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11
12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 IN AND FOR THE COUNTY OF FRESNO

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

16 Plaintiffs,

17 v.

18 STATE OF CALIFORNIA; WILLIAM
LOCKYER, Attorney General of the State of
19 California, et. al.,

20 Defendants.

) CASE NO. 01CECG03182

) **PLAINTIFFS' REPLY TO OPPOSITION**
) **FOR PRELIMINARY INJUNCTION**

) Date: April 10, 2002

) Time: 3:00 p.m.

) Dept.: 98A



TABLE OF CONTENTS

	<u>PAGES</u>
2	
3	TABLE OF AUTHORITIES ii
4	A. PROCEDURAL ISSUES 1
5	1. Government Code Section 11350 Does Not Preclude Equitable Relief To Void
6	Invalid Regulations, Nor To Require Formulation of Valid Ones. 2
7	2. Plaintiffs Have Alleged Irreparable Injury Sufficient To Justify Issuance Of A
8	Preliminary Injunction 2
9	B. SUBSTANTIVE ISSUES 5
10	1. Courts Construe Statutes To Avoid Constitutional Vagueness Problems,
11	Even Though The Statute Might Not Necessarily Be Vague In All Its
12	Applications 5
13	2. Courts Do Not Defer To Law Enforcement Interpretations of Criminal
14	Statutes 6
15	3. The Uncontradicted Evidence Is That, In Reference To Shotgun Rounds,
16	Penal Code Section 12020(c)(25) Refers Only To Standard 2.75 Inch
17	Rounds 7
18	4. Defendants' Regulatory Definition Of "Flash Suppressor" Should Be Stripped Of
19	Its Outer Elements 9
20	5. Injunctive Relief Is Required To Correct The "Threaded Barrel" Problem. 11
21	6. The "Permanent Alteration" Is Withdrawn from this Motion 13
22	<u>CONCLUSION</u> 13
23	
24	
25	
26	
27	
28	

TABLE OF AUTHORITIES

		<u>PAGES</u>
2		
3	FEDERAL CASES	
4	Crandon v. United States (1990) 494 US 152	6
5	Davis v. Erdmann (10th Cir. 1979) 607 F.2d 917	6
6	Evans v. U.S. Parole Com'n (7th Cir. 1996) 78 F.3d 262, 265	6
7	F.J. Vollmer Co., Inc. v. Higgins (D.C.Cir. 1994) 23 F.3d 448	6
8	F.J. Vollmer Co., Inc. v. Magaw (D.C.Cir. 1996) 102 F.3d 591, 593	6
9	Lynch v. Household Finance Corp. (1972) 405 U.S. 540	3
10	North Georgia Finishing v. Di-Chem (1985) 419 U.S. 601	3
11	Pennell v. City of San Jose (1988) 485 U.S. 1	4
12	Peoples Rights Organization, Inc. v. City of Columbus (6th Cir. 1998) 152 F.3d 522	9
13	San Jacinto Savings & Loan v. Kacal (5 Cir. 1991) 928 F.2d 697	3
14	United States v. Brady (D.Colo. 1989) 710 F.Supp. 290	6
15	United States v. Seven Miscellaneous Firearms (D.D.C. 1980) 503 F.Supp. 565(BATF)	6
16	United States v. Thompson/Center Arms (1992) 504 U.S. 505	6
17		
18	STATE CASES	
19	California Ass'n. for Public Education v. Brown (1994) 30 Cal.App.4th 1264	2
20	California School Employees Ass'n. v. Governing Board (1994) 8 Cal.4th 333	8
21	City of Sacramento v. Workers' Compensation Appeals Board (2002) 94 Cal.App.4th 1304 ...	8
22	Comunon Cause v. Board of Supervisors (1989) 49 Cal.3d 432	3
23	Green v. Obledo (1981) 29 Cal.3d 126	2
24	Harrott v. County of Kings (2001) 25 Cal.4th 1138	5
25	League of Women Voters v. Eu (1992) 7 Cal.App.4th 649	2
26	Los Angeles v. State Department of Public Health (1958) 158 Cal.App.2d 425	2
27	Loska v. Superior Court (1986) 188 Cal.App.3d 569	3
28	People v. Dayan (1995) 34 Cal.App.4th 707	8

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18 LOCKYER, Attorney General of the State of) Dept.: 98A
19 California, et. al.,)
20 Defendants.)

21
22 Plaintiff's hereby reply to Defendant's Opposition to Motion for Preliminary Injunction.
23

24 A. PROCEDURAL ISSUES

25 In addition to their other bases for standing, plaintiffs expressly sue as taxpayers and
26 citizens. Independent of any other basis, such claims are remediable in equity and by declaratory
27
28

1 relief.¹

2 **1. Government Code Section 11350 Does Not Preclude Equitable Relief To Void**
3 **Invalid Regulations, Nor To Require Formulation of Valid Ones.**

4 Defendants appear to be arguing that Government Code section 11350 governs equitable
5 as well as declaratory relief. On the contrary, no language of the statute suggests that, nor have
6 defendants cited any case so holding, nor have we been able to find any case so holding or even
7 intimating that assertion. In fact, Government Code section 11350 does *not* preclude the equitable
8 (and/or declaratory) relief available in taxpayer and citizen mandamus proceedings. (Other bases
9 for plaintiffs' standing are discussed below.)

10 Defendants claim *Los Angeles v. State Department of Public Health* (1958) 158
11 Cal.App.2d 425, 443 [322 P.2d 968], holds that Government Code section 11350 is the exclusive
12 remedy for declaratory relief against regulations. We do not so read it. But assuming it so holds,
13 that holding is overruled by *Woods v. Superior Court* (1981) 28 Cal.3d 668, 682 [170 Cal.Rptr.
14 484, 620 P.2d 1032], recognizing no impediment to relief against regulation under Government
15 Code section 1060. Nor, in any event, is there presently a request for declaratory relief before the
16 court.

17
18 **2. Plaintiffs Have Alleged Irreparable Injury Sufficient To Justify Issuance Of A**
19 **Preliminary Injunction.**

20 Defendants argue that irreparable injury cannot exist unless a criminal prosecution is
21 pending under the law challenged in this case. But, as stated in *Green, supra*, 29 Cal.3d at 144:

22 where the question is one of public right and the object of the mandamus is to procure the
23 enforcement of a public duty, the relator need not show that he has any legal or special
24 interest in the result since *it is sufficient that he is interested as a citizen in having the laws*

25 ¹ As to citizen's actions see, e.g., *Green v. Obledo* (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624
26 P.2d 256]; as to taxpayers actions see *Van Atta v. Scott* (1980) 27 Cal.3d 424, 447-450 [166 Cal.Rptr.
27 149, 613 P.2d 210] (taxpayer suit may generate mandamus and declaratory relief as well as injunction).
28 Both forms of action are to be liberally allowed to permit otherwise uninvolved persons to challenge
allegedly improper governmental activity. (*California Ass'n. for Public Education v. Brown* (1994) 30
Cal.App.4th 1264, 1281 [36 Cal.Rptr.2d 404], *League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649,
657, fn. 4 [9 Cal.Rptr.2d 416].)

1 executed and the duty in question enforced. [emphasis added.]

2 Thus *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr.
3 574, 777 P.2d 610], recognized that citizens suing as such are entitled to preliminary equitable
4 relief if their substantive legal claims are correct. In that case relief was denied only because the
5 substantive claims were invalid. (Compare *Venice Town Council v. City of Los Angeles* (1996) 47
6 Cal.App.4th 1547, 1563-64 [55 Cal.Rptr.2d 465] [upholding preliminary injunction on the ground
7 that substantively valid claims were stated by citizens alleging standing as such].)

8 Over and above their entitlement to a preliminary injunction under the citizen-suit
9 doctrine, the plaintiffs herein are personally suffering irreparable injury. Plaintiffs include a
10 sporting goods store that deals in firearms, and a trade association of many such stores which wish
11 to offer for sale firearms they own and/or wish to acquire for sale. If these firearms may legally be
12 sold, these stores are entitled to preliminary injunction to avert financial detriment that cannot be
13 rectified by damage suits since the defendants are immune.² Note also that, if these firearms may
14 legally be offered for sale, by prohibiting sales defendants are depriving the owners of
15 constitutional rights.³ Irreparable injury is therefore clear.

16 Plaintiffs also represent innumerable individuals (including police officers) who are
17 suffering irreparable injury because they cannot determine which of their firearms and magazines
18 they can sell, or loan to friends. Neither can such individuals tell which firearms are "assault
19 weapons" they cannot legally possess and must surrender. As a result of defendants' regulatory
20 failures these individuals are continually at risk of (valid or invalid) arrest, prosecution and/or
21

22 ² The formulation of APA-type regulations -- particularly regulations that just define the meaning of
23 legislation -- is a quasi-legislative act for which absolute immunity exists under both California and
24 federal law. (*Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1783-85 [58 Cal.Rptr.2d 668].)

25 ³ If their sale is legal, there is a commercial speech right to offer to sell the firearms (see, e.g., *Loska*
26 *v. Superior Court* (1986) 188 Cal.App.3d 569 [233 Cal.Rptr. 213]) and a due process right to make the
27 sale. (*Lynch v. Household Finance Corp.* (1972) 405 U.S. 540, 544 [92 S.Ct. 1113, 31 L.Ed.2d 424] [due
28 process protects "the rights to acquire, enjoy, own and dispose of property"], *Sei Fujii v. State of*
California (1952) 38 Cal.2d 718, 728 [242 P.2d 617] (same); Compare *San Jacinto Savings & Loan v.*
Kacal (5 Cir. 1991) 928 F.2d 697 [by driving plaintiff out of business, police deprived her of due
2d 751] [even temporary interference with the use of property implicates due process and may constitute
a deprivation thereof].)

1 property confiscation by police and prosecutors who are also confused or misled by defendants'
2 regulatory failures. (Compare *Pennell v. City of San Jose* (1988) 485 U.S. 1, 7-8 [108 S.Ct. 849,
3 99 L.Ed.2d 1] [where association representing large number of landlords in city brought the suit,
4 the court accepted that one or another of its members would sooner or later be subject to
5 operation of ordinance relating to landlord-tenant disputes].)

6 By failing to clarify the law -- or actually confusing what was clear in Senate Bill 23 ("SB
7 23") as enacted -- defendants' regulatory failure has irreparably injured those subject to the SB 23
8 requirements. Criminal laws must provide sufficient information to allow the citizenry to
9 understand the laws and conform to them -- and for law enforcement officials to understand and
10 enforce those laws as intended by the Legislature.⁴

11 Pursuant to their delusion that only a criminal defendant can show irreparable injury from
12 their misconduct, defendants respond by asserting that a vague law is not invalid unless it is vague
13 in all applications. This is irrelevant because plaintiffs are not by this motion seeking to invalidate
14 any law! (See discussion in the next section of this memorandum.) Plaintiffs are alleging
15 irreparable injury because defendants have failed to clarify the meaning of these laws *in all their*
16 *applications*, which the Legislature relied on them to do, as indicated by among other things, the
17 Legislative expressly requiring them to conduct an educational campaign to enable those
18 represented in this suit to understand the law.

19 Last, but scarcely least, many of those represented are public officers who are irreparably
20 injured because they cannot enforce the laws involved until defendants clarify what those laws
21 mean. This point spotlights the irony of defendants' repeated queries as to whether criminal
22 prosecutions are occurring under the specific provisions whose ambiguity we have spotlighted.
23 What if it turns out that prosecutions are not occurring because prosecutors are unwilling to bring
24 them when they themselves do not understand the law? The logical corollary of defendants'
25 position is that the SB 23 laws might never be enforced because defendants refuse to perform their
26

27
28 ⁴ See, e.g., *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389-90 [250
Cal.Rptr. 515, 758 P.2d 1046] and *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269 [198
Cal.Rptr. 145, 673 P.2d 732], citing numerous prior U.S. and California Supreme Court cases.

1 duty to clarify the laws and police and prosecutors cannot sue to require defendants to perform
2 that duty.

3 The proper remedy is for these laws to be clarified by civil proceedings like this suit.

4 This brings us full circle to the point with which our opening memorandum ended: this
5 lawsuit, and issuance of preliminary relief in it, serves the public interest rather than deserving it.
6 At the same time it averts the irreparable personal injuries being suffered by plaintiffs as discussed
7 above.

8 9 **B. SUBSTANTIVE ISSUES**

10 **1. Courts Construe Statutes To Avoid Constitutional Vagueness Problems, Even** 11 **Though The Statute Might Not Necessarily Be Vague In All Its Applications.**

12 An underlying premise of all plaintiffs' arguments is that the laws in question should be
13 construed to produce certainty in order to avoid the danger that they might be held fatally vague
14 when challenged in applications in which they are vague. Defendants think they have refuted our
15 premise as premature. They cite a U.S. Supreme Court case to the proposition that a statute cannot
16 be attacked for uncertainty unless it is vague in all its applications. If the matter were relevant, we
17 would reply with U.S. Supreme Court caselaw limiting that proposition.

18 But that proposition is irrelevant because, to reiterate, we are not asking that the laws be
19 invalidated, but only that they be construed to avoid the constitutional questions. The desirability
20 of that approach was emphasized when the court did exactly what defendants say this Court ought
21 not to do in *Harrott v. County of Kings* (2001) 25 Cal.4th 1138. The court there construed the
22 assault weapon law to avoid a vagueness issue *and* flatly rejected defendants' point in the
23 following language:

24 . . . we reject the argument that a saving construction is unnecessary because the
25 statute [is not vague in all its possible applications] This argument is based on
26 a false premise. That premise is that we adopt a saving construction only if a statute
27 would be unconstitutional on its face, that is, in *all* its applications. This premise is
28 simply wrong. "If a statute is susceptible of two constructions, one of which will
render it constitutional and the other unconstitutional in whole or in part, or raise
serious and doubtful constitutional questions, the court will adopt the construction
which, without doing violence to the reasonable meaning of the language used, will
render it valid in its entirety, or free from doubt as to its constitutionality, even
though the other construction is just as reasonable." (*Harrott, supra*, 25 Cal.4th at

1 1138; italics by court; our underlining.)

2 That is exactly our position here -- except that we strongly deny that defendants'
3 constructions of the laws at issue are just as reasonable as the alternative constructions we offer.

4
5 **2. Courts Do Not Defer To Law Enforcement Interpretations of Criminal**
6 **Statutes**

7 Contrary to defendants' claim to deference "judges do not defer to the Attorney General's
8 interpretation of Title 18." (*Evans v. U.S. Parole Com'n* (7th Cir. 1996) 78 F.3d 262, 265.) "We
9 have never thought that the interpretation of those charged with prosecuting criminal statutes is
10 entitled to deference." (*Crandon v. United States* (1990) 494 US 152, 177-78 [110 S.Ct. 997, 108
11 L.Ed.2D 132] (Scalia, J., concurring).)

12 The classification of types of firearms according to the law is not a subject on which the
13 federal courts defer to the federal Bureau of Alcohol, Tobacco, and Firearms (BATF). *United*
14 *States v. Thompson/Center Arms* (1992) 504 U.S. 505 [112 S.Ct. 2102, 119 L.Ed.2d 308], holding
15 a pistol and carbine kit not be short-barreled rifle, rejected BATF's interpretation even though
16 "neither the statute's language nor its structure provides any definitive guidance." (*Id.* at 513; *See*
17 *F.J. Vollmer Co., Inc. v. Higgins* (D.C.Cir. 1994) 23 F.3d 448, 452 [rejecting BATF's position that
18 a machinegun receiver remanufactured as a semiautomatic remains a machinegun], later
19 proceeding *F.J. Vollmer Co., Inc. v. Magaw* (D.C.Cir. 1996) 102 F.3d 591, 593 ["the Bureau's
20 action was inconsistent with the governing statute and would have produced an
21 'incredible result'"].)⁵ Far from deferring to BATF, *Vollmer II* noted: "Although . . . the Bureau
22 had followed its interpretation of the Firearms Act since at least the early 1980s, we do not see
23 how merely applying an unreasonable statutory interpretation for several years can transform it
24 into a reasonable interpretation." (*Id.* at 598.)

25
26 ⁵ Other decisions rejecting BATF firearm classifications include *United States v. Seven Miscellaneous*
27 *Firearms* (D.D.C. 1980) 503 F.Supp. 565 (BATF raid on NRA museum); *Davis v. Erdmann* (10th Cir.
28 1979) 607 F.2d 917, 920 (BATF position denying importation "a classic example of agency 'nit picking,'
and an arbitrary and capricious action"); *United States v. Brady* (D.Colo. 1989) 710 F.Supp. 290, 293
(contrary to BATF, a device "as a matter of practicality and common sense would never be used for that
purpose by a sane person").

1 **3. The Uncontradicted Evidence Is That, In Reference To Shotgun Rounds,
2 Penal Code Section 12020(c)(25) Refers Only To Standard 2.75 Inch Rounds.**

3 Penal Code section 12020(c)(25)⁶ defines a "large capacity magazine" (as that term is used
4 in § 12020 (a)(2)) as one that has "the capacity to accept more than ten rounds...." The
5 uncontradicted expert testimony here is that "in this country the magazine capacity of a shotgun is
6 universally understood to be the number of 2.75 *inch* rounds its magazine will hold. [Emphasis
7 added.]" This has been true "[t]hroughout the 20th Century and to date in the U.S.," even though
8 longer rounds are common, and shorter rounds invented in other nations are somewhat available
9 here. A shotgun's owner would assume its magazine capacity means how many 2.75 inch rounds
10 it holds, not how many shorter (or longer) ones it holds.⁷

11 Instead, say defendants, shotgun magazine capacity should be deemed variable, being
12 measured not in terms of a single standard round length but of the length of whatever rounds the
13 person having the shotgun possessed at the time. Thus defendants assert that even though a
14 shotgun only holds six 2.75 inch rounds it would still be deemed a "large capacity" firearm if the
15 person having it possesses the 1.5 inch Mexican rounds, 11 of which will fit in the shotgun.⁸
16 (Though defendants don't discuss this, the logical corollary is that even if a shotgun will hold 11
17 standard 2.75 inch rounds it is *not* a "large capacity" shotgun, if the person possessing it only has 3
18 inch rounds, of which only ten will fit in the shotgun's magazine.)

19 The short answer to this is that Penal Code section 12020 (c)(25) has to do with the size
20 (length) of a firearm's magazine – a matter which is fixed – rather than with the variable length of
21 the various rounds that may fit it. Nor have defendants thought out the consequences of holding
22 that a shotgun is legal or not depending on the length of the rounds present. Remember that the
23 section 12020(a)(2) prohibition is against selling or loaning a large magazine capacity shotgun,
24 not against owning it. Defendants see the legality of the sale or loan as depending on the length of
25

26 _____
27 ⁶ All further statutory references are to the Penal Code unless other wise stated.

28 ⁷ Declaration of plaintiffs' expert Paul Dougherty, ¶¶ 14-16.

⁸ Defendants' Opposition Memorandum, pp. 18-19.

1 the round the recipient receives with the shotgun. So how does a court decide whether the
2 shotgun was legal if the person who acquired it did not buy or borrow any shells at that time? Or,
3 what if the seller or lender had shells of one length but the acquirer had shells of a different
4 length? How can the legality of a sale or loan be known if section 12020 (c)(25)'s definition of
5 guns according to magazine size is viewed as varying according to ammunition size? Suffice it to
6 repeat that laws should be construed so as to produce "fairer and more predictable consequences,"⁹
7 not results that are confusing, "elusive and unpredictable," uncertain, impractical or absurd.¹⁰

8 Moreover, the obvious purpose of Penal Code section 12020(a)(2) is to flatly ban transfer
9 of firearms based on *their* characteristics -- not to ban or allow transfer depending on variations in
10 the length of the ammunition an owner happens to have. That purpose is effectuated by
11 construing the statute in terms of a singly unvarying standard shell length but frustrated by
12 construing it as varying where shells of non-standard length are used. It is, of course, "the
13 fundamental rule of construction that statutes be interpreted to give effect to the Legislature's
14 intent" rather than to "frustrate its purpose."¹¹

15 We reiterate that the uncontradicted testimony is that in relation to shotguns, magazine
16 capacity is "universally understood" to mean 2.75 inch rounds. It is axiomatic that, absent specific
17 definition of a term in a statute, that term is to be read according to its "commonly understood
18 meaning."¹² So it should be presumed that in relation to shotgun magazine capacity, section
19 12020 (c) (25)'s term "rounds" incorporates the universal understanding that the length of a

21 ⁹ *Escobedo v. Snider* (1997) 14 Cal.4th 1214, 1226 [60 Cal.Rptr.2d 722, 930 P.2d 979].

22 ¹⁰ *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105-07 [17 Cal.Rptr.2d 594, 847 P.2d 560], *People v.*
23 *Simon* (1995) 9 Cal.4th 493, 517 [37 Cal.Rptr.2d 278, 886 P.2d 1271] ("the court must attempt to avoid a
24 construction that will lead to unreasonable or arbitrary results." Emphasis added), *California School*
Employees Ass'n. v. Governing Board (1994) 8 Cal.4th 333, 340, 341 [33 Cal.Rptr.2d 109, 878 P.2d

25 ¹¹ *People v. Dayan* (1995) 34 Cal.App.4th 707, 716 [40 Cal.Rptr.2d 391], *California School*
26 *Employees, supra*, 8 Cal.4th 333, *People v. Wells* (1996) 12 Cal.4th 979, 985 [50 Cal.Rptr.2d 699, 911

27 ¹² *City of Sacramento v. Workers' Compensation Appeals Board* (2002) 94 Cal.App.4th 1304, 1308
28 [115 Cal.Rptr.2d 63], *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 [90 Cal.Rptr.2d 260, 987 P.2d

1 standard shotgun round is 2.75 inches.

2 A further point of great significance is that the U.S. Sixth Circuit invalidated an ordinance
3 banning shotguns having a magazine capacity of more than five rounds. *Peoples Rights*
4 *Organization, Inc. v. City of Columbus* (6th Cir. 1998) 152 F.3d 522, 536 held this fatally vague
5 for not specifying what length of rounds the magazine capacity should be measured with. That
6 problem disappears if defendants are, as plaintiffs request, enjoined from prosecuting section
7 12020 (a)(2) cases on any other basis than that magazine capacity is to be measured in terms of the
8 standard 2.75 inch shotgun round.

9
10 **4. Defendants' Regulatory Definition Of "Flash Suppressor" Should Be**
11 **Stripped Of Its Outre Elements.**

12 The numerous problems with defendants' definition are detailed in two declarations
13 (totaling 31 pages) by credible experts, one of them a 22 year DOJ firearms examiner whom DOJ
14 employed to train its other examiners. Defendants seek to refute these facts by a 3 page
15 declaration from a non-firearms examiner whose opinions about firearms have been found
16 erroneous by three different judges in three separate cases, and whose veracity has been
17 questioned in at least once. Further, this declaration is accompanied by a number of
18 unauthenticated documents. (See our Objections to the Chinn Declaration and Request for
19 Judicial Notice, and attachments thereto (filed herewith).)

20 Defendants argue that their Chinn declaration-cum-attachments show that "flash
21 suppressor" is differently defined in differing firearms technical materials. While this is true to
22 some extent, it is also irrelevant to the part of defendants' regulation defining flash suppressor to
23 include any device that "redirects" flash. The concept of "redirecting" flash (as opposed to
24 reducing it) is not a part of *any* definition presented by either side. As our expert attests, it does
25 not appear in the technical materials DOJ says it relied on in formulating its regulation. (Johnson
26 declaration, ¶ 5.) Nor do any of the other materials we have presented or that defendants now
27 present with the Chinn declaration support their extension of the term flash suppressor to devices
28 that only "redirect" flash rather than reducing it.

1 Equally unsupported is the part of defendants' regulation that misdefines the statutory term
2 "flash suppressor" as including two very different devices, "muzzle brakes" and "compensators."
3 Once again, all the documentary evidence confirms plaintiffs' expert declaration that, while these
4 three devices may look alike, the other two are entirely different from flash suppressors in that
5 their purpose is reducing recoil, not flash:

6 Accordingly, definitions in firearms dictionaries of "muzzle brake" and
7 "compensator" often cross-reference each other. But they do not cross-reference
8 "flash suppressor" and vice versa (except occasionally to differentiate "muzzle
9 brake" and/or "compensator" from "flash suppressor"). It bears emphasis that *this is*
10 *as true of sources DOJ cites as justifying its definition as of the firearms technical*
11 *literature in general. None of the sources I have reviewed that DOJ cites to justify*
12 *its definition confuse flash suppressor, on the one hand, with muzzle brakes and*
13 *compensators on the other, nor do they include muzzle brakes and compensators*
14 *when defining "flash suppressor."*¹³

11 Review of the papers attached to the Chinn declaration shows that defendants could not
12 find a single firearms reference source to support their extension of the concept flash suppressor to
13 the entirely different devices called compensators and muzzle brakes (respectively).

14 Equally baseless is the assertion in defendants' unsworn, unexpert memorandum:
15 "plaintiffs incorrectly assume that a firearm owner must be able to perform scientific testing upon
16 a firearm in order to reasonably know whether a device [attached to a rifle] perceptibly reduces
17 flash."¹⁴ This is not something we "assume." It is *necessarily true* because the regulation wrongly
18 extends the definition of "flash suppressors" to cover devices that actually reduce or redirect flash,
19 even if not so intended and designed. How else could anyone determine whether a device on a
20 rifle actually reduces or redirects flash than by test-firing the rifle, first with the device and then
21 without?

22 The declarations of plaintiffs' experts prove, first, that such testing is the only way to
23 determine whether a device actually reduces or redirects flash; and, second, that ordinary rifle
24 owners are simply not in a position to do such testing.¹⁵ In order to contradict these declarations

26 ¹³ Johnson declaration, ¶¶ 12 and 13; italics added; bold face in original. To the same effect see Shain
27 declaration, ¶ 10.

28 ¹⁴ Defendants' Opposition Memorandum p. 15, fn. 7.

¹⁵ Shain declaration, ¶¶ 10-19, 22-25 and 30; adopted also in Johnson declaration, ¶ 7.

1 defendants were obliged to submit competent expert evidence. Their failure to do that speaks for
2 itself.

3 We respectfully submit that defendants should be limited by preliminary injunction to the
4 conceitedly valid portion of their regulatory definition. That is to say, they should be limited to
5 defining "flash suppressor" as a device intended to reduce flash, and precluded from acting on the
6 erroneous inclusion within their definition of "muzzle brakes," "compensators" or devices of any
7 kind based on redirecting flash.

8 We note that such a preliminary injunction is proper even if defendants were correct that
9 our attack on their regulation must be based solely on the evidence defendants considered in
10 formulating that definition. To reiterate, none of the firearms dictionaries and other technical
11 documents defendants used supports them in defining "flash suppressor" to include
12 "compensators" or "muzzle brakes" (respectively) or devices that merely redirect flash.

13
14 **5. Injunctive Relief Is Required To Correct The "Threaded Barrel"
15 Problem.**

16 The great majority of pistols with threaded barrels are extremely low powered Olympic
17 target pistols that are little more dangerous than an air rifle. (Yes, admittedly a .22 Short round can
18 kill or severely injure if it wounds in the right place. So can an air rifle pellet.)

19 Olympic-type pistols are threaded to allow adding weights for the precision balance useful
20 in competition shooting. Though these threads were not intended to do so, they are "capable of
21 accepting a flash suppressor, forward hand grip or silencer" -- to quote section 12276.1(a)(4)(A) --
22 if any exist that have conformable thread dimensions.

23 Perhaps misadvised by their incompetent expert, defendants claim there is no problem
24 because "Olympic precision pistols are expressly exempted from the definition of 'assault weapon'
25 by Penal Code section 12276.1 (b) and (c)."¹⁶ Had they read the cited sub-sections more carefully,
26 defendants would have realized that sub section (b) does not itself exempt anything. It only
27 provides a rationale (that they are Olympic target pistols) for exempting *the specific* pistols (c)

28

16 Opposition Memorandum, p. 17: 5-6.

1 lists. Compare the unnamed, non-exempt Olympic pistols we list as examples in the margin.¹⁷

2 Defendants go on to suggest that "it is reasonable to expect the owner of such a pistol with
3 a threaded barrel to consider and look into whether the threaded barrel is capable of accepting a
4 flash suppressor, forward hand grip or silencer."¹⁸ That is not at all reasonable, given the
5 uncontradicted testimony of our experts:

6 . . . if a pistol has a threaded barrel, that pistol is not "capable of accepting a flash
7 suppressor, forward handgrip, or silencer" unless its threads match those of some
8 flash suppressor, forward handgrip, or silencer that exists somewhere in the world.
9 To know whether their pistols are "capable of accepting" any of those items,
10 owners of pistols with threaded barrels must know: (a) the dimensions of the
11 threads on their pistols' barrels; and (b) the dimensions of the threads on the flash
suppressors, forward handgrips and silencers that exist all over the world. While it
is possible for owners to determine (a), not even experts know, or can determine
(b). *There are no books or written materials of any kind that catalog the thread
dimensions of all, or most, or many, flash suppressors, forward handgrips, and/or
silencers.*

12 Absent such written materials, the only way owners could determine
13 whether their pistols are "capable of accepting" those items would be to obtain a
14 selection of flash suppressors, forward handgrips, and silencers to try to screw on
15 the barrels of their pistols. *As to silencers, Penal Code section 12520 makes it a
16 felony for an ordinary person not involved in law enforcement to handle them even
17 momentarily. As to flash suppressors and forward handgrips for a handgun, they
18 are rare and arcane objects that the ordinary gun owner would have no idea how
19 to obtain.* The fact is that, outside of watching James Bond-type movies, ordinary
20 handgun owners will never even have seen (much less closely examined) a
21 silencer, flash suppressor or forward handgrip for a handgun. So, assuming the
22 owner's pistol barrel had threads, how could s/he know or ascertain if somewhere
23 in the world there exists a silencer, flash suppressor or forward handgrip whose
24 threads fit it?

25 There exists another problem for owners of precision target pistols beyond
26 the impossibility of ascertaining thread dimensions for silencers, flash suppressors
27 or forward handgrips. *Many such owners will not even know that their target
28 pistols have a threaded barrel.* The threads are concealed by the weight or
compensator that has been placed on them. Many owners will never have thought
about how the compensator or weight is affixed on the end of the barrel. (Is it
screwed on to threads, spot-welded or affixed in some other way?) Yet, unless they
realize there are threads on the barrel under the compensator or weight, owners
cannot anticipate that their target pistol may be classified as an "assault weapon"
under section 12276.1 by reason of the threaded barrel. Many such precision target
pistols are in the .22 target calibers. Many of them are .22 Shorts, the lowest

¹⁷ GUN DIGEST 2002 lists the following currently produced Olympic type competition pistols that are not named in the exemption: on p. 292 - High Standard Trophy, Morini Model 84E and Pardini K22; on p. 294 - the Unique Models D.E.S. models 32U, 69U and 96U. There are many other non-exempt 20th Century Olympic-type pistols that are still in service, but are no longer currently produced. Penal Code section 12276.1 (b) and (c) exempt only certain of the Olympic pistols that were being produced when SB 23 was enacted in 1999.

¹⁸ Opposition Memorandum, p. 17: 13-15.

1 velocity of the .22 calibers. Owners are unlikely to think of their precision target
2 pistol as a weapon at all, since it was designed and purchased for the exclusive
3 purpose of putting holes in paper targets. Much less would they deem this low-
4 powered pistol to be an "assault weapon." So, even if target pistol owners
5 understood section 12276.1 (a)(4)(A), they would be unlikely to think that statute
6 applicable to their firearms which were neither designed nor intended to be used in
7 connection with a flash suppressor, forward handgrip, or silencer.¹⁹

8 Defendants suggest that if the owner of an Olympic pistol did not know its threads
9 conformed to those on some silencer (etc.) s/he would be acquitted of possessing an unregistered
10 assault weapon (Pen. Code, § 12280 (b).) Perhaps so, perhaps not. In any event the owner would
11 have undergone the irreparable injury of an unjust prosecution. And the expensive Olympic pistol
12 would be confiscated because it was not registered before the Jan. 1, 2001 deadline. This would
13 itself be unfair and unjust since the owner would not have known that it had to be registered,
14 given the facts just recited from the expert testimony.

15 To preclude such injustices defendants should be preliminarily enjoined from enforcing
16 the threaded barrel provision except in situations where the gun owner can be shown to have had
17 adequate knowledge from which the legal duty would spring.

18 **6. The "Permanent Alteration" Is Withdrawn from this Motion.**

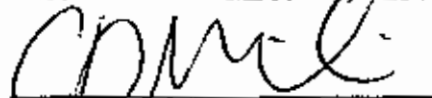
19 Defendants' Opposition indicates agreement with our position regarding the statutory use
20 of the term "permanent" in connection with magazine alterations. In light of this, the parties intend
21 to attempt to enter into an arrangement that will obviate the need for injunctive relief on this issue.
22 We therefore respectfully withdraw this issue from consideration as to the pending motion for
23 preliminary injunction.

24 **CONCLUSION**

25 For the foregoing reasons, the preliminary injunction should issue as requested.

26 Date: April 3, 2002

27 TRUTANICH • MICHEL, LLP:

28 

C. D. Michel
Attorneys for Plaintiffs

¹⁹ Dougherty declaration ¶¶ 6-9 (emphasis added).

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF LOS ANGELES

4 I, Haydee Villegas, am employed in the City of San Pedro, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
6 business address is 407 North Harbor Boulevard, San Pedro, California 90731.

6 On April 3, 2002, I served the foregoing document(s) described as

7 **PLAINTIFFS' REPLY TO OPPOSITION**
8 **FOR PRELIMINARY INJUNCTION**

9 on the interested parties in this action by placing

10 the original

11 a true and correct copy

12 thereof enclosed in sealed envelope(s) addressed as follows:

13 Douglas J. Woods
14 Attorney General's Office
15 1300 "F" Street, Ste. 125
16 Sacramento, CA 94244-2550

17 X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
18 processing correspondence for mailing. Under the practice it would be deposited with the
19 U.S. Postal Service on that same day with postage thereon fully prepaid at San Pedro,
20 California, in the ordinary course of business. I am aware that on motion of the party
21 served, service is presumed invalid if postal cancellation date is more than one day after
22 date of deposit for mailing an affidavit.

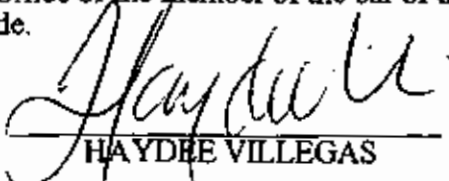
23 Executed on April , 2002, at San Pedro, California.

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

Executed on April 3, 2002, at San Pedro, California.

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

(FEDERAL) I declare that I am employed in the office of the member of the bar of this
of this court at whose direction the service was made.


HAYDEE VILLEGAS