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8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12  
13 **MARK AARON HAYNIE, THE  
14 CALGUNS FOUNDATION, INC., and THE  
15 SECOND AMENDMENT FOUNDATION,  
16 INC.,**

17 Plaintiffs,

18 v.

19 **KAMALA HARRIS, Attorney General of  
20 California (in her official capacity) and  
21 CALIFORNIA DEPARTMENT OF  
22 JUSTICE, and DOES 1 TO 20,**

23 Defendants.

10-cv-1255-SI

**NOTICE OF MOTION AND MOTION  
TO DISMISS THIRD AMENDED  
COMPLAINT AND REQUEST FOR  
INJUNCTIVE/DECLARATORY  
RELIEF; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS THIRD  
AMENDED COMPLAINT**

Date: February 28, 2014  
Time: 9 a.m.  
Courtroom: 10  
Judge: The Honorable Susan Illston  
Trial Date: N/A  
Action Filed: 3/25/2010

24 **NOTICE OF MOTION AND MOTION TO DISMISS**

25 TO ALL PARTIES AND THEIR COUNSEL OF RECORD

26 PLEASE TAKE NOTICE that on February 28, 2014 at 9:00 a.m., or as soon thereafter as  
27 counsel may be heard, in Courtroom #10 of the above entitled court, located at 450 Golden Gate  
28 Avenue, 19th Floor, San Francisco, California, defendants Kamala D. Harris, Attorney General of  
California, and the California Department of Justice will move this Court for an order under

1 Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) dismissing the Third Amended  
2 Consolidated Complaint for injunctive/declaratory relief because it fails to state a claim for which  
3 relief can be granted.

4 This motion will be based on this Notice of Motion and Motion, the Memorandum of Points  
5 and Authorities in support thereof, the pleadings, papers, and documents on file with the Court,  
6 and the oral argument of counsel.

7  
8 Dated: January 13, 2014

Respectfully Submitted,

9 KAMALA D. HARRIS  
10 Attorney General of California  
11 MARK R. BECKINGTON  
12 Supervising Deputy Attorney General

13 /s/ Ross C. Moody

14 ROSS C. MOODY  
15 Deputy Attorney General  
16 *Attorneys for Defendants*  
17 *California Department of Justice and*  
18 *Attorney General Kamala Harris*

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## INTRODUCTION

3 Plaintiffs' Third Amended Consolidated Complaint ("ACC") seeks declaratory and  
4 injunctive relief to declare California's Assault Weapons Control Act (Cal. Penal Code §§ 12275,  
5 et seq., hereafter "AWCA") unconstitutionally vague. Specifically, plaintiffs seek "an order from  
6 this Court suspending the enforcement of the California Assault Weapons Control Act until such  
7 time as the Defendants take steps to clarify the definition of Assault Weapon . . . ." ACC, ¶ 113.  
8 The ACC alleges that the "California Department of Justice has the power and resources to clarify  
9 the law," but has failed to do so. ACC, ¶ 112. These allegations fail to present a case or  
10 controversy which may be adjudicated in federal court. Plaintiffs lack standing, fail to allege  
11 facts demonstrating an unconstitutionally vague law, and present unripe claims. The Amended  
12 Consolidated Complaint must be dismissed due to these defects.

13 In seeking to overturn the AWCA and its implementing regulations, plaintiffs Mark Aaron  
14 Haynie, Brendan Richards, The Calguns Foundation, Inc., and The Second Amendment  
15 Foundation ("plaintiffs") allege that enforcement of these measures has "result[ed] in wrongful  
16 arrests and seizures of lawfully possessed/owned arms." ACC, ¶ 9. The gravamen of this claim  
17 is that because law enforcement personnel made errors in interpreting the AWCA, errors that  
18 allegedly led to the erroneous arrests of plaintiffs Haynie and Richards, the AWCA must be  
19 fatally flawed.

20 But the allegations of the ACC show that plaintiffs do not allege facts sufficient to present a  
21 case or controversy ripe for adjudication. Instead, the allegations in the ACC affirmatively  
22 demonstrate that one of the plaintiffs no longer own guns, eliminating the requirement that a  
23 present controversy exists as to him, and the allegations as to the other plaintiff's present gun  
24 ownership are inconclusive. Absent allegations that the individual plaintiffs have some present  
25 stake in the interpretation of California's assault weapons laws, the ACC does not present ripe  
26 claims for adjudication.

27 Further, all penal statutes are subject to some interpretation, and arrests that turn out to be  
28 mistaken are not uncommon. The fact that a handful of mistakes have been made by officers in

1 interpreting the AWCA at the time of arrest does not establish that the AWCA fails to meet  
2 constitutional requirements for adequate notice to the public and to law enforcement. An  
3 examination of the AWCA establishes that it contains sufficient detail to survive the vagueness  
4 challenge mounted here.

#### 6 **SUMMARY OF RELEVANT FACTS**

7 Plaintiff Haynie was arrested in Alameda County on February 7, 2009 for allegedly  
8 violating the AWCA, when Pleasanton Police thought that his AR-15 style weapon had features  
9 that qualified it as a weapon banned by the statute. ACC ¶¶ 22, 26. However, the rifle possessed  
10 by Haynie was equipped with a “bullet button,” a device which required the use of a tool to  
11 remove the magazine, taking the weapon out of the statutory definition of an assault weapon.  
12 ACC ¶ 25. Therefore, charges were never filed, and Pleasanton stipulated to Plaintiff Haynie’s  
13 factual innocence and agreed to pay for Haynie’s bail bond costs. ACC ¶¶ 28-32. Haynie no  
14 longer owns any firearms, having sold them after his arrest. ACC ¶ 33.

15 Plaintiff Richards was arrested twice. The first arrest occurred on May 20, 2010, when  
16 police were investigating a disturbance at a Motel 6 in Rohnert Park, and two firearms were found  
17 in the trunk of Richards’ car. ACC ¶¶ 43, 48. The police believed that the firearms were assault  
18 weapons within the scope of the AWCA, and Richards was arrested. ACC ¶ 50-51. Following  
19 the arrest, a criminalist employed by the California Department of Justice examined the rifles and  
20 stated that he believed that they did not have features which made them illegal under the AWCA.  
21 ACC ¶54. Thereafter, all charges against Richards were dismissed. ACC ¶ 56.

22 Richards’ second arrest occurred on August 14, 2011, when police found a Springfield  
23 Armory M1A rifle in the trunk of Richards’ car. ACC ¶¶ 66, 72. Police believed that the rifle  
24 was illegal under the AWCA because it had a “flash suppressor” on it, and therefore arrested  
25 Richards. ACC ¶ 67. Thereafter, a criminalist employed by the California Department of Justice  
26 examined the rifle and expressed the opinion that it did not have a flash suppressor and was thus  
27 not illegal under the AWCA. ACC ¶ 69. Subsequently, all charges against Richards were  
28 dismissed. ACC ¶ 72.



**CALIFORNIA'S ASSAULT WEAPON CONTROL ACT**

The AWCA is codified in California Penal Code section 30500, et seq. The California Legislature passed the AWCA after finding that “the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state.” Cal. Penal Code § 30505. California law defines assault weapons in Penal Code sections 30510 and 30515. Subdivisions (a) through (c) of section 30510 lists specified models of rifles, pistols and shotguns that are defined as assault weapons.<sup>1</sup> Subdivisions (d) through (f) of section 30510 indicate that the lists of weapons identified by judicial decisions, as well as by Department of Justice regulations, are also assault weapons.

In addition to the list in section 30510, a further definition of assault weapons is found in section 30515, “assault weapon further defined.” Section 30515 provides:

(a) Notwithstanding Section 30510, “assault weapon” also means any of the following:

(1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and any one of the following:

(A) A pistol grip that protrudes conspicuously beneath the action of the weapon.

(B) A thumbhole stock.

<sup>1</sup> Specifically, section 30510 defines “assault weapon” as meaning “the following designated semiautomatic firearms:

(a) All of the following specified rifles:

(1) All AK series including, but not limited to, the models identified as follows: (A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S. (B) Norinco 56, 56S, 84S, and 86S. (C) Poly Technologies AKS and AK47. (D) MAADI AK47 and ARM. (2) UZI and Galil. (3) Beretta AR-70. (4) CETME Sporter. (5) Colt AR-15 series. (6) Daewoo K-1, K-2, Max 1, Max 2, AR 100, and AR 110C. (7) Fabrique Nationale FAL, LAR, FNC, 308 Match, and Sporter. (8) MAS 223. (9) HK-91, HK-93, HK-94, and HK-PSG-1. (10) The following MAC types:

(A) RPB Industries Inc. sM10 and sM11. (B) SWD Incorporated M11. (11) SKS with detachable magazine. (12) SIG AMT, PE-57, SG 550, and SG 551. (13) Springfield Armory BM59 and SAR-48. (14) Sterling MK-6. (15) Steyer AUG. (16) Valmet M62S, M71S, and M78S. (17) Armalite AR-180. (18) Bushmaster Assault Rifle. (19) Calico M-900. (20) J&R ENG M-68. (21) Weaver Arms Nighthawk.

(b) All of the following specified pistols:

(1) UZI. (2) Encom MP-9 and MP-45. (3) The following MAC types: (A) RPB Industries Inc. sM10 and sM11. (B) SWD Incorporated M-11. (C) Advance Armament Inc. M-11. (D) Military Armament Corp. Ingram M-11. (4) Intratec TEC-9. (5) Sites Spectre. (6) Sterling MK-7. (7) Calico M-950. (8) Bushmaster Pistol.

(c) All of the following specified shotguns: (1) Franchi SPAS 12 and LAW 12. (2) Striker 12. (3) The Streetsweeper type S/S Inc. SS/12.”

- 1 (C) A folding or telescoping stock.
- 2 (D) A grenade launcher or flare launcher.
- 3 (E) A flash suppressor.
- 4 (F) A forward pistol grip.
- 5 (2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to
- 6 accept more than 10 rounds.
- 7 (3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.
- 8 (4) A semiautomatic pistol that has the capacity to accept a detachable magazine and
- 9 any one of the following:
- 10 (A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or
- 11 silencer.
- 12 (B) A second handgrip.
- 13 (C) A shroud that is attached to, or partially or completely encircles, the barrel that
- 14 allows the bearer to fire the weapon without burning the bearer's hand, except a slide
- 15 that encloses the barrel.
- 16 (D) The capacity to accept a detachable magazine at some location outside of the
- 17 pistol grip.
- 18 (5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more
- 19 than 10 rounds.
- 20 (6) A semiautomatic shotgun that has both of the following:
- 21 (A) A folding or telescoping stock.
- 22 (B) A pistol grip that protrudes conspicuously beneath the action of the weapon,
- 23 thumbhole stock, or vertical handgrip.
- 24 (7) A semiautomatic shotgun that has the ability to accept a detachable magazine.
- 25 (8) Any shotgun with a revolving cylinder.

24 Cal. Penal Code § 30515.

25 ///

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**PROCEDURAL BACKGROUND**

1  
2 Plaintiffs' First Amended Complaint was dismissed with leave to amend by this Court  
3 following a motion by defendants. (See Order dated October 24, 2011, *Haynie v. Harris*, 2011  
4 WL 5038357 (N.D. Cal. 2011.) In the prior complaint, plaintiffs sought "an order compelling the  
5 defendant California Department of Justice to issue appropriate memorandums and/or bulletins to  
6 the State's District Attorneys and law enforcement agencies to prevent wrongful arrests." (*Id.*, p.  
7 \*1.) This Court noted that "Plaintiffs seeking equitable relief must also show "irreparable injury,  
8 a requirement that cannot be met where there is no showing of any real or immediate threat that  
9 the plaintiff will be wronged again—a 'likelihood of substantial and immediate irreparable  
10 injury.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 [(1983)]  
11 (internal citation omitted)." (*Id.*, p. \*6.) This Court concluded that Plaintiffs had not met the  
12 requirements of *Lyons*: "Under the *Lyons* standard, to show a real and immediate threat and  
13 demonstrate a case or controversy, Haynie and Richards would have to allege either that all law  
14 enforcement officers in California always arrest any citizen they come into contact with who is  
15 lawfully in possession of a weapon with a bullet button, or that the DOJ has ordered or authorized  
16 California law enforcement officials to act in such a manner." (*Id.*, p. \*7.) This Court also  
17 dismissed Plaintiffs' declaratory relief claims as unripe for similar reasons. (*Id.*, p. \*9.) This  
18 Court indicated that if Plaintiffs "wish to pursue the dismissed claims for injunctive and  
19 declaratory relief, they should plead facts demonstrating that they have standing to do so in the  
20 consolidated amended complaint." (*Id.*, p. \*10.)

21 Following dismissal of the First Amended Complaint, a Second Amended Complaint was  
22 filed. Plaintiffs and the remaining Defendants did not actively litigate the issues presented in it to  
23 allow Plaintiffs and the local law enforcement defendants to see if local law enforcement could be  
24 removed from the case by motion practice or settlement. The local law enforcement defendants  
25 brought a partially successful motion to dismiss (See Order dated July 30, 2012, *Richards v.*  
26 *Harris*, 2012 WL 3074869 (N.D.Cal.,2012), and thereafter these defendants were dismissed from  
27 the case pursuant to a settlement. The current Third Amended Complaint followed was filed  
28 December 20, 2013.

## LEGAL STANDARDS

### I. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's jurisdiction over the subject matter of the complaint. See Fed. R. Civ. P. 12(b)(1). Any party invoking the jurisdiction of the federal court bears the burden of establishing that the court has the subject matter jurisdiction required to grant the relief requested. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). "In resolving a Rule 12(b)(1) factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *In re. Digimarc Corp. Derivative Litigation*, 549 F.3d 1223, 1236 (9th Cir.2008) (citation omitted). A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either "facially" or "factually." *Thornhill Pub'g Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir.1979). When the complaint is challenged for lack of subject matter jurisdiction on its face, all material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). When deciding a Rule 12(b)(1) motion which mounts a factual attack on jurisdiction, "no presumption of truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Mortensen v. First Fed. Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977).

### II. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. See *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), overruled on other grounds by *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). A complaint may be dismissed based "on the lack of a cognizable legal theory or the absence of sufficient facts alleged

1 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th  
2 Cir.1990). In considering this question, the Court must assume that the plaintiff’s allegations are  
3 true and must draw all reasonable inferences in the plaintiff’s favor. See *Usher v. City of Los*  
4 *Angeles*, 828 F.2d 556, 561 (9th Cir.1987).

## 5 ARGUMENT

### 6 I. PLAINTIFFS’ VAGUENESS CLAIMS ARE NOT RIPE

7 Article III of the United States Constitution confines the jurisdiction of federal courts “to  
8 the resolution of cases and controversies.” *Valley Forge Christian Coll. v. Americans United for*  
9 *Separation of Church & State*, 454 U.S. 464, 471 (1982) (internal quotation marks omitted). To  
10 establish a “case or controversy,” the “irreducible constitutional minimum” that a plaintiff must  
11 show contains the following three elements: (1) a concrete “injury in fact”; (2) a causal  
12 connection between the injury and defendant’s conduct; (3) and a likelihood that the injury will be  
13 redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).  
14 These constitutional requirements are “rigorous.” *Valley Forge*, 454 U.S. at 475. The ripeness  
15 doctrine “is peculiarly a question of timing,” *Reg’l Rail Reorg. Act Cases*, 419 U.S. 102, 140, 95  
16 S.Ct. 335 (1974), designed “to separate matters that are premature for review because the injury is  
17 speculative and may never occur from those cases that are appropriate for federal court action.”  
18 *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir.1993) (internal quotation marks  
19 omitted). “[T]hrough avoidance of premature adjudication,” the ripeness doctrine prevents courts  
20 from becoming entangled in “abstract disagreements.” *Abbott Labs. v. Gardner*, 387 U.S. 136,  
21 148, 87 S.Ct. 1507 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 97  
22 S.Ct. 980 (1977).

23 Ripeness has both constitutional and prudential components. *Portman*, 995 F.2d at 902.  
24 The constitutional component of ripeness overlaps with the “injury in fact” analysis for Article III  
25 standing. *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138–39 (9th Cir.2000)  
26 (en banc); see also *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202  
27 (1980). But whether framed as an issue of standing or ripeness, the inquiry is largely the same:  
28

1 are the issues presented “definite and concrete, not hypothetical or abstract.” *Thomas*, 220 F.3d at  
2 1139 (internal quotation marks omitted).

3 Here, plaintiffs’ claims for declaratory and injunctive relief are not ripe for adjudication.  
4 Neither of the two plaintiffs expressly allege that they possess a weapon that they believe will  
5 subject them to prosecution under the AWCA. Indeed, the ACC expressly admits that one of the  
6 plaintiffs (Haynie) no longer owns guns, and that his “reasonable fear” of suffering a wrongful  
7 arrest under the AWCA will only occur “if he reacquires a firearm.” ACC, ¶¶ 33-34[emphasis  
8 added]. In describing the second individual plaintiff (Richards) the ACC uses the past tense to  
9 describe his firearms (ACC ¶ 55 [Richards’ seized firearms “were” semiautomatic guns]) and  
10 does not aver that he presently owns a weapon at all. Accordingly, the vagueness attack on the  
11 AWCA is premature.

12 “A claim is not ripe for adjudication if it rests upon contingent future events that may not  
13 occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300  
14 (1998) (internal quotations omitted). Here, the ACC contains an express contingency as to  
15 plaintiff Haynie, admitting that he has sold his guns, and alleging that his fear of prosecution  
16 under the AWCA will occur only “if” he obtains a weapon in the future. ACC ¶ 33-34.  
17 Likewise, the allegations in the ACC regarding the weapons ownership of plaintiff Richards  
18 implicitly concede that his claim is also contingent; the past-tense is used to describe his gun  
19 ownership, and no allegation that he presently owns weapons potentially subject to the AWCA  
20 can be found. It is “wholly conjectural that another occasion might arise” when plaintiffs Haynie  
21 and Richards “might be prosecuted” under the AWCA and the bare assertion that plaintiffs might  
22 acquire weapons in the future “is hardly a substitute for evidence that this is a prospect of  
23 ‘immediacy and reality.’” *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). To the extent that the  
24 ACC presents claims that would be contingent upon plaintiffs acquiring weapons in the future,  
25 the ACC fails to present ripe claims which can be adjudicated.<sup>2</sup>

26 <sup>2</sup> As this Court noted in its order dismissing the First Amended Complaint, the standing of  
27 the institutional plaintiffs in this case (The Calguns Foundation and The Second Amendment  
28 Foundation) is derived from the standing of their members. *Haynie v. Harris*, 2011 WL 5038357,  
at \*9-10. As before, to the extent that the individual plaintiffs lack standing due to their

**II. PLAINTIFFS DO NOT MEET THE STANDARDS FOR INJUNCTIVE RELIEF**

In the order dismissing the First Amended Complaint in this case, and permitting plaintiffs to file a further amended complaint, this Court warned plaintiffs to allege facts “demonstrating that they have standing” if they wished to pursue their dismissed injunctive and declaratory relief claims. (*Haynie v. Harris*, 2011 WL 5038357, p. \*10.) Yet the allegations in the ACC contain the same defects found in the First Amended Complaint. Specifically, plaintiffs have not alleged that “*all* law enforcement officers in California *always* wrongly arrest any citizen with whom they come into contact who is lawfully in possession of a weapon with a bullet button.” (*Id.*, p. \*8, original emphasis.) Plaintiffs re-assert their fear of being arrested for an AWCA violation, but these fears are “speculative” and fail to show “a ‘likelihood of substantial and immediate irreparable injury’” which is needed for standing to seek an injunction in federal court. *City of Los Angeles v. Lyons*, 461 U.S. at 111.

Although plaintiffs have changed their theory of the case slightly in the ACC, the relief sought is similar: an injunction from this Court stopping enforcement of the AWCA unless and until DOJ “issues appropriate regulations, bulletins, or memoranda to prevent wrongful arrests of law-abiding citizens.” ACC, Prayer for Relief, p. 27. In seeking such an injunction (and related declaratory relief), plaintiffs must allege facts sufficient for standing. As the Supreme Court held in *Lyons*, “recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate.” *City of Los Angeles v. Lyons*, 461 U.S. at 112. The allegations here fall short, and the ACC should be dismissed.

**III. THE AWCA IS NOT UNCONSTITUTIONALLY VAGUE**

Even if it presented ripe claims, the ACC must still be dismissed because the AWCA is not unconstitutionally vague. The AWCA and its implementing regulations are sufficiently definite to withstand scrutiny, and must be upheld.

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(...continued)

presentation of unripe claims, the institutional plaintiffs similarly lack standing.

1           **A. The AWCA is Sufficiently Definite**

2           In general, “the void-for-vagueness doctrine requires that a penal statute define the criminal  
3 offense with sufficient definiteness that ordinary people can understand what conduct is  
4 prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”  
5 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). “The test is whether the language conveys  
6 sufficiently definite warning as to the proscribed conduct when measured by common  
7 understanding and practices.” *Jordan v. DeGeorge* (1951) 341 U.S. 223, 231-32. “[P]erfect  
8 clarity and precise guidance have never been required” of a penal statute. *Holder v.*  
9 *Humanitarian Law Project* \_\_ U.S. \_\_, 130 S. Ct. 2705, 2720 (2010).

10           The statutes at issue contain lists of banned models and descriptions of the characteristics or  
11 features on models not listed that would bring those weapons within the scope of the AWCA.  
12 See Cal. Penal Code §§ 30510, 30515. These lists provide ample notice to citizens and law  
13 enforcement regarding what types of weapons are covered by the AWCA. See *Chaker v.*  
14 *Preciad*, 2010 WL 2491421 (C.D. Cal. 2010) (rejecting vagueness challenge to AWCA).

15           **B. Plaintiffs’ Focus on Arrests, Rather Than the Statute, is Misplaced**

16           Plaintiffs, apparently recognizing that there have been no prosecutions under the AWCA  
17 that were constitutionally problematic, focus instead on arrests. See, e.g., ACC at ¶ 107 [“state of  
18 confusion caused by current vague and ambiguous statutes/regulations continues to result in  
19 wrongful arrests...”]. But wrongful arrests do not support a claim that the statute and its  
20 implementing regulations are unconstitutionally vague. The Second Circuit case of *Dickerson v.*  
21 *Napolitano*, 604 F.3d 732, 745, n. 15 (2d Cir. 2010) made this point explicitly:

22           We reject the notion that the plaintiffs can assert a facial challenge based on the  
23 constitutionally-protected right to be free from an improper arrest. It is often the case  
24 that a constitutional challenge to an arrest implicates the right to be free from that  
25 arrest. If the infringement of such a right gave rise to a facial challenge, facial  
26 vagueness challenges would be the rule, not the exception. The constitutionally-  
27 protected right that must be implicated to support a facial challenge must be the right  
28 infringed by *the statute* that was applied to the plaintiffs, not the right infringed by *the*  
*arrest* for a violation of that statute.

*Ibid.* (original emphasis).



1 In this case, there is no question that the statute contains sufficient detail to provide notice  
2 to citizens and law enforcement about what is prohibited. Indeed, the undisputed facts of this  
3 case show that following all of the arrests of plaintiffs it was an application of the statute to the  
4 facts of their arrest which led to charges being dropped. See ACC ¶¶ 28, 32, 54, 56, 69, 72. The  
5 allegation that plaintiffs were arrested due to a belief on the part of the arresting officers that their  
6 weapons were illegal assault weapons does not support a contention that the statute is improper; it  
7 supports a contention that in protecting the public and enforcing the law that some mistakes will  
8 inevitably be made. This fact is unfortunate, to be sure, but does not support a contention of  
9 unconstitutional vagueness.

10 And the desire of plaintiffs to possess and display weapons that appear to be banned  
11 weapons certainly can lead to confusion on the part of law enforcement. Plaintiffs assert the right  
12 to own a weapon that “looks like a contraband weapon” but, upon close inspection, is not. ACC,  
13 ¶ 33a. They certainly have that right, but there are consequences that flow from such choices. As  
14 the United States Supreme Court has emphasized,

15 [F]ew words possess the precision of mathematical symbols, most statutes must deal  
16 with untold and unforeseen variations in factual situations, and the practical  
17 necessities of discharging the business of government inevitably limit the specificity  
18 with which legislators can spell out prohibitions. Consequently, no more than a  
19 reasonable degree of certainty can be demanded. *Nor is it unfair to require that one  
who deliberately goes perilously close to an area of proscribed conduct shall take the  
risk that he may cross the line.*

20 *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) [emphasis supplied].

21 In this case, the allegations of the ACC show that the standards for enforcement of the  
22 AWCA are present in the statute and regulations, but that in certain cases law enforcement makes  
23 errors in the field in applying these standards. The burden on law enforcement is exacerbated by  
24 Plaintiffs’ stated desire to possess weapons that appear to be contraband, although, on close and  
25 careful inspection, are not. The facts alleged by plaintiffs do not demonstrate any defect in the  
26 statute; they demonstrate that the statute is ultimately quite clear and effective.

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**CONCLUSION**

For the foregoing reasons, the ACC should be dismissed.

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Respectfully Submitted,

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