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FILED

MAR 18 2003

FRESNO COUNTY COURTS

By _____ DEPT 72

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
CENTRAL DIVISION

EDWARD W. HUNT, in his official)	No. 01CECG03182	Dept. 72
capacity as District Attorney)		
of Fresno County, and in his)		
personal capacity as a citizen)		
and taxpayer, et al.,)		
Plaintiffs,)	ORDER RE DEFENDANTS' DEMURRER	TO FIRST AMENDED COMPLAINT
v.)		
STATE OF CALIFORNIA, et al.,)		
Defendants.)		

On March 17, 2003 Defendants' Demurrer to the First Amended Complaint came on regularly for hearing in Department 72 of the above-entitled court. On March 14, the court issued a statement that no tentative ruling was issued and the court intended to take the matter under submission without oral argument unless a party timely requested argument. No party requested argument. On March 17, 2003 the matter was taken under submission. The court has reviewed the papers filed in support of, and in opposition to, the demurrers.

The first issue that the court must resolve is whether

1 the Plaintiffs' claims are ripe for adjudication. Here, the
2 Plaintiffs' claims are ripe for review. The first amended
3 complaint alleges that the AWCA threatens the individual
4 Plaintiffs and gun dealer plaintiffs with both criminal
5 prosecution and jeopardizes their right to possess and sell their
6 property. (See FAC, ¶¶ 32; *Peoples' Rights Organization v. City*
7 *of Columbus* (6th Cir. 1998) 152 F.3d 522, 529.) Just as in PRO,
8 here the Plaintiffs are faced with a *Hobson's* choice: they can
9 either remove their weapons from the state, depriving themselves
10 of the use and possession of their property, or they can defy the
11 law and risk prosecution. The individual Plaintiffs and gun
12 dealer Plaintiffs should not have to risk imprisonment in order to
13 determine whether the challenged law is valid.

14 Likewise, the public official Plaintiffs are faced with
15 an impossible choice, because they have a duty to enforce the law
16 on the one hand, and a duty not to enforce provisions which they
17 believe are unconstitutional on the other. (FAC, ¶ 34; *Board of*
18 *Education v. Allen* (168) 392 U.S. 236, 241, fn. 5.) Therefore,
19 the public official Plaintiffs also have alleged sufficient facts
20 to demonstrate that their claims are ripe for adjudication.

21 Defendants argue that Plaintiffs have failed to allege
22 any instances of actual prosecutions under the challenged
23 provisions, and therefore have failed to allege an actual
24 controversy. However, Plaintiffs do not necessarily have to
25 allege an actual prosecution or even a specific threat of
26 prosecution in order to demonstrate that the controversy is ripe
27 for adjudication. (*Coalition of New Jersey Sportsmen v. Whitman*
28 (1999) 44 F.Supp.2d 666, at 673, fn. 10.) Courts assume that the

1 authorities will enforce a challenged law unless there is evidence
2 that the authorities do not intend to enforce it. "When fear of
3 criminal prosecution under an allegedly unconstitutional statute
4 is not imaginary or wholly speculative a Plaintiff need not 'first
5 expose himself to actual arrest or prosecution to be entitled to
6 challenge [the] statute.'" (*Babbitt v. United Farm Workers*
7 *National Union* (1979) 442 U.S. 289, 302.) Here, the individual
8 and gun dealer Plaintiffs allege that they are in danger of
9 criminal prosecution due to the vagueness of the AWCA and the
10 regulations interpreting it. (FAC, ¶¶ 32, 33.) Therefore, the
11 Plaintiffs' claims are ripe for adjudication, and the court must
12 address the question of whether Plaintiffs have stated valid
13 claims for relief.

14 Defendants have challenged the merits of Plaintiffs'
15 vagueness claims on the ground that, in order to demonstrate that
16 a law is vague on its face, the Plaintiff must demonstrate that
17 the law is vague in all of its applications. (*Hoffman Estates v.*
18 *Flipside, Hoffman Estates* (1982) 455 U.S. 489, 497.) The court in
19 *Coalition of New Jersey Sportsmen v. Whitman* (1999) 44 F.Supp.2d
20 666 further explained the concept of vagueness: "So long as the
21 disputed law encompasses some of the 'core' conduct in which
22 Plaintiffs wish to engage, a court will not entertain a facial
23 vagueness challenge to other hypothetical conduct. [Citation.]
24 Courts will rarely invalidate a statute on its face so long as it
25 provides "minimally fair notice" of what is prohibited.
26 [Citation.]" (*Id.* at 676.)

27 Here, Plaintiffs have expressly alleged that the
28 regulatory definition of the term "flash suppressor" is vague in

1 all of its applications, because there is no way for an ordinary
2 person, or even law enforcement authorities, to determine whether
3 a device functions to redirect or reduce flash. (FAC, ¶¶ 41- 56.)
4 Defendants contend that the definition is not vague in all of its
5 applications because a gun owner could reasonably determine
6 whether a device functions to redirect or reduce flash by asking a
7 gun dealer or credible friend. However, Plaintiffs have
8 specifically alleged that they cannot "seek advice from law
9 enforcement personnel and agencies because neither do law
10 enforcement personnel and agencies know what these laws mean."
11 (FAC, ¶ 32.) If Plaintiffs cannot seek advice regarding the
12 meaning of the term "flash suppressor" from law enforcement
13 agencies, then presumably they also cannot obtain reliable
14 information from gun dealers or friends. According to the
15 allegations of the first amended complaint, there is simply no
16 accurate way for Plaintiffs to determine whether their weapons
17 have a device that redirects or reduces flash. When ruling on a
18 general demurrer the court must assume that all properly pled
19 allegations in the complaint are true. Therefore, Plaintiffs have
20 sufficiently alleged that the definition of flash suppressor is
21 vague on its face, and the court's ruling is to overrule the
22 demurrer to the first two causes of action.

23 However, the court's ruling is to sustain the demurrer
24 to the third cause of action regarding pistols with threaded
25 barrels. Plaintiffs admit in their complaint that pistols with
26 threaded barrels are rare, and the generally only Olympic
27 competition pistols have such threads. (FAC, ¶ 59.) Yet Olympic
28 competition pistols are specifically exempted from the AWCA.

1 (Pen. Code, § 12276.1(b) and (c). Therefore, Plaintiffs cannot
2 claim that the owners of competition pistols are in danger of
3 prosecution for owning an assault weapon.

4 As for other pistols with threaded barrels, Plaintiffs
5 argue that there is no way for the owner to determine whether the
6 pistol can accept a silencer without breaking the law. However,
7 since there is no legitimate reason for a non-competition pistol
8 to have a threaded barrel, the mere fact that the barrel is
9 threaded is sufficient to put the owner on notice of the fact that
10 the pistol may be able to accept a silencer. "Courts will rarely
11 invalidate a statute on its face so long as it provides 'minimally
12 fair notice' of what is prohibited." (*Coalition of New Jersey*
13 *Sportsmen, supra*, 44 F.Supp.2d at 676.) Here, the statute gives
14 minimally fair notice of the fact that non-competition pistols
15 with threaded barrels are likely to be considered assault weapons,
16 and therefore the statute is not unconstitutionally vague.
17 Consequently, the court's ruling is to sustain the demurrer to the
18 third cause of action without leave to amend, since there does not
19 appear to be a reasonable likelihood that Plaintiffs will be able
20 to allege any new facts which would cure the defects in the claim.

21 Likewise, the court's ruling is to sustain the demurrer
22 to the fourth cause of action regarding tubular magazines.
23 Plaintiffs argue that Penal Code section 12020(c)(25)'s definition
24 of a "large capacity feeding device" could be interpreted to
25 include tubular magazine shotguns with the capacity to accept only
26 6 standard shotgun rounds, but which could theoretically accept
27 more than 10 rounds of non-standard Mexican ammunition. Again,
28 Plaintiffs have failed to allege facts showing that the statute is

1 vague on its face because it is vague in all of its applications.
2 The statute provides minimally fair notice of that which it
3 prohibits, namely magazines that hold more than 10 rounds.
4 (*Coalition of New Jersey Sportsmen, supra*, 44 F.Supp.2d at 676.)
5 It is not difficult for an owner or potential buyer of a shotgun
6 to determine whether a particular shotgun has the capacity to hold
7 more than 10 rounds, and in fact this information is readily
8 available in the owner's manual. The fact that certain shotguns
9 may be able to hold more than 10 rounds if loaded with an obscure
10 Mexican ammunition does not make the statute vague in all of its
11 applications, since generally speaking the statute provides fair
12 notice of what it prohibits. Consequently, the court's ruling is
13 to sustain the demurrer to the fourth cause of action, without
14 leave to amend.

15 On the other hand, the court's ruling is to overrule the
16 demurrer to the fifth cause of action, which relates to the
17 Defendants' alleged failure to promulgate a regulation clarifying
18 the "permanently altered" language in Penal Code section
19 12020(c)(25). That statute provides that firearms and feeding
20 devices may be sold if they have been "permanently altered so that
21 [the feeding device] cannot accommodate more than 10 rounds...."
22 Plaintiffs claim that it is impossible to permanently alter a
23 weapon or feeding device, because given sufficient time and
24 effort, any modification is reversible. (FAC, ¶ 72.) They claim
25 that the Defendants' failure to promulgate a regulation clarifying
26 the meaning of the term "permanently altered" has caused confusion
27 and uncertainty among firearms owners and dealers. Defendants
28 contend that they have done nothing to suggest that compliance


1 with the permanently altered escape clause would require
2 irreversible alterations to the weapon or magazine, and that
3 Plaintiffs are concocting a dispute where none exists. However,
4 as discussed above, Plaintiffs have alleged sufficient facts to
5 show that there is a genuine dispute and that the matter is ripe
6 for adjudication because Plaintiffs are in the position of either
7 complying with the law and damaging their property, or defying the
8 law and risking criminal prosecution. Plaintiffs contend that
9 they cannot comply with the law, because the plain language of the
10 statute is vague. The fact that Defendants have not threatened
11 any of the Plaintiffs with criminal charges does not mean that
12 there is no genuine controversy over the meaning of the law.
13 Plaintiffs should not have to face criminal prosecution in order
14 to determine what the law means. (*Babbitt v. United Farm Workers*
15 *National Union, supra*, 442 U.S. 289, 302.)

16 The sixth cause of action alleges "inconsistent conduct"
17 on the part of Defendants based on the Defendants' rulings, advice
18 letters, official statements, and other actions inconsistent with
19 Defendants' formal regulations or policies. (FAC, ¶ 77.) In
20 actuality, the sixth cause of action contains three separate and
21 distinct claims. However, although the sixth cause of action
22 contains three separate claims, Defendants' arguments on demurrer
23 only address the second claim. Defendants do not even mention the
24 first and third claim in their points and authorities. (See
25 Defendants' points and authorities, pp. 18-19.) However, a
26 general demurrer will not lie as to only part of a cause of
27 action. (Weil & Brown, Cal. Prac. Guide: Civil Procedure Before
28 Trial (The Rutter Group 2002) at § 7:42.2.) Therefore, since

1 Defendants have not demonstrated that the entire cause of action
2 fails to state a claim, the court's ruling is to overrule the
3 demurrer to the sixth cause of action.

4 The Demurrers to the First, Second, Fifth and Sixth
5 Causes of Action are overruled. The Demurrers to the Fourth and
6 Fifth Causes of Action are sustained without leave to amend.
7 Defendants shall serve and file their answer within ten days of
8 the date of the service of this order.

9 DATED this 18 day of March, 2003.

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14 STEPHEN J. KANE
15 JUDGE OF THE SUPERIOR COURT
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