead demanded further affirmative

evidence as to each and every plaintiff—even where the record was clear that no financial interest existed. The Court should overturn the trial court's order and grant Parker a reasonable fee award.[7]

A. The Trial Court Correctly Held that Parker Satisfied the First Three Factors of a Section 1021.5 Fee Claim

The record is clear that Parker satisfies the first three section 1021.5 factors—i.e., prevailing party, public interest, and significant benefit—as well as the first prong of the fourth factor—i.e., necessity of private enforcement. The State made little effort to argue otherwise (see A.A.I 148-151), and the trial court rightly found that Parker demonstrated that he had met those requirements (A.A.II 677). That decision should be affirmed on appeal.

First, Parker is the " 'prevailing part[y]' for attorney's fees purposes if [he] succeed[s] on *any significant issue* in litigation which achieves some of the benefit . . . [he] sought in bringing suit." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153.) In other words, a party is successful if it achieves some relief from the benchmark conditions challenged in the lawsuit. (*Folsom v. Butte County Assn. of Govts.* (1982) 32 Cal.3d 668, 686-687.) There can be little debate that Parker is the "prevailing party" here. He brought this lawsuit, seeking a declaration that the challenged laws were unconstitutionally vague and a permanent injunction preventing their enforcement.

[7] Parker proposes a reasonable fee award and discusses the record evidence supporting that figure below. (See *infra*, Part III.)

(J.A.I 34-35.) The trial court declared the challenged laws unconstitutional on their face and struck them in their entirety, granting Parker the very relief he sought. (J.A.XIV 4033-4034, 4050, 4058-4060.) His victory was affirmed in full by this Court on November 6, 2013. (*Parker*, *supra*, 221 Cal.App.4th 340.) And, while subsequent legislation ultimately mooted Supreme Court review, Parker's total victory on appeal still stands today. (*Parker v. California* (2016) 211 Cal.Rptr.3d 98 (mem) (citing Sen. Bill 1235 (2015-2016 Reg. Sess.) § 4; Safety for All Act of 2016 (Prop. 63, as approved by voters, Gen. Elec. (Nov. 8, 2016).)

Second, Parker's action "*necessarily affect[ed] the public interest*" because it sought to—and successfully did—enforce fundamental, constitutional rights. (*City of Fresno v. Press Commcns., Inc.* (1994) 31 Cal.App.4th 32, 44, italics added.) Here, the public benefitted from the enforcement of two important constitutional rights—those embodied in the Fourteenth and Second Amendments. (*Parker*, *supra*, 221 Cal.App.4th at p. 366.) Specifically, Parker vindicated the rights of all Californians to be free from the burden of vague laws that violate due process and improperly infringe on their access to ammunition necessary for the exercise of their right to arms. (*Ibid.*)

Third, the lawsuit conferred a "significant benefit," on the public or a large class of persons. (*Woodland Hill*s, *supra*, 23 Cal.3d 917, 939.) For when, as here, an action vindicates constitutional principles of great magnitude, the court *presumes* that the public benefits. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318-319 (*Press*); see, e.g., *Sokolow v. County of San*

Mateo (1989) 213 Cal.App.3d 231, 246 [enforcing right to equal protection and freedom from sex discrimination].) That presumption is appropriate here because this lawsuit vindicated fundamental, constitutional rights shared by *all* Californians. (*Parker*, *supra*, 221 Cal.App.4th at p. 366.)

Regardless, a "large class of persons" did, in fact, benefit from Parker's success. At issue in this case were the rights of *every* ammunition purchaser and seller in California and any person who might have sought to transact in ammunition in the state. Even non-party, out-of-state shippers benefitted from the enforcement of their interests in conducting internet and mail-order ammunition sales free from arbitrary or discriminatory enforcement of the challenged laws. (See, e.g., J.A.VIII 2040-2041, 2048-2049.)

Fourth, the court considers the necessity and burden of private enforcement. (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214 (*Whitley*).) This factor requires the court to examine two interrelated issues: (1) " 'whether private enforcement was necessary' "; and (2) " 'whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys.' " (*Ibid.*, quoting *Lyons v. Chinese Hosp. Assn.* (2006) 136 Cal.App.4th 1331, 1348.) The trial court promptly (and correctly) disposed of the first prong, holding that because this action was brought against a government entity to enjoin the enforcement of an unconstitutional public law, the need for private enforcement was clear. (A.A.II 677, citing *Whitley*, *supra*, 50 Cal.4th 1206, 1215, and *Woodland Hills*,

supra, 23 Cal.3d at p. 941.) Indeed, it is well-settled that the "necessity" prong is satisfied when "public enforcement is not available, or not sufficiently available." (*Whitley*, *supra*, 50 Cal.4th at p. 1217.) And when an action is brought against the agency bearing responsibility for a law's enforcement, as here, the need for private enforcement is often presumed. (*Woodland Hills*, *supra*, 23 Cal.3d at p. 941.)

As to the second prong, however, the trial court abused its discretion, inexplicably requiring affirmative evidence regarding every plaintiff's individual, financial interest even though the record was clear that no plaintiff harbored a pecuniary interest sufficient to bar section 1021.5 fees. (See *infra*, Part II.B.)

B. The Record Established that No Plaintiff's Pecuniary Interest Outweighed the Costs of Suit; the Trial Court Abused Its Discretion in Holding Otherwise

Fees are recoverable "when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' " (*Woodland Hills*, *supra*, 23 Cal.3d at p. 941, quoting *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89.) When balancing the costs and benefits of litigation for fee-shifting purposes, the court must quantify the monetary value of the benefit obtained, then discount that benefit by the likelihood of success and weigh the resulting value against the actual cost of litigation. (*L.A. Police Prot. League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9-10 (*L.A. Police*).) A fee award is proper unless

"the expected value of the litigant's own monetary award[, discounted by the likelihood of success,] *exceeds by a substantial margin* the actual litigation costs." (*Ibid.*, italics added; see also *Whitley*, *supra*, 50 Cal.4th at pp. 1215-1216.)

While the trial court is authorized to consider outside evidence, "[t]he determination of entitlement to fees is generally based on the record already before the court." (See Pearl, *supra*, § 11:47, p. 11-49; see also *Woodland Hills*, *supra*, 23 Cal.3d at p. 940 [determination should be based on "a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case"].) It is the " 'rare situation[,]' " indeed, that requires the " 'court to make factual findings based on conflicting testimony from live witnesses of varying credibility.' " (Pearl, *supra*, § 11:47, p. 11-49, quoting *L.A. Police*, *supra*, 188 Cal.App.3d at p. 8.)

Here, no plaintiff has a financial interest in this case coming anywhere close to the costs of litigating this case. The entire record, evidence submitted in support of Parker's fee motion, as well as logical inference and case law bear this fact. The trial court's decision to deny fees, based entirely on a perceived failure to provide affirmative evidence regarding every plaintiff's financial interest, was in error.

1. The Individual Plaintiffs Had *No* Financial Interest in this Case

The individual plaintiffs, then-Sheriff Clay Parker and Steven Stonecipher, had *no* pecuniary interest in the outcome of this case. They are not engaged in the business of selling ammunition for profit (J.A.I 16-18; J.A.VIII 2055, 2071), and thus

will not gain financially from an injunction prohibiting the enforcement of statutes regulating the ammunition sales. Monetary damages were neither sought nor awarded. (J.A.I 34-35; J.A.XIV 4058-4060.) So, these plaintiffs in fact reaped no financial benefit. In short, these parties' goals were strictly non-pecuniary. The financial burden of bringing this suit is thus *grossly* disproportionate to their personal stake in the matter.

In its opposition below, the State did not even attempt to challenge the overwhelmingly obvious point that individuals who do not sell ammunition for profit and who did not seek a monetary judgment would have no disqualifying pecuniary interest. (See A.A.I 148-151.) The court was, in fact, the first to raise a concern that Parker and Stonecipher had not established, with evidence, the absence of a financial interest in this case. (A.A.II 251.)

But the record and logical inferences made therefrom were clear that they had no such interest. (J.A.I 16-18, 34-35; J.A.XIV 4058-4060.) What's more, the fact was literally undisputed by the State. (A.A.I 149-151.) No more was required. (See *Woodland Hills*, *supra*, 23 Cal.3d at p. 940; Pearl, *supra*, § 11:47, p. 11-49.)

2. The Ammunition-Shipper Plaintiffs Had No Financial Interest in the Litigation Sufficient to Disqualify Them from Fees

While the shipper plaintiffs, RTG and Able's, might have conceivably had some business interest in this litigation, it is not one that disqualifies them from fees. For any pecuniary interest they might have had is (1) outweighed by the interest in access to constitutionally protected goods they share with their customers,

(2) indirect and entirely speculative, and (3) far less than the cost of litigating this case.

a. Because the shipper plaintiffs sell constitutionally protected goods, they share a non-pecuniary interest in this suit with their customers

Not all potential business interests are the sort that take section 1021.5 fees off the table. Even when a litigant's personal, financial interests might be sufficient motivation to sue, if its ultimate goals "transcend" those self-interests and are shared with the greater public, a fee award is appropriate. (*County of San Luis Obispo v. The Abalone Alliance* (1986) 178 Cal.App.3d 848, 868-869; *Planned Parenthood v. Aakhus* (1993) 14 Cal.App.4th 162, 173 (*Aakhus*).) More to the point, when a purveyor of constitutional goods or services sues to vindicate both its own rights and the constitutional rights of *its patrons'*, the financial burden factor is met. (*Aakhus*, *supra*, 14 Cal.App.4th at p. 173.)

In *Planned Parenthood v. Aakhus*, the Court of Appeal affirmed a fee award to an abortion provider that had sued to enjoin protestors from disturbing its business. (14 Cal.App.4th at pp. 167-169.) Though the court recognized that Planned Parenthood had "sufficient business motive to wage this suit," it held that fees were appropriate because the case could not "be exclusively characterized as a self-serving, private dispute commenced by respondent to protect its own pocketbook." (*Id.* at p. 173.) Rather, "the interest of [the clinic] and its clients,

rendering and receiving reproductive medical care, are *mutual and inseparable*." (*Ibid.*, italics added.)

Here, to the extent that the shipper plaintiffs' participation in this suit benefitted them at all, it benefited their patrons more so. RTG and Able's are undoubtedly purveyors of a constitutional right. That is, they are retailers who transact in ammunition necessary for the meaningful exercise of the Second Amendment. (J.A.I 17-19; J.A.VIII 2058-2060, 2063-2064.) Their right to sell constitutionally protected goods (i.e., ammunition), free from the threat of arbitrary and discriminatory enforcement of vague criminal laws, is thus "mutual and inseparable" from the right of their customers to acquire those goods free from that threat.[8] (See *Aakhus*, *supra*, 14 Cal.App.4th at p. 173.)

Simply put, this case is not merely "a private success story." (*Aakhus*, *supra*, 14 Cal.App.4th at p. 173.) Like the abortion clinic in *Aakhus*, even if the shipper plaintiffs had sufficient business interests to justify their participation, which they do not concede, those interests would not disqualify plaintiffs from fees because the fundamental mutual interests of the shipper plaintiffs and their patrons cannot be disentangled. (*Ibid.*)

[8] AB 962 also criminalized the mail-order and internet *purchase* of so-called "handgun ammunition" by individuals, a prohibition Parker also challenged. (J.A.I 14, 20, 30-32, 34-35.)

b. The indirect and speculative nature of any financial gain the shipper plaintiffs might have realized favors a fee award

What's more, when viewed from the parties' expectations at the outset of litigation (the appropriate perspective for determining expected pecuniary gain), it is clear that a fee award is proper. For the highly speculative nature of any future monetary gain the shipper plaintiffs could have realized *favors* a fee award. (*Galante Vineyards v. Monterey Penins. Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1127 (*Galante*); *Citizens Against Rent Control v. City of Berkeley* (*Citizens*) (1986) 181 Cal.App.3d 213, 230-231.)

In *Galante Vineyards v. Monterey Peninsula Water Management District*, the court upheld a fee award even though the claimants were "probably the greatest beneficiaries" of the underlying action. (60 Cal.App.4th at p. 1127.) The court reasoned that, because the plaintiffs reaped no "*direct* pecuniary benefit" and any future monetary benefit was speculative, "the question of whether the cost of petitioners' legal victory transcend[ed] their personal interests" was "a close one." (*Id.* at pp. 1127-1128, citing *Citizens*, *supra*, 181 Cal.App.3d at pp. 230-231 [reasoning that a speculative, future monetary gain *favors* a fee award].)

Similarly, in *Citizens Against Rent Control*, the appellate court upheld a fee award—even though the claimants were landlords seeking to raise political contributions to fight proposed rent control. (181 Cal.App.3d at p. 229.) The court reasoned that, while the plaintiffs were initially motivated to enforce their First

Amendment rights because of economic interests, they ultimately vindicated fundamental, constitutional rights that would be directly enjoyed by society. (*Ibid.*)

Here, the shipper plaintiffs realized no *direct* pecuniary gain. Damages were neither sought nor awarded. (J.A.I 34-35; J.A.XIV 2058-2060.) And, at the time critical litigation decisions were being made, any advantage tied to the shipper plaintiffs' profits from sales to California was entirely speculative. There was no way to accurately quantify the revenues this suit protected because there was no way of knowing how many customers would have been exempt from the face-to-face transaction requirement, or how long the law would have remained in effect. (A.A.II 244, 410, 417-418; see also A.A.II 456-477 [two bills introduced in state legislature to moot Parker's lawsuit]; Sen. Bill No. 1235 (2015-2016 Reg. Sess.) [clarifying legislation passed in 2016 removing such retailers from the California market].) Further, there was no way to predict the way other market factors would impact their profits. (A.A.II 244 [describing outside factors that impact ammunition sales and profits].)

As such, it was impossible to properly quantify any potential financial interest the shipper plaintiffs might have had, let alone determine that any such interest *substantially* outweighed the costs of litigation. *Galante* and *Citizens Against Rent Control* therefore counsel in favor of an award.

c. Any pecuniary interest the shippers had did not outweigh the cost of litigation

Even if an accurate valuation of the shipper plaintiffs' financial interest could be calculated under *L.A. Police Protective League*, it is impossible to say the shipper plaintiffs stood realize a pecuniary benefit sufficient to defeat their entitlement to fees. (188 Cal.App.3d at pp. 9-10 [monetary value of the benefit obtained discounted by the likelihood of success and weighed against the cost of litigation].) On reply, plaintiffs attempted to temper the State's hyperbolic claim that the shipper plaintiffs "gained hundreds of thousands, perhaps millions, of dollars" (A.A.I 151), with evidence that neither realized profits from sales to California coming close to the $435,596.45 in actual costs (A.A.II 229-230, 240-241, 244).

They provided evidence that RTG's California sales amounted to only about $2,190 in 2010—the year that RTG joined this suit. (A.A.II 244.) So even if it were accepted that plaintiffs initially had a 50% chance of success, a generous assumption to be sure, RTG's properly valued interest would have barely exceeded $1,000 annually at the time "vital litigation decisions were made."[9] (*Whitley*, *supra*, 50 Cal.4th at p. 1215; see

[9] Parker's counsel could not obtain a signed declaration from Able's because Wright was out-of-town and unreachable via any means of electronic communication. (A.A.II 240.) Having seen Able's' profit figures, counsel submitted a declaration stating that he believed Wright's declaration would be competent evidence on the pecuniary interest issue. (A.A.II 240-241.) And Parker thus offered in his reply to present a declaration upon Wright's return. (A.A.II 229, 240.) The court's September 20th tentative did not address that offer. (See A.A.II 247-250.) Evidence Parker later sought to submit confirmed that Able's

also *L.A. Police*, *supra*, 188 Cal.App.3d at pp. 9-10.) The court inexplicably found the evidence to be insufficient—wrongly holding that RTG was required to provide an "*estimate* of the financial benefits that success in this action yielded." (A.A.II 250, italics added.) But *L.A. Police Protective League* requires the *court* to make that estimate based on the evidence before it. (188 Cal.App.3d at pp. 9-10.) From the Giles declaration, the trial court easily could have estimated RTG's annual benefit from continued ammunition sales into the state. And if it had, it would have been clear that RTG's meager $1,000 interest pales in comparison to the actual cost of litigating this case. Indeed, it would have taken RTG over *400 years* to even begin to recover its costs. This cannot be the sort of business interest that would disqualify one from fees.

For these reasons, RTG and Able's had insufficient financial interest in the outcome of this lawsuit to overcome their clear entitlement to a fee award under section 1021.5. The trial court abused its discretion in denying Parker's motion on this ground.

3. The Litigation Ran Counter to the Pecuniary Interests of Brick-and-Mortar-Retailer Plaintiff Herb Bauer Sporting Goods

Plaintiff Herb Bauer's primary interest in this lawsuit was an altruistic one—the protection of the constitutional rights of its employees and customers. (J.A.VIII 2067-2068.) Nowhere in the

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pecuniary interest was less than $35,000 annually. (A.A.II 280-283, 484-487.)

record does Herb Bauer allege that the challenged laws' enforcement would have resulted in lost profits. And for good reason. In terms of monetary interests, Herb Bauer stood to *lose* much more than it gained. For enforcement of the challenged face-to-face purchase requirement would have restricted internet and mail-order purchases, directing buyers to traditional "brick-and-mortar stores," *like Herb Bauer Sporting Goods*. (See former Pen. Code, § 12318.) It is inherently logical that enforcement of a law eliminating competition from online and mail-order ammunition sellers would have *increased* Herb Bauer's profits. Because this plaintiff stood to *lose* money, it could not have harbored a disqualifying pecuniary interest.

To the extent that Herb Bauer could be said to have reaped some financial benefit, it is not the sort that puts a section 1021.5 fee award out of reach. The record is clear that, like the shipper plaintiffs, Herb Bauer is a seller of constitutionally protected ammunition. (J.A.I 16; J.A.VIII 2067-2068.) As such, any business interest it had in seeing the challenged laws overturned was overcome by the non-pecuniary interest it shared with its customers. (*Aakhus*, *supra*, 14 Cal.App.4th at p. 173; see also *supra* Part I.B.2.a.) That is, Herb Bauer shares a "mutual and inseparable" interest with its customers in selling and receiving ammunition necessary for the meaningful exercise of the Second Amendment, free from unconstitutionally vague criminal laws. (*Aakhus*, *supra*, 14 Cal.App.4th at p. 173.) Again, in such cases, section 1021.5 fees are appropriate notwithstanding some potential business motive. (*Ibid.*) No further evidence of Herb

Bauer's profits or losses was thus necessary to establish its entitlement to fees. The trial court was wrong to hold otherwise.

Finally, like the shipper plaintiffs, Herb Bauer's potential financial interest in this lawsuit was both indirect and speculative. (See *supra* Part I.B.2.b.) It relied entirely on how long it would take the State to pass legislation clarifying the vague law—something that was entirely impossible to predict at the time vital litigation decisions were made. (A.A.II 408-409, 458-466, 470-475.) In fact, it was quite impossible to know what that clarifying legislation might have even looked like. For instance, two bills were considered while the parties were litigating. One, Senate Bill 427, would have applied AB 962's requirements to a laundry list of named cartridges. (A.A.II 409, 458-466.) The other, Senate Bill 124, would have applied those requirements to *all* ammunition. (A.A.II 409, 470-475.) Either bill would have reversed Parker's victory before even a minimal benefit could have been realized, and would have *increased* the registration burden on brick-and-mortar retailers like Herb Bauer, expanding the list of ammunition types for which records must be taken and stored.[10] The indirect and speculative nature of Herb Bauer's monetary interest thus favors a fee award. (*Galante*, *supra*, 60 Cal.App.4th at pp. 1127-1128; *Citizens*, *supra*, 181 Cal.App.3d at pp. 230-231.)

[10] In 2016, the State opted to make the provisions of AB 962 applicable to all ammunition. (Sen. Bill No. 1235 (2015-2016 Reg. Sess.) [signed July 1, 2016].) The voters passed a similar law four months later. (Safety for All Act of 2016 (Prop. 63, as approved by voters, Gen. Elec. (Nov. 8, 2016).)

The court thus erred in denying Parker's fee motion on the basis that Herb Bauer had not established that it lacked a disqualifying pecuniary interest.

4. The CRPA Foundation Has No Financial Interest in this Case

The CRPA Foundation is a civil rights organization whose interests in this case were not financial, but ideological. (J.A.I 17.) It is primarily an organization representing *individual firearm owners and sportsmen* to protect and preserve the rights enshrined in the Second Amendment. (J.A.I 17.) To that end, the CRPA Foundation joined this action on behalf of tens of thousands of its individual supporters who sought only to purchase ammunition free from the risk of unfair prosecution. (J.A.I 17.) It was the non-pecuniary interests of these individuals that the Foundation sought to promote through this litigation.

Any incidental benefit that an ammunition-retailer supporter *might* have realized does not overcome the CRPA Foundation's entitlement to a fee award here. *California Licensed Foresters Association v. State Board of Forestry* (1994) 30 Cal.App.4th 562 (*Cal. Lic. Foresters*), is instructive. There, the California Licensed Foresters Association, an organization whose stated mission was to protect the economic welfare of foresters and industry professionals, obtained an injunction barring enforcement of regulations that would have halted timber harvesting and significantly reduced CLFA members' income. (*Id.* at pp. 567, 571-572.) The court denied fees because CLFA had a financial stake "*to the same extent as its members*" for its "*very existence depends upon the economic vitality of its members*" and

because CLFA's "*primary* objective" was the protection of its members' economic interests. (*Id.* at pp. 570, 573, italics added.)

Unlike CLFA, the CRPA Foundation is not devoted to the interests of ammunition retailers—or to *anyone's* economic interests. Rather, the Foundation primarily fights on behalf of individual firearm owners and sportsmen to preserve fundamental rights enshrined in the Constitution. (J.A.I 17.) These individuals, like Parker and Stonecipher, have *no* pecuniary interest in this litigation. And they make up the overwhelming majority of the CRPA Foundation's supporters. Because its supporters are financially uninterested individuals, the livelihood of the CRPA Foundation does not depend on the few of its supporters who might happen to be ammunition retailers. For that reason, the CRPA Foundation does not hold a "financial stake in pursuing this matter to the same extent as its members," and it has insufficient personal economic interest to defeat its entitlement to fees. (See *Cal. Lic. Foresters*, *supra*, 30 Cal.App.4th at pp. 570, 573.)

What's more, like Herb Bauer and the shipper plaintiffs, any retailer supporter's interest was speculative, indirect, and equally shared with their non-retailer customers. These reasons too counsel in favor of granting section 1021.5 fees, not denying them. (*Aakhus*, *supra*, 14 Cal.App.4th at p. 173; *Galante*, *supra*, 60 Cal.App.4th at pp. 1127-1128; *Citizens*, *supra*, 181 Cal.App.3d at pp. 230-231; see also *supra* Part I.B.2.a-b.)

The entire record, logical and legal arguments, as well as evidence filed in support of Parker's fee motion, all plainly

established that no plaintiff harbored a disqualifying pecuniary interest. The trial court thus abused its discretion when it denied section 1021.5 attorneys' fees on the grounds that Parker was required to submit additional affirmative evidence as to every plaintiff's pecuniary interest.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PARKER'S MOTIONS TO SUPPLEMENT THE RECORD

Recall, after the trial court issued its tentative ruling stating its intent to deny fees (A.A.II 247-251), Parker sought leave to file various declarations addressing the court's evidentiary concerns (A.A.II 252-296 [September 21 offer of proof]). He followed that motion with two similar motions over the course of three months. (A.A.II 394-504, 544-605.) The trial court ultimately sustained the State's objections as to the first request and rejected the September 2011 declarations, reasoning that courts have discretion to reject late-filed evidence. (A.A.II 674-675.) On the same grounds, it denied Parker's subsequent motions. (A.A.II 675.) But because the trial court should liberally grant leave to file late documents absent prejudice to the other party, and because failure to do so invited substantial injustice upon plaintiffs, the trial court abused its discretion in denying Parker's requests. The Court should reverse.

A. The Trial Court Abused Its Discretion When It Denied Parker Leave to Cure Perceived Evidentiary Defects Because He Could Do So Immediately and No Circumstances Supported Denial

While trial courts generally have discretion to reject late-filed documents under California Rules of Court, rule 3.1300(d), a court's discretion not to consider them may not be exercised arbitrarily. Rather, the court should seek to do justice, rejecting strict adherence to procedural rules " 'whenever the purposes of justice require.' " (*In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881, 905, quoting *Adams v. Sharp* (1964) 61 Cal.2d 775, 777 (Murray, J., concurring).) As the California Supreme Court long ago held:

> Rules of Court should be framed in furtherance of justice; but they may sometimes, if strictly adhered to, work the other way. They are always under the control of the Court, and if there is any reason to apprehend the latter result, they should be made to yield to the superior calls of justice.

(*People v. Williams* (1867) 32 Cal. 280, 287.) What's more, there is a strong public policy favoring the resolution of matters on the merits whenever possible. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854; *Slusher v. Durrer* (1977) 69 Cal.App.3d 747, 753-754.)

To these ends, courts should consider late-filed papers where there is no prejudice to the non-moving party and if refusal would result in substantial injustice to the filing party. In fact, a court may abuse its discretion in refusing to do so absent evidence of such prejudice. (*Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32-33 (*Kapitanksi*) [holding that trial court abused its discretion in refusing to consider late-filed

papers where defendant did not show that it would suffer prejudice or that injustice would result]; see also *Sec. Pac. Natl. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 94 (*Sec. Pac. Natl.*) [reversing summary judgment entered for failure of opponent to submit separate statement as abuse of discretion absent evidence of prejudice to opposing party].)

In *Security Pacific Bank v. Bradley*, the plaintiff bank moved for summary judgment, but failed to file a separate statement of undisputed facts in support. (4 Cal.App.4th at p. 92.) The court denied the bank's motion without prejudice for failure to file the motion in proper form. (*Ibid.*) The bank thereafter corrected the error and refiled. (*Ibid.*) The defendant responded to the bank's corrected motion, but this time without his own separate statement. (*Ibid.*) Without providing the defendant an opportunity to cure, the court granted summary judgment. (See *id.* at pp. 92-93.)

On appeal, the court held that defendant's failure to file an adequate separate statement was a presently curable defect from which the bank suffered no prejudice beyond the expense of appearing at an additional hearing. (See *Sec. Pac. Natl.*, *supra*, 4 Cal.App.4th at p. 96.) There was no showing that the defendant had engaged in dilatory conduct or prior abuse of procedure. (*Ibid.*) And, far from serving the ends of justice, the court's rejection of the deficient opposition effectively resulted in a "sanction" granting judgment for the bank on procedural grounds—a disfavored result. (*Id.* at p. 97.) Accordingly, the court held that the trial court abused its discretion in denying

defendant the opportunity to correct his filing deficiency. (See *id.* at p. 93.)

Two years later, the court in *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152 (*Kalivas*) followed *Security Pacific*'s lead. (*Kalivas*, *supra*, 49 Cal.App.4th at p. 1161, citing *Sec. Pac. Natl.*, *supra*, 4 Cal.App.4th at pp. 97-99.) There, the Court of Appeal reversed a summary judgment granted because the opposing party had failed to file a written opposition. (*Id.* at pp. 1154, 1161-1162.) As in *Security Pacific*, the *Kalivas* court recognized that the error was a "curable defect" that did not prejudice the party seeking summary judgment. (*Id.* at p. 1162.) And the party opposing it had no history of dilatory conduct. (*Ibid.*) The court thus held that the trial court should have given the opposing party an opportunity to cure, recognizing that "[a]n order based upon a curable procedural defect (such as the failure to file a separate statement), which effectively results in a judgment against a party, is an abuse of discretion." (*Id.* at p. 1161.)

Like the failure of counsel to provide a separate statement of undisputed facts that introduces all available evidence in a motion for summary judgment—the requirement for which is clearly laid out in Code of Civil Procedure section 437c—Parker's perceived failure to present sufficient extra-record evidence in support of his fee motion with his moving papers (to the extent such was required in this instance at all) was an error that the court should have allowed Parker to correct. Parker stood immediately ready to correct the deficiency, presenting the declarations simultaneously with his requests to supplement the record. (A.A.II 252-292, 394-504, 544-661.) There was no

prejudice to the State that could not have been remedied through additional briefing and hearing—which the court in fact ordered. (A.A.II 359, 367, 523-544, 606-618; R.T.VI [transcript of continued hearing Parker's fee motion held on January 18, 2012] Parker ct-ordered resp) And Parker had no history of dilatory conduct. Quite the opposite. Parker's counsel worked diligently from the beginning of this case to bring it to its successful conclusion in mere months. (A.A.I 90-98.) Indeed, the complaint was filed on June 17, 2010 (J.A.I 13), and judgment was entered on February 23, 2011 (J.A.XIV 4058-4060), after the parties worked feverishly to conduct all discovery and prepare cross-motions for summary judgment under tight deadlines (A.A.I 94-97).

Although Parker's motion was not for summary judgment, failure to grant leave to cure here had the same deleterious effect—judgment against Parker on his entire fee claim, a sanction wholly out of proportion to the evidentiary defect perceived by the court. The policy in favor of adjudicating matters on their merits thus applies equally here, and the trial court should have granted Parker leave to cure.

Even if prejudice might have resulted from consideration of the late-filed documents, the appropriate remedy is to accept the filing, continue the hearing to allow the opponent to respond, and order the offending party to pay costs reasonably incurred by the delay (or, in this case, offset plaintiffs' fee award by that amount). (*Kapitanksi*, *supra*, 146 Cal.App. 3d at p. 33; see also *Parkview Villas Assn., Inc. v. State Farm Fire & Cas. Co.* (2005) 133

Cal.App.4th 1197, 1212 [reversing grant of summary judgment entered for failure to submit separate statement in support of opposition without opportunity to cure defect as abuse of discretion].) Alternatively, the court, in its discretion, may deny the underlying motion without prejudice and invite the party to correct the deficiency and refile. (*Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1014-1015 (*Farber*).)

Indeed, when faced a fee motion lacking sufficient evidence establishing whether the fees claimed were reasonable and necessary, the trial court in *Farber* did just that. (141 Cal.App.4th at pp. 1014-1015.) The defendant then renewed its motion, having corrected the evidentiary deficiencies, and the court awarded fees. (*Ibid.*) Affirming the trial court's decision, the Court of Appeal observed that the trial court had two options when faced with a fee motion lacking sufficient evidence: continue the motion, granting leave for submission of further evidence and supplemental briefing, or deny the motion without prejudice. (*Id.* at p. 1015.)

> Which route to choose is an administrative matter of calendar management—some might want to streamline a docket and continue a pending motion to allow supplemental filings, while others might prefer to decide the motion on the existing papers and reconsider that decision in a new motion.

Ibid.

Here, the court initially chose to first route, continuing the hearing and ordering supplemental briefing and oral argument. (A.A.II 359, 364; R.T.VI.) After entertaining the parties' briefing,

the court closed off the first route and sustained the State's objections to the late-filed evidence, having effectively invited the parties to needlessly expend significant resources preparing billing records (A.A.II 369-393), additional briefing (A.A.II 394-504, 523-543,606-661), motions (A.A.II 544-605, 662-665), objections (A.A.II 505-516-522, 662-671), and oral argument (R.T.VI). Then, the court closed the door to the second option too, ultimately denying Parker's fee motion with prejudice. (A.A.II 672, 676; R.T.VI. 509:15 -510:17.)

Certainly, the court is within its power to control the schedule of proceedings before it and to limit the introduction of evidence after briefing has been done. (See *Farber*, *supra*, 141 Cal.App.4th at p.1015.) But denying that opportunity under the circumstances here resulted not in substantial justice or judicial economy, but an effective sanction exceeding $435,000 and the waste of considerable resources spent further litigating the issue. Absent any prejudice to the State, the trial court's refusal to admit the late-filed evidence was thus an abuse of discretion.

B. *Bozzi v. Nordstrom* Does Not Authorize the Trial Court to Reject the Late-Filed Evidence in this Case

The trial court's terse denial of Parker's motions to supplement the record relied entirely on the same reasoning used to sustain the State's objections. (A.A.II 675.) That is, rather than consider whether the State would suffer undue prejudice or whether Parker had previously engaged in abusive tactics, the trial court simply held that it has discretion to reject late-filed evidence and that it was exercising it. (A.A.II 674-675.) The

opinion cites rule 3.1300(d) and a solitary case, *Bozzi v. Nordstrom, Inc.*, for support. But *Bozzi* could hardly be more distinguishable.

There, an injured store patron sought to file a surrebuttal and a supplemental declaration in support of a motion for summary judgment. (*Bozzi*, *supra*, 186 Cal.App.4th at p. 765.) She filed those papers on the day of the motion hearing, she did not request leave to file them, she did not request a continuance, she provided no reason for her late submission, and, regardless, the evidence she sought to provide would not have changed the outcome. (*Id.* at p. 765-766.) The Second District held that the trial court had not abused its discretion in denying the late-filed documents because the "[p]laintiff did not invoke any of the available procedures to obtain a court order permitting her to file late papers." (*Id.* at p. 765.)

Here, while Parker did seek to file declarations on the day of the fee hearing, he specifically sought leave to file them. (A.A.II 253, 268.) He requested a continuance in writing (A.A.II 253, 268) and at the fee hearing (R.T.IV 305:12-306:10). And his counsel provided a signed declaration, as well as legal citation and argument, justifying the late filing. (A.A.II 253-255, 257-258, 260-261, 264-265, 400, 405-411, 414-420, 546, 552-554.) What's more, the court effectively *granted the requested continuance*. (A.A.II 359, 364.) It ordered supplemental briefing on the merits. (A.A.II 359.) It allowed that briefing to take place. (A.A.II 523-543, 606-618.) And it took additional oral argument on the issue. (R.T.VI.) In short, Parker invoked the procedures available to

him before the court finally ruled on his fee motion, and both Parker and the court took every step necessary to prevent prejudicing the State. The action taken in this case to perfect the record were thus in no way reminiscent of those taken in *Bozzi*.

Further, unlike *Bozzi*, if the trial court had admitted the evidence, it would have had to have held that the *Parker* plaintiffs, in fact, harbored no disqualifying pecuniary interest. For the evidence sought to be admitted clearly established, among other things, that:

- Plaintiffs Parker and Stonecipher are individuals who are not involved in the sale of ammunition for profit and who estimated a gain of $0 resulting from their victory in this action (A.A.II 271-272, 290-291, 489-490, 502-503);
- Plaintiff RTG made less than $2,200 in pre-tax profit from California ammunition sales in 2010 and estimated $2,200 in future annual sales, making its properly valued pecuniary interest at most $1,100 annually (A.A.II 285-297, 479-481);
- Plaintiff Able's made around $32,000 in pre-tax profit from California ammunition sales in 2010 and estimated $35,000 in future annual sales, making its properly valued pecuniary interest at most $17,500 annually (A.A.II 280-282, 440-442);[11]

[11] These figures generously assume that the shipper plaintiffs had a 50% chance of success at the time vital litigation decisions were made (i.e., at the outset of litigation). It is more likely that plaintiffs had only 10% chance of success at that time. Able's and RTG thus had a pecuniary interest of just $3,500 and

- Plaintiff Herb Bauer projected a net *loss* of $2,000 annually as result of overturning AB 962 (A.A.II 275-277, 429-431); and
- Plaintiff the CRPA Foundation primarily fights on behalf of individual firearm owners and sportsmen—including the approximately 30,000 individual members of the California Rifle & Pistol Association—to preserve the Second Amendment and other fundamental rights and that it does not primarily represent the interests of or rely on the financial support of any ammunition retailer (A.A.II 435-436, 498-499, 561-563, 567-569).

For these reasons, *Bozzi* does not control. Even if the trial court properly held that the record was insufficient to support Parker's claim that the financial burden of private enforcement justified a fee award, it abused its discretion in denying Parker's requests to supplement the record. Because the trial court held that Parker satisfied every other requirement of section 1021.5, and because the late-filed evidence would have satisfied the final factor, this Court should reverse the order denying fees and hold that Parker is entitled to a reasonable fee award.

Alternatively, the Court should remand, directing the trial court to accept Parker's evidence and reevaluate his entitlement to section 1021.5 fees.

$200, respectively. The actual costs of litigation exceeded $435,000—an amount more than 115 times higher than the combined interest of each shipper plaintiff. This figure in *no way* exceeds "by a substantial margin" the costs of bringing this suit. (See *L.A. Police*, *supra*, 188 Cal.App.3d at pp. 9-10.)

III. PARKER'S ATTORNEYS' FEES CLAIM REPRESENTS A REASONABLE VALUATION OF THE TIME SPENT BY HIS COUNSEL

When a party is entitled to attorneys' fees under section 1021.5, the amount of the award is calculated per the "lodestar/multiplier" method, whereby the base fee or "lodestar" is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48 (*Serrano III*); *Serrano v. Unruh* (1982) 32 Cal.3d 621, 626 fn. 6.) To fix the fee at the fair market value of the specific legal services provided, the lodestar may then be enhanced by a multiplier after the court has considered other factors concerning the lawsuit. (*Press*, *supra*, 34 Cal.3d at p. 322 fn. 12.)

Parker sought compensation for 1760.6 hours of work on the merits by four attorneys of varying experience levels, one law clerk, and one paralegal, to be augmented by 1.5 multiplier. (A.A.I 32-35, 39-42, 98-111.) They also sought $30,338.50 for services rendered following the hearing on Plaintiffs' Motion for Summary Judgment for an award totaling $625,048.75. (A.A.I 39.) Considering the expertise and reputation of Parker's attorneys and the novelty, contingent risk, and exceptional outcome of this litigation, these figures represent a more-than-reasonable fee award.

Though the trial court withheld judgment on this issue (A.A.II 676-680), Parker asks the Court, in the interests of judicial economy, to exercise its discretion to review the record and determine a reasonable fee award. (Code Civ. Proc., § 909.)

Alternatively, the Court should remand and allow the trial court to decide the issue in the first instance.

A. Parker Submitted More-than-Sufficient Evidence Establishing that Counsel's Hours Were Reasonable

The prevailing party is entitled to compensation for "*all* the hours reasonably spent." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.) "The question is not whether . . . in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success" when the work was performed. (*Woolridge v. Marlene Indus. Corp.* (6th Cir. 1990) 898 F.2d 1169, 1177; see, e.g., *Robertson v. Fleetwood Travel Trailers of Cal., Inc.* (2006) 144 Cal.App.4th 785, 818 [holding that fee claimant must demonstrate that "fees incurred were reasonably necessary to the conduct of the litigation"].) Counsel's "sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required." (*Perkins v. Mobile Housing Bd.* (11th Cir. 1988) 847 F.2d 735, 738; see also *PLCM*, *supra*, 22 Cal.4th at p. 1095 fn. 4; Pearl, *supra*, § 9.83, p. 9-70.) Once a fully documented claim is presented, the burden shifts to the fee opponent to demonstrate with specific evidence that the hours or rates claimed are not reasonable. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682.)

Every hour that Parker claimed is compensable. First, his success here was complete. While some theories were never reached, when substantial results are achieved and the plaintiff's

claims are related, no reduction for losing theories or claims is appropriate. (See *Downey Cares v. Downey Cmty. Dev. Commn.* (1987) 196 Cal.App.3d 983, 997.) Here, each of Parker's claims were directed at the same conduct—the enactment and enforcement of the challenged ammunition laws—and each sought declaratory and injunctive relief. (J.A.I 67-71.) That relief was obtained, and Parker's attorneys are entitled to be fully compensated. (J.A.XIV 5058-4060.)

Second, Parker's fee claim was documented both by the declaration of his counsel and by extensive billing records. (A.A.I 47-141; A.A.II 369-393.) Counsel's declaration provides a detailed, step-by-step summary of the various tasks that required counsel's time. (A.A.I 90-111.) And "the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112.) Further, Parker's counsel exercised considerable "billing judgment," excluding from their claim time for entries that might be considered vague, excessive, or redundant. (A.A.I 41, 98-99 [indicating that counsel did not seek compensation for 626.6 hours of work performed].)

Additionally, all of Parker's requested hours were reasonably spent. Mr. Monfort's declaration illustrates the time and effort required of counsel to bring this case to its successful conclusion. (A.A.I 90-111.) It further identifies key reasons counsel made the decisions they made during this litigation, not

the least of which being the State's litigation tactics. (See, e.g., (A.A.I 93-94.)

To summarize, Clinton Monfort, who billed the most hours, was responsible for compiling the factual basis for the lawsuit, exploring the theories under which Parker's challenge could be brought, and developing the legal strategy that led to the success of this matter. He was further responsible for the bulk of the drafting, editing, and revising of all documents submitted during this litigation, conducting discovery, and making appearances. (A.A.I 101-103, 106-107, 110-111.)

Monfort was assisted by attorney Sean Brady, who was largely responsible for conducting legal research, drafting early versions of the pleadings, compiling evidentiary support, and analyzing extensive deposition testimony. He also provided invaluable input on the types and uses of ammunition. Additionally, he billed several hours preparing Monfort for depositions and for oral argument on Parker's preliminary injunction and summary judgment motions. (A.A.I 101-102, 104-106, 108-111.)

Joshua Dale assisted with taking and defending depositions and preparing Plaintiffs' Motion for Summary Judgment. (A.A.I 106, 109.) While Senior Partner, C.D. Michel, oversaw the litigation, revised and polished court filings, and worked closely with Monfort and Brady to ensure that all critical issues were addressed. (A.A.I 101-102, 104, 106, 111.)

Finally, Anna Barvir, then a law clerk, conducted significant legal research, created draft versions of motions,

compiled evidence, assisted Monfort in preparing for depositions and appearances, and conducted final proofreading and cite-checking of each of Parker's filings. Additionally, to keep fees low, Barvir performed the bulk of the post-hearing work. (A.A.I 102, 104, 106, 108, 110.)

B. Parker's Evidence Established that Counsel's Schedule of Hourly Rates Is Reasonable

Parker's attorneys are entitled to compensation at rates that reflect the current "prevailing hourly rate in the community" (*PLCM*, *supra*, 22 Cal.4th at p. 1094), weighing the rates of attorneys of similar skill, reputation, and experience for comparable legal services (*Crommie v. Cal. Pub. Utils. Commn.* (N.D. Cal. 1994) 840 F.Supp. 719, 724-725). Generally, the rate of attorneys from the community where the court sits controls. (*MBNA Am. Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1.) But when a plaintiff retains out-of-town counsel, the attorney's "home" market rate prevails if obtaining local counsel would have been impracticable. (*Horsford v. Bd. of Trustees of Cal. State U.* (2005) 132 Cal.App.4th 359, 399.) This is because "the public interest in the prosecution of meritorious civil rights cases requires that the financial incentives be adjusted to attract attorneys who are sufficient to the cause." (*Ibid.*)

Here, Parker retained Michel & Associates, P.C., a firm based in Long Beach, because it is the largest firearms practice in the nation, having represented gun-rights organizations, firearm retailers and manufacturers, and individual gun owners in countless actions. (A.A.I 47-51.) What's more, Michel & Associates is among only a handful of California firms with

practices concentrated in this field of law. (A.A.I 50.) Their clients include the largest firearms civil rights organizations in the state and, in fact, the CRPA Foundation has relied on Michel & Associates to represent them in their firearms-related legal matters for well over a decade. (A.A.I 50.) What's more, the highly technical and specialized nature of this lawsuit required attorneys with specialized knowledge of firearms and civil rights litigation. Parker's attorneys are unaware of any attorney in the Fresno legal community with comparable experience, expertise, and resources. As such, it was necessary to seek out-of-town counsel, and counsel's "home" market rate controls.

Further, as described in Parker's counsel's declarations, the skill, expertise, and reputation of counsel justifies the rates sought. (A.A.I 48-50, 88-89, 133-134, 140.) As further attested to in the Declarations of Jason Davis, C.D. Michel, Joshua R. Dale, and Clinton B. Monfort, the rates of the four attorneys performing the work in this case—Michel ($450), Dale ($375), Monfort ($325), Brady ($250)—are more than reasonable, being well within the range of rates charged by comparable professionals in the relevant legal community. (A.A.I 49-50, 99, 124.)

C. The Nature and Outcome of this Case, as Well as the Reputation of Parker's Counsel, Justify a 1.5 Multiplier

Courts have considerable discretion in determining whether to apply a lodestar multiplier and the size of that adjustment. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.App.4th 553, 581.) They generally consider the several factors

listed in *Serrano III*, *supra*, 20 Cal.3d at p. 49, but any one of those factors may justify an enhancement. (*Ctr. for Bio. Divers. v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 901.) In some cases, any of several other factors may justify a multiplier. (See *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 835 (*Thayer*).) Because this case involved novel issues of law and technical underlying subject matter, and because Parker's attorneys took a significant risk in bringing the action and obtained exceptional results, a lodestar multiplier of 1.5 should be applied.

1. The Novelty of the Issues, the Technicality of the Subject Matter, and the Skill Displayed by Parker's Attorneys Warrant a Lodestar Enhancement

A lodestar enhancement is appropriate based on the novelty, difficulty, and complexity of the action, and the skill displayed in presenting it. (*Serrano III*, *supra*, 20 Cal.3d at p. 49.) Additionally, when the case's complexity is combined with the skill required to overcome determined and competent opposition, a lodestar enhancement is justified. (*Edgerton v. State Personnel Bd.* (2000) 83 Cal.App.4th 1350, 1363 [affirming 1.5 multiplier based in part on novelty and difficulty of issues and skill displayed in overcoming intransigent opposition].) The instant case involved both novel questions of law and technical underlying subject matter, requiring skill and expertise beyond the level that might be expected from counsel billing at the rates requested.

Parker set forth a new legal theory applicable to constitutional vagueness claims—namely that, like other fundamental rights, the right to keep and bear arms should trigger a heightened level of certainty in criminal laws touching upon that right. (See J.A.XI 2887-2891.) Before Parker won on appeal, that theory had yet to find itself in a published opinion, requiring counsel to forge new arguments supporting their position. While the trial court ultimately did not reach that argument (J.A.XIV 4058-4060), this Court ultimately penned a thoughtful and comprehensive opinion adopting Parker's novel theory in its entirety. (*Parker*, *supra*, 221 Cal.App.4th at pp. 354-336.)

Further, the highly technical nature of the subject matter of this litigation is clear, for a great wealth of knowledge regarding ammunition types and uses was necessary for the successful prosecution of this suit. This type of knowledge is uncommon. And counsel is aware of only a handful of firms in the state that specialize in this area. (A.A.I 50.) Parker's counsel's unique experience and resources (A.A.I 50) were, in this regard, essential to the ultimate success of Parker's claims.

Finally, Parker faced rigorous and competent opposition from the State, which repeatedly stalled this case's progress, worked with the Legislature to attempt to moot Parker's claims by amending the challenged laws, and often sent two or three highly experienced attorneys from the Department of Justice to depositions and hearings. (A.A.I 93-94.) Faced with such experienced and vigorous opposition, Parker nonetheless

prevailed. His attorneys' compensation should reflect the great skill required to overcome such odds.

2. A Reasonable Multiplier Is Necessary to Offset the Inherent Risk in Bringing Civil Rights Cases Where No Damages Are Available

The "contingent and deferred nature of the fee award in a civil rights or other case with statutory attorney fees requires that the fee be adjusted in some manner to reflect the fact that the fair market value of legal services provided on that basis is greater than the equivalent noncontingent hourly rate." (*Horsford*, *supra*, 132 Cal.App.4th at pp. 394-395; see also *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1217 [affirming a multiplier based in part on inherent "contingent risks"].) Here, absent the possibility of monetary damages, Parker and his attorneys risked hundreds of hours bringing a case to enforce constitutional rights without the promise of ever recovering fees. Nevertheless, Parker's counsel provided zealous representation of Parker's interests, accepting the possibility that they might never be fully compensated. That risk must be reflected in any fee award and further warrants upward adjustment of the lodestar.

3. The Exceptional Result Achieved by Parker's Counsel Justifies a Reasonable Multiplier

The factors listed in Serrano *III* are not exclusive; "the results obtained" is an appropriate factor when considering whether to apply a multiplier. (*Thayer*, *supra*, 92 Cal.App.4th at p. 835.) Because the purpose of lodestar enhancements is to

reflect the legal marketplace, exceptional success should permit enhancement of the lodestar figure. (See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 61.)

In this case, Parker obtained all the relief sought, *and* his efforts resulted in a once-published opinion adopting, wholesale, Parker's novel facial vagueness theory, detailing precisely why criminal laws that touch upon Second Amendment rights require the most exacting clarity. (*Parker*, *supra*, 221 Cal.App.4th at pp. 354-336.) While the opinion was automatically de-published on review by the Supreme Court (*Parker v. California* (2014) 167 Cal.Rptr.3d 658 (mem), review dism. as moot Dec. 14, 2016), it remains good law and will undoubtedly lead to further important precedent on this complex issue.

CONCLUSION

For the foregoing reasons, Parker respectfully requests this Court reverse the trial court's denial of Plaintiffs' Motion for Attorneys' Fees and grant a reasonable award of fees or remand with instructions to set an appropriate award.

Alternatively, Parker asks the Court to reverse the trial court's denial of Plaintiffs' requests to supplement the record and remand with instructions that the trial court accept Parker's evidence and re-evaluate his entitlement to section 1021.5 fees.

Date: August 28, 2017 **Michel & Associates, P.C.**

s/ Anna M. Barvir
Anna M. Barvir
Counsel for Plaintiffs-Appellants

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204, subdivision (c)(1), of the California Rules of Court, I hereby certify that the attached Appellants' Opening Brief is 1 ½-spaced, typed in a proportionally spaced, 13-point font, and the brief contains 12097 words of text, including footnotes, as counted by the word-count feature of the word-processing program used to prepare the brief.

Date: August 28, 2017 **Michel & Associates, P.C.**

s/ Anna M. Barvir
Anna M. Barvir
Counsel for Plaintiffs-Appellants

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