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In the Supreme Court of the State of California

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

Plaintiffs and Respondents,

v.

THE STATE OF CALIFORNIA; KAMALA D. HARRIS, in her official capacity as Attorney General for the State of California; AND THE CALIFORNIA DEPARTMENT OF JUSTICE,

Defendants and Appellants.

Case No. S215265

Fifth Appellate District, Case Nos. F062490, F062709
Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeff Hamilton, Judge

APPELLANTS' OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
KATHLEEN A. KENEALY
Chief Assistant Attorney General
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
ROSS C. MOODY
Deputy Attorney General
State Bar No. 142541
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1376
Fax: (415) 703-1234
Email: Ross.Moody@doj.ca.gov
Attorneys for Defendants and Appellants

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INTRODUCTION

In 2009, in an effort to protect public safety, the California Legislature passed Assembly Bill No. 962 (2009-2010 Reg. Sess.), the Anti-Gang Neighborhood Protection Act of 2009, which regulated the commercial sale, display, and transfer of ammunition "principally for use" in handguns. (Stats. 2009, ch. 628, §§ 1-2, 7.) The statutes placed record-keeping, storage, and sales restrictions on sellers of handgun ammunition. The primary impact on individuals was the requirement that purchases of handgun ammunition be conducted face-to-face, with the buyer showing identification, and providing a thumbprint at the time of sale.

Ammunition vendors, a county sheriff, and a gun rights interest group brought a pre-enforcement facial challenge to block implementation of the law. Plaintiffs claimed that they could not tell what calibers of ammunition were "principally for use" in a handgun. The trial court agreed, finding that, in the absence of a list of the ammunition cartridges involved, if two people could come to different conclusions about which ammunition was covered, the law was unconstitutionally vague on its face. The Court of Appeal affirmed the judgment of the trial court, holding that the key term of the statute, "principally for use" in handguns, was unconstitutionally vague.

In reaching this holding, the Court of Appeal erred on two primary grounds. First, the Court of Appeal erred by applying a lenient test to this pre-enforcement facial challenge to a penal statute. Facial constitutional challenges are disfavored, and generally must satisfy the robust "invalid in all its applications" test. The Court of Appeal failed to justify the use of a much more lenient standard. Although case law suggests that a less robust test for facial challenges may be proper in First Amendment and reproductive rights cases, that more lenient test should not have been used in this case. Expanding its use here was an error, even though the challenged statutes, properly examined, survive either test.

Second, the Court of Appeal erred in holding that the term "principally for use" was unconstitutionally vague. Myriad California penal statutes use similar terminology. Further, in this particular context, the terminology reflects actual vendor and purchaser practices. Thus, the notion that a list of applicable ammunition cartridges was needed, or that a universally accepted definition had to be employed in order to provide constitutionally adequate notice must be rejected. The statutes here can be easily understood employing a reasonable and practical construction. This Court should reject the improper vagueness analysis used below.

ISSUES PRESENTED

The issues presented in this appeal are:

(1) Whether the Court of Appeal erred by finding these statutes unconstitutional in a pre-enforcement facial challenge?

(2) What is the proper standard of review in a pre-enforcement facial vagueness challenge to a criminal statute regulating the sale of ammunition?

(3) Does a vagueness challenge to a statute regulating handguns or handgun ammunition require the use of a standard of review usually reserved for First Amendment and abortion cases?

(4) Must a statute use an objective standard for measuring compliance to satisfy constitutional vagueness principles?

THE CHALLENGED STATUTES

The statutes at issue restrict the sale and transfer of handgun ammunition. A handgun is defined by statute as any pistol, revolver, or firearm capable of being concealed upon the person. (Pen. Code, § 16640,

subd. (a).)[1] The terms "pistol," "revolver," and "firearm capable of being concealed upon the person" are defined in section 16530. These terms "include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length." (§ 16530, subd. (a).) As used in the statutory scheme being challenged, "'handgun ammunition' means ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, notwithstanding that the ammunition may also be used in some rifles." (§ 16650, subd. (a).)[2]

The statutes at issue place certain obligations on handgun ammunition vendors regarding the storage, handling, and transfer of handgun ammunition. A "handgun ammunition vendor" is defined by statute as "any person, firm, corporation, dealer, or any other business enterprise that is engaged in the retail sale of any handgun ammunition, or that holds itself out as engaged in the business of selling any handgun ammunition." (§ 16662.) The manner in which handgun ammunition is stored and sold is restricted by the statutes. Handgun ammunition must be stored in a place inaccessible to customers unless they are being assisted by the vendor or a

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[1] All further statutory references are to the Penal Code, unless otherwise noted.

[2] When the statutes at issue were passed, they were codified as Penal Code sections 12060, 12061, and 12318. However, during the pendency of this case, Senate Bill 1080 was passed, and it renumbered and reconfigured the Penal Code sections on deadly weapons, including the challenged statutes. (Stats. 2010, ch. 711, §§ 4, 6.) As a result, the statutes challenged (and found unconstitutional) are now Penal Code sections 16650, 30312, and 30345 through 30365. Some references in the opinion and record below reflect the new numbering scheme, while others cite the "former" numbers of the statutes. To the extent possible, this brief will use the new numbering scheme.

qualified employee. (§ 30350.) A vendor must not allow any employee who cannot lawfully possess a firearm to "handle, sell, or deliver handgun ammunition in the course and scope of employment." (§ 30347.)

The statutes also impose certain requirements on potential purchasers of handgun ammunition. Section 30312 states that "the delivery or transfer of ownership of handgun ammunition may only occur in a face-to-face transaction with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee." (§ 30312, subd. (a).) Limited exceptions are provided for law enforcement personnel and other qualified individuals. (*Id.*, subd. (b).) When handgun ammunition is sold or otherwise transferred, the vendor must obtain the buyer's date of birth, address, telephone number, driver's license number, signature, and thumbprint. (§§ 30352, subd. (a), 30360.) Vendors must maintain records of handgun ammunition sales and transfers for five years, and make them available for inspection to law enforcement. (§§ 30355, 30357.) A violation of sections 30312, 30352, 30355, or 30357 is a misdemeanor. (§§ 30312, subd. (c), 30365, subd. (a).)

STATEMENT

On June 17, 2010, plaintiffs filed a complaint in Fresno County Superior Court alleging that certain statutes adopted as part of Assembly Bill 962 (the "Anti-Gang Neighborhood Protection Act of 2009") were void for vagueness under the Due Process Clause of the Fourteenth Amendment. (Joint Appendix "JA" Volume I, 0014.) Specifically, they contended that because many calibers of ammunition could be used in both handguns and rifles, sections 16650, 30312, and 30345 through 30365 of the Penal Code were fatally vague, both facially and as applied, because their definition of "handgun ammunition" failed "to provide any standard whereby a person of ordinary intelligence can understand and determine whether a given caliber of ammunition is 'principally for use' in a handgun." (JA I 0014.) They

also asserted that this alleged vagueness gave law enforcement officials "essentially unbridled discretion to interpret and apply the Challenged Provisions." (JA I 0015.)

On these facts, respondents alleged three causes of action for (1) Due Process Vagueness – Facial, (2) Due Process Vagueness – As Applied, and (3) a Petition for Writ of Mandate. (JA I 0031-34.) Defendants State of California, the California Department of Justice, and the Attorney General ("State") answered plaintiffs' complaint and verified petition on August 4, 2010. (JA I 0052-74.) Thereafter, respondents filed a voluminous motion for preliminary injunction, but withdrew the motion prior to a ruling on it. (JA I-II 0076-523, JA III 0592-707.) Respondents then filed a motion for summary judgment and/or summary adjudication. (JA III 0815.) On January 18, 2011, following briefing and argument, respondents dismissed their second and third causes of action, leaving only their facial vagueness challenge, and submitted the balance of their motion to the Court. (JA XIV 4031.)

On January 31, 2011, the Court granted in part and denied in part respondents' motion for summary adjudication, and enjoined enforcement of the challenged statutes. (JA XIV 4032.) In its written order, the Court found that the statutes were unconstitutionally vague on their face. (JA XIV 4033-55.) On February 22, 2011, judgment was entered in favor of respondents. (JA XIV 4056-60.) On April 28, 2011, the State filed a timely notice of appeal. (JA XV 4271.)

On November 6, 2013, a divided panel of the Fifth District Court of Appeal issued a published opinion declaring Penal Code sections 16650, 30312, and 30345 through 30365 unconstitutionally vague. (Slip Op., p. 37.) The Court of Appeal first noted that there was a "lack of clarity" in both United States Supreme Court and California Supreme Court cases on the appropriate standard to use in a facial challenge. (Slip Op., p. 13.) The

Court of Appeal declared that the "controversy over the proper analytical framework for facial challenges is a recurring issue that has evaded resolution" and asserted that "[t]he present state of the law is thus uncertain." (Slip Op., p. 27.)

The Court of Appeal then applied the more lenient test usually reserved for First Amendment and reproductive rights cases to this case. (Slip. Op., p. 29.) The basis for selecting the more lenient standard was that the statutory scheme here "'implicates' or 'reaches' a substantial amount of constitutionally protected activity, or 'threatens to inhibit the exercise of constitutionally protected rights.'" (Slip Op., p. 29.) The Court of Appeal concluded that because the possession of handguns for self-defense, and by extension obtaining ammunition for those guns, appears protected by the Second Amendment, the restrictions in the statutes "reach a substantial amount of constitutionally protected conduct." (Slip. Op., pp. 28-29, 31.)

Applying the more lenient standard, the Court of Appeal declared the statutes unconstitutionally vague. The Court of Appeal found that the statutes "provide no guidance or objective criteria" to determine whether ammunition is "principally for use" in a handgun. (Slip Op., p. 36.)

The decision included a dissent which disagreed with the test selected, noting that in a facial challenge the stricter "incapable of any valid application" standard must be employed. (Dis. Op., p. 3.) The dissent observed that the stricter standard has been employed by this Court repeatedly when considering facial challenges to criminal statutes in California. (Dis. Op., p. 9.) Further, even if a more lenient standard were appropriate in some other case, here it was not: the dissent disagreed with the majority's assertion that the provisions burdened Second Amendment rights. It observed that "requiring the ammunition seller or transferor to record the buyer's identification information" is a "minor inconvenience to

the buyer" and not a "threat to inhibit his or her right to possess an operable handgun for self-defense." (Dis. Op., p. 7.) In the dissent's view, a "decrease in convenience does not constitute a meaningful deprivation of the right." (Dis. Op., p. 7.)

On the issue of vagueness, the dissent wrote that legal phraseology similar to "principally for use" had been upheld in many cases. (Dis. Op., pp. 13-14.) Moreover, the dissent recognized that it was appropriate to read a scienter requirement into the statutes, and limit their application to "ammunition that is generally recognized as used more often in handguns than in other types of firearms." (Dis. Op., p. 10.) With this construction of the statutes, "an ammunition purveyor would be liable criminally for failing to comply with the statutes only when he or she knows or should know that the ammunition displayed, sold, or transferred is ammunition principally for use in handguns because the ammunition is generally recognized as handgun ammunition." (Dis. Op., p. 10.)

The decision became final on December 6, 2013. This Court granted the State's petition for review on February 19, 2014.

ARGUMENT

This case presents an opportunity for this Court to reaffirm the appropriate test to be used when a penal statute is challenged facially for vagueness. The Court of Appeal chose to apply the lenient test in which a petitioner need only show that a statute is unconstitutionally vague in the generality of cases, as opposed to the more demanding unconstitutional in all applications test. But selecting the more lenient standard in a case not involving the First Amendment or reproductive rights was a departure from established case law. In addition to going beyond this Court's prior cases, extending the application of this test to include the statutes at issue here cannot be justified on policy grounds. This Court should reverse the judgment, and reinforce existing case law applying the stricter standard in

pre-enforcement facial vagueness challenges. Alternatively, this Court should confirm that the challenged statutes survive under either standard.

I. FACIAL PRE-ENFORCEMENT CONSTITUTIONAL CHALLENGES TO STATUTES ARE DISFAVORED

The starting point for evaluating a constitutional challenge like the one at issue here is the presumption that legislative enactments "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*People v. Ervin* (1997) 53 Cal.App.4th 1327, 1328; see also *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1403 [the constitutionality of a statute designed to protect the public from dangerous weapons must be sustained if possible].) A statute will not be held void for vagueness if any reasonable and practical construction can be given its language, or if its terms may be made reasonably certain by reference to other definable sources. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117; *People v. Townsend* (1998) 62 Cal.App.4th 1390, 1401.)

The mere fact that a statute contains "one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face." (*In re Jorge M.* (2000) 23 Cal.4th 866, 886; *People v. Hazelton* (1996) 14 Cal.4th 101, 109.) A level of uncertainty may well be inevitable in all written language: "Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear." (*People v. Townsend, supra*, 62 Cal.App.4th at pp. 1401-1402 [internal quotations and citation omitted].) Reasonable specificity is all that is required. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890; *People ex rel. Gallo v. Acuna, supra*, 14 Cal.4th at p. 1117.)

Facial challenges are disfavored, and as the United States Supreme Court has explained, litigants who bring them face a high burden:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (internal quotation marks and brackets omitted). Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)). Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion)).

(*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 450.)

In evaluating a facial challenge, a court must consider "only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) This Court has not articulated a single test for determining the propriety of a facial challenge, but instead has presented the governing doctrine in two ways. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Under the "strictest test," the statute must be upheld unless the complaining party establishes the statute is invalid in all of its applications and "'inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.'" (*Ibid.*, quoting *Pacific Legal Foundation v. Brown* (1981)

29 Cal.3d 168, 181.) Under the "more lenient standard sometimes applied," a party must still establish that the statute conflicts with constitutional principles "'in the generality or great majority of cases.'" (*Ibid.*, italics omitted; see also *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 278 (conc. & dis. opn. of Cantil-Sakauye, C.J.) [recognizing multiple standards of review for facial challenges].) But under either test, the plaintiff "has a heavy burden to show the statute is unconstitutional in all or most cases, and he 'cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute.'" (*Coffman Specialties, Inc. v. Department of Transp.* (2009) 176 Cal.App.4th 1135, 1144-1145, quoting *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39 [internal quotation marks omitted].)

To date, the more lenient test has generally been limited to cases involving the First Amendment or reproductive rights. (See *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679 [outside First Amendment and abortion cases, "the challenger must establish that no set of circumstances exists under which the Act would be valid"].) The policy reasons articulated for imposition of the more lenient standard focus on the fundamental nature of the constitutional rights at issue. (See *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 708-709 [in the absence of allegation that a statute "broadly impinges upon an individual's exercise of a fundamental constitutional right or that in its general and ordinary application it does so," the lenient standard will not be employed].) In the context of reproductive rights, this Court has emphasized that it was scrutinizing "a statute whose broad sweep directly impinges upon the *fundamental constitutional privacy rights* of a large class of persons." (*American Academy of Pediatrics v. Lungren* (1997) 16

Cal.4th 307, 344 (plur. opn. of George, C.J.), emphasis added.) In the context of the First Amendment, there is concern about the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." (*N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 432-433 [internal citations and footnote omitted].) Due to the concern about deterring expressive conduct, a series of as-applied challenges is deemed insufficient, and facial challenges are favored in comparison: "[G]radually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case . . . does not respond sufficiently to the peculiarly vulnerable character of activities protected by the first amendment." (Tribe, American Constitutional Law (2d ed. 1988) § 12–27, at p. 1023.)

The categories of cases to which the more lenient standard applies are extremely limited, and application of the lenient standard to those categories is based on specific jurisprudential policy grounds. Absent sound policy reasons, expanding the roster of cases to receive this treatment is unwarranted.

II. THE COURT OF APPEAL ERRED BY APPLYING THE MORE LENIENT STANDARD TO THE CHALLENGED STATUTES

Most cases involving a pre-enforcement facial challenge require the application of the strict invalid in all circumstances test, while only a narrow set of other cases receives the more lenient generality of cases test. Prior to the decision of the Court of Appeal, the cases receiving the more lenient test in California were limited to disputes involving the First Amendment or reproductive rights. These cases were treated differently based on the fundamental nature of the rights at issue, and the need to

provide enhanced protections to them, even in a pre-enforcement facial challenge setting.

The Court of Appeal declined to apply the strict standard as would have been expected in a case where neither First Amendment nor reproductive rights were at issue. Instead, the Court of Appeal expanded the category of cases which should receive the lenient standard of review. According to the Court, the strict standard normally employed in a facial constitutional challenge must also give way when a criminal statute being examined implicates *any* constitutional rights. But this leap of logic is unsupported, unfounded, and ill-advised.

A. The Court of Appeal's Creation of a New Three-Part Test for When to Apply the Lenient Standard Exceeds the Scope of This Court's Prior Decisions

In the words of the Court of Appeal, there has been a "lack of clarity" in both United States Supreme Court and California Supreme Court cases on the appropriate standard to use in facial constitutional challenges. (Slip Op., p. 13.) The Court of Appeal explained that the "controversy over the proper analytical framework for facial challenges is a recurring issue that has evaded resolution," and "[t]he present state of the law is thus uncertain." (Slip Op., p. 27.) As recently as last year, this Court wrote in *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218 that the "standard for a facial constitutional challenge to a statute is exacting" but that its formulation was subject to "some uncertainty." This Court then declared in that case that it "need not settle the precise formulation of the standard because under any of the versions we have articulated the due process claim here would fail." (*Ibid.*) Similar statements have been made by this Court in other cases from time to time over the last decade.

The opinion below described the two standards that have been applied to facial challenges. (Slip Op., pp. 13-14.) The first standard, announced in *United States v. Salerno* (1987) 481 U.S. 739, 745 (*Salerno*), is strict, requiring a showing "that no set of circumstances exists under which the [statute] would be valid." The California formulation of the *Salerno* standard is that "a present total and fatal conflict with applicable constitutional prohibitions" be shown. (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.) The alternative, more lenient, standard asks whether a statute is constitutionally invalid "in the generality or great majority of cases." (*San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 673.)

The Court of Appeal applied the more lenient standard here. The justification offered by the Court of Appeal for why the strict standard must give way in cases implicating *any* constitutional right is drawn by inference from this Court's citation to *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489 (*Hoffman Estates*) when it applied the *Salerno* standard in *People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1116. The Court of Appeal noted that *Acuna* "cited and quoted *Hoffman Estates*" when applying "California's strictest standard" for facial challenges. (Slip Op., p. 28.) The Court of Appeal concluded from this that because *Acuna* cited *Hoffman Estates*, it created an implication that this Court intends the stricter standard for facial challenges to be used only in circumstances mirroring the circumstances that were present in *Hoffman Estates*. (Slip. Op., p. 28.)

Hoffman Estates involved a First Amendment challenge to an ordinance regulating the sale of drug paraphernalia. The high court noted that the general standard to be applied to a vagueness challenge was whether "the law is impermissibly vague in all of its applications." (455 U.S. at p. 497.) The Court then went on to discuss the greater scrutiny to be

given when a law "threatens to inhibit the exercise of constitutionally protected rights" such as the right of free speech or of association. (*Id.* at p. 499.) The Court found that the drug paraphernalia ordinance was "sufficiently clear" and denied the facial challenge, relying in part on the scienter requirement of "marketing" paraphernalia for drug use. (*Id.* at pp. 499-500.)

Here, the Court of Appeal acknowledged that this Court has applied language similar to the *Salerno* standard, holding that an unconstitutionally vague law is one that is "impermissibly vague in *all* of its applications."[3] (Slip Op., p. 28, citing *People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1116.) But putting great significance on the *Acuna* decision's citation to *Hoffman Estates* in connection with the vague-in-all-applications statement, the Court of Appeal adopted a three-part test for applying the more lenient standard:

> [T]he *Hoffman Estates* standard is a qualified rule which "assum[es] the enactment implicates no constitutionally protected conduct," and recognizes the need for heightened scrutiny of criminal statutes. (*Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495, 498-499.)
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> If California's strictest standard of review mirrors the *Hoffman Estates* standard, it is flexible and yielding to vagueness concerns under the due process clause of the United States and California Constitutions when three elements are present. First, the statute at issue must reach or implicate a substantial amount of constitutionally protected conduct. (*Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495; *Kolender*, *supra*, 461 U.S. at p. 358 and fn. 8; *Morales*, *supra*, 527 U.S. at p. 53.) Second, the statute must impose criminal rather than civil penalties. (*Hoffman Estates* at pp. 498-499; *Kolender* at p. 358 and fn. 8; *Morales* at

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[3] The Court of Appeal's concession regarding the use of the *Salerno* standard was appropriate, as this Court "has repeatedly employed the *Salerno* standard." (*City of Vacaville v. Pitamber* (2004) 124 Cal.App.4th 739, 743.)

p. 55.) Third, the statute must lack a scienter requirement. (*Hoffman Estates* at p. 499; *Morales* at p. 55.)

(Slip Op., p. 28.) According to the Court of Appeal, if these three elements are present, then the strict standard for a vagueness challenge gives way in favor of the more lenient standard.

No authority from this Court establishes this three element test. Indeed, the penal statutes examined by this Court on facial challenges for vagueness have applied the strict standard. (See, e.g., *People v. Morgan* (2007) 42 Cal.4th 593, 605-606; *People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1116; *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.) The Court of Appeal's conclusion that this Court has already articulated, in *Acuna*, by citing *Hoffman Estates*, a three element test for deciding which standard to apply in facial constitutional challenges is erroneous, and must be corrected. In any event, contrary to the Court of Appeal's resulting assessment, two of the three elements of the test would not be met in the present case.[4]

B. Even Under the Court of Appeal's New Three-Part Test for When to Apply the Lenient Standard, the No-Scienter Element Would Not Be Met

Even if the three element test was impliedly created by this Court, as suggested by the Court of Appeal, at least one required element has not been satisfied here because the challenged statutes include an implied scienter requirement.

Central to the Court of Appeal's determination that a more lenient test should apply was its conclusion that the statutes at issue "do not contain a

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[4] Only one of the three elements that Court of Appeal distilled from *Acuna* and *Hoffman Estates*, that the statute must impose criminal rather than civil penalties, is definitively present with respect to the statutes challenged here.

scienter requirement." (Slip Op., p. 29.) While it is true that no express scienter requirement appears in the challenged statutes themselves, the statutes are not strict liability statutes and a mental state is clearly required. (See Penal Code, § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"]; see also *People v. Valenzuela* (2001) 92 Cal.App.4th 768, 775 [mens rea requirement "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence"].)

There is abundant case law from this Court that a scienter element must be read into a criminal statute such as this one. (See *In re Jorge M.*, *supra*, 23 Cal.4th at p. 887 [finding scienter requirement for Assault Weapons Control Act despite lack of specific mental state requirement in statute]; see also *In re Jennings* (2004) 34 Cal.4th 254, 267 [it is common for a scienter requirement to be read into penal statutes].) In fact, the State conceded the existence of the scienter requirement both in briefing and in oral argument. (See Dissenting Op., p. 9, fn. 2 [acknowledging concession at oral argument]; see also Appellant's Reply Brief, p. 6, fn. 5 [conceding that challenged statutes contained mens rea requirement].) Determined to apply the more lenient standard, the Court of Appeal failed to confront the State's legal analysis or its concession that the challenged statutes require scienter. The result is a published decision selecting the incorrect standard for facial challenges, even under the Court of Appeal's own incorrect test for selecting the applicable standard. The judgment below must be reversed.

C. Even Under the Court of Appeal's New Three-Part Test for When to Apply the Lenient Standard, the Element That the Challenged Statutes Must Implicate a Substantial Amount of Constitutionally Protected Conduct Would Not Be Met

The Court of Appeal devoted much analysis to assessing whether the statutes reach or "implicate a substantial amount of constitutionally protected conduct" (Slip Op., p. 28), but again failed to appreciate that First Amendment principles do not necessarily transfer to other constitutional contexts, here the Second Amendment.

The Court characterizes the inquiry as "whether an allegedly vague statute 'implicates' or 'reaches' a substantial amount of constitutionally protected activity, or 'threatens to inhibit the exercise of constitutionally protected rights.'" (Slip Op., p. 29.) Then, citing the seminal Second Amendment cases *District of Columbia v. Heller* (2008) 554 U.S. 570 and *McDonald v. Chicago* (2010) 561 U.S. ___, [130 S.Ct. 3020], the Court notes that possession of handguns for self-defense, and by extension ammunition for those guns, appears protected by the Second Amendment. (Slip. Op., pp. 28-29.) And, beyond the Second Amendment provision, the Court of Appeal expresses concern about the "liberty interests" of ammunition sellers to "pursue lawful and remunerative business endeavors" without the risk of being prosecuted for violating the statutes. (Slip. Op., p. 29.)

The Court of Appeal singles out the face-to-face sales requirement for buying handgun ammunition, and its impact on internet sales of ammunition. Penal Code section 30352 "requires a face-to-face transaction" when selling "handgun ammunition," and includes a requirement that the vendor obtain "the buyer's signature and right thumbprint. (§ 30352, subd. (a)(4) & (6).)" (Slip Op., p. 30.) The Court of Appeal notes that a "brick-and-mortar business can err on the side of

caution by complying with the provisions of section 30352" but questions how "mail-order businesses and online retailers" can lawfully sell "handgun ammunition" without face-to-face interaction unless the terms are well defined: "In the absence of a sufficiently clear definition of that term, these vendors must repeatedly choose between foregoing what may or may not be a lawful sales transaction, or making a sale at the risk of criminal liability and punishment." (Slip Op., pp. 30-31.)

Further, citing the "the interplay between the rights of ammunition buyers and vendors," the Court of Appeal concludes that "it is difficult to argue that the challenged statues do not reach a substantial amount of constitutionally protected conduct." (Slip Op., p. 31.) In light of this conclusion, the Court of Appeal finds that the final "element necessary for the void-for vagueness exception under the *Hoffman Estates* standard is satisfied" and that the more forgiving and lenient facial review standard should be employed. (Slip Op., p. 31.)

The Court of Appeal's analysis is flawed on several levels. First, while the Supreme Court in *Hoffman Estates* did use the terminology "constitutionally protected conduct," there is no question that the constitutional rights being considered were First Amendment rights. In fact, the Court was careful to cabin the analysis advanced to the First Amendment setting. (See *Hoffman Estates*, *supra*, 455 U.S. at p. 495, fn. 7 ["Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand" (internal quotation and citations omitted)].)

Second, the Second Amendment is not analogous to the First Amendment. The right to free speech is largely unfettered, while the right to bear arms is not. First Amendment rights receive special protections because they are central to our democratic process. "The constitutional right of free expression is powerful medicine in a society as diverse and

populous as ours." (*Cohen v. California* (1971) 403 U.S. 15, 24.) The free speech protections of the First Amendment have been characterized as "the Constitution's most majestic guarantee," that are "essential to intelligent self-government in a democratic system." (Tribe, American Constitutional Law (2d ed. 1988) § 12–1, at pp. 785-86.) "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (*N.A.A.C.P. v. Button*, *supra*, 371 U.S. at pp. 432-433.)

In contrast, even as it held six years ago that the Second Amendment right to bear arms was an individual right, the Supreme Court affirmed that it did not intend to "cast doubt" on laws "imposing conditions and qualifications on the commercial sale of arms" because such laws were "presumptively lawful regulatory measures." (*District of Columbia v. Heller*, *supra*, 554 U.S. at pp. 626-627 and fn. 26.) The Supreme Court chose to "repeat those assurances" two years later, noting directly that "this constitutional right is subject to regulation." (*McDonald v. Chicago*, *supra*, 130 S.Ct. at p. 3047.) "Stated otherwise, the right announced in *Heller* does not render invalid otherwise lawful statutes of the types enumerated." (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1491.) Contrary to the Court of Appeal's conclusion, the restrictions on the sale of handgun ammunition fall within the "presumptively lawful regulatory measures" described in *Heller*. (See Dis. Op., p. 7 ["In my view, however, the challenged provisions fall within the reasonable conditions on the commercial sale of arms recognized in *Heller* and *McDonald* . . ."].) Directly comparing the First Amendment, with its special status in our democratic processes, to the Second Amendment, which the Supreme Court has held is properly subject to substantial regulation, and essentially equating them without offering additional analysis, is not appropriate.

Third, the restrictions on the sale of handgun ammunition created by the challenged statues are benign and reasonable. The Court of Appeal notes "that the right to possess and use a firearm in one's home for self-defense necessarily includes the right to acquire ammunition for the weapon." (Slip Op., p. 30.) But the statutes here do not burden the right to acquire ammunition. Requiring identification when purchasing ammunition is no more burdensome than requiring identification to purchase alcohol or over-the-counter cold remedies. By the same token, asking handgun ammunition purchasers to conduct their business face-to-face is in keeping with firearms restrictions generally. For example, a face-to-face transaction with identification is *already* required to purchase *a handgun itself* in California. (See Penal Code, § 26845, subd. (a) ["No handgun may be delivered unless the purchaser, transferee, or person being loaned the firearm presents documentation indicating that the person is a California resident"].) Extending this requirement to the purchase of ammunition for the handgun is hardly intrusive, and in no sense intrudes on the right to bear arms. (See Dis. Op., p. 7 ["requiring the ammunition seller or transferor to record the buyer's identification information" is a "minor inconvenience to the buyer" and not a "threat to inhibit his or her right to possess an operable handgun for self-defense"].)

Finally, the Court of Appeal announces a standard for triggering lenient treatment of a facial challenge to a statute involving firearms, and thus consideration of the Second Amendment, that is far too low. The Court of Appeal finds "noteworthy" a passage in *Hoffman Estates* inquiring whether the challenged statute "implicates no constitutionally protected conduct" before applying the "vague in all of its applications" test of *Salerno*. (Slip Op., p. 17, citing *Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495.) Citing a dictionary definition of "implicate," the Court then concludes that "the statutes in this case implicate (i.e., involve as a

consequence, corollary or natural inference) individual rights under the Second Amendment. (See Merriam-Webster's Collegiate Dict. (11th ed. 2011) p. 624.)" (Slip Op., p. 29.) Armed with this definition, which essentially substitutes the word "involve" for "implicates," the Court of Appeal finds "these statutes implicate a significant amount of constitutionally protected behavior." (Slip Op., p. 31.) But surely something more than a mere showing that a constitutional right is "involved" is needed, particularly in the face of the Supreme Court's declaration that limits on commercial sales of arms are presumptively lawful. Other than being statutes that involve ammunition for firearms, nothing about the challenged statutes would implicate any constitutionally protected conduct, let alone a substantial amount of such conduct.

There is thus no basis for the Court of Appeal's departure from the use of the ordinary strict unconstitutional-in-all-applications standard applicable to facial pre-enforcement constitutional challenges, even under its own newly-fashioned analytical framework. Even if this Court does not wish to answer definitively the question of the proper test for facial challenges in all cases, it should at a minimum confirm that the Court of Appeal erred in its analysis here. The lack of clarity perceived by the Court of Appeal has been exacerbated by its choice of the more lenient test, and the winding analytical path by which it reached its choice. The Court of Appeal states that it "do[es] not believe" that this Court "has ever endorsed" the stricter standard that the challenged law be shown "unconstitutional in all circumstances." (Slip. Op., p. 13.) But to the contrary, as the dissent noted, this Court *has* generally applied the stricter standard when considering facial challenges to criminal statutes in California. (Dis. Op., p. 9, citing *People v. Morgan*, *supra*, 42 Cal.4th at pp. 605-606, *People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1116, *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084, and *People v. Kelly*

(1992) 1 Cal.4th 495, 534.) Having taken review, this Court should reverse the decision of the Court of Appeal and clarify it was improper to use the more lenient standard in considering this pre-enforcement facial challenge to a criminal statute.

III. THE VAGUENESS ANALYSIS EMPLOYED BY THE COURT OF APPEAL DID NOT PROPERLY APPLY THE MORE LENIENT STANDARD

Having selected the more lenient standard, the Court of Appeal found that the statutes "provide no guidance or objective criteria" to determine whether ammunition is "principally for use" in a handgun. (Slip Op., p. 36.) The Court found that the statutes were therefore unconstitutional:

> We find no basis from the text of the challenged statutes, their legislative history, the record on appeal, or elsewhere upon which to conclude there is a common understanding or objective meaning of the term "handgun ammunition." The level of certainty necessary to provide fair notice of the proscribed conduct and adequate standards for compliance with the law is missing. Therefore, the statutory scheme is unconstitutional.

(Slip Op., p. 37.) In reaching this conclusion, the Court of Appeal found fault with the statutes in that they did not "establish a technical meaning or universally accepted standard" for what ammunition was "primarily for use" in a handgun. (Slip Op., p. 36.) This is not the test for vagueness under any standard.

A criminal statute must "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567 [citations and internal quotations omitted].) The fact that a statute contains "one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face." (*In re Jorge M., supra*, 23 Cal.4th at p. 886.) As the United States Supreme Court has emphasized,

> few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a 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.

(*Boyce Motor Lines v. United States* (1952) 342 U.S. 337, 340.)

"[I]t is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited." (*People v. Deskin* (1992) 10 Cal.App.4th 1397, 1400.) Accordingly, a statute "cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." (*People v. Morgan*, *supra*, 42 Cal.4th at p. 606, citing *Walker v. Superior Court* (1988) 47 Cal.3d 112, 143; see also *United States v. Powell* (1975) 423 U.S. 87, 93 [statute prohibiting the mailing of firearms "capable of being concealed on the person" was not unconstitutionally vague simply because potential uncertainty existed regarding the precise reach of the statute in marginal fact situations not currently before the court].) And "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 794.)

Fundamentally, due process does not require that a statute contain a list of all if its applications. For example, this Court rejected an argument that the requirement in the statute defining kidnapping that the victim be carried a "substantial distance" was unconstitutionally vague. (*People v. Morgan*, *supra*, 42 Cal.4th at p. 606.) The reasoning in *Morgan* rejected an argument very similar to that advanced by respondents here:

> "The law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,'

> 'substantial,' and the like. Indeed, a wide spectrum of human activities is regulated by such terms: thus one man may be given a speeding ticket if he overestimates the 'reasonable or prudent' speed to drive his car in the circumstances (Veh. Code, § 22350), while another may be incarcerated in state prison on a conviction of willful homicide if he misjudges the 'reasonable' amount of force he may use in repelling an assault. As the Supreme Court stated in *Go–Bart Importing Co. v. United States* (1931) 282 U.S. 344, 357, 'There is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissively vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind."

(*People v. Morgan*, *supra*, 42 Cal.4th at p. 606, quoting *People v. Daniels* (1969) 71 Cal.2d 1119, 1128-1129.)

By criticizing the statutes at issue for using "primarily for use" and not a term with "a common understanding or objective meaning," the Court of Appeal places in jeopardy scores of legislative acts. (Slip Op. at p. 37.) The dissent addressed this defect:

> The Legislature regularly has used terms such as "principally" and "primarily" to define prohibited conduct. (See, e.g., §§ 189, 243, subd. (f)([10]), 498, subd. (c)(1); Civ. Code, § 1802.4; Ins. Code, § 11580.06, subds. (a), (d); Lab. Code, § 108.2, subd. (b)(3); Veh. Code, § 435.5; Bus. & Prof. Code, § 10133.1, subd. (a)(5); Fam. Code, § 852, subd. (c); *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1132-1133 [ordinance that required business proprietor to bar minors unaccompanied by a parent or guardian from remaining in a store where "'firearms sales activity is the primary business performed at the site'" was not unconstitutionally vague].)

(Dis. Op., p. 11.)[5] Indeed, language substantially similar to the "principally for use" definition at issue here has been upheld in cases construing drug

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[5] Additional examples include Penal Code section 453, subdivision (b)(2) ("no device commercially manufactured primarily for the purpose of illumination shall be deemed to be an incendiary device"); Penal Code

(continued...)

paraphernalia and firearms statutes. (See, e.g., *Posters 'N' Things, Ltd. v. United States* (1994) 511 U.S. 513, 520-521 ["primarily intended . . . for use" drug paraphernalia law not unconstitutionally vague where language is "to be understood objectively and refers generally to an item's likely use"]; *Richmond Boro Gun Club, Inc. v. City of New York* (2d Cir. 1996) 97 F.3d 681, 684-686 ["designed for" assault weapon law not facially vague where "persons have plain notice of the applicability of the law to [a] core group of weapons"].)

The opinion below contained a plainly erroneous application of the vagueness test, under any facial challenge standard. This Court should reaffirm the Legislature's ability to use terms of common understanding such as are at issue here by reversing the Court of Appeal.

IV. THE CHALLENGED STATUTES SHOULD BE DECLARED CONSTITUTIONAL UNDER EITHER STANDARD

The statutes challenged here should survive even under the more lenient "generality of cases" standard employed by the Court of Appeal. Demonstrating that statutes are unconstitutional "in the generality or great majority of cases" has been described as a "heavy burden" for a litigant to meet. (*Coffman Specialties, Inc. v. Department of Transp.*, *supra*, 176 Cal.App.4th at p. 1145; see also *420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1339 [petitioners "bear the heavy burden" of meeting generality or great majority of cases standard].) The Court of Appeal's conclusion that a reasonable person cannot understand

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(...continued)
section 635 (criminalizing manufacture of "any device which is primarily or exclusively designed or intended for eavesdropping"); and Penal Code section 12022.2 (criminalizing possession of ammunition "designed primarily to penetrate metal or armor").

what is meant by ammunition "principally for use" in handguns, and that therefore the more lenient standard has not been met, is wrong.

The record developed in the trial court shows that there was a general understanding among witnesses about which cartridges were covered by the language of the statute. For example, plaintiffs Clay Parker, Steve Stonecipher, and Herb Bauer Sporting Goods identified in deposition fifteen different cartridges of ammunition among them as cartridges that were used more often in handguns than in rifles. (JA VIII 2207.) Even the ammunition expert hired by respondents conceded that at least seven cartridges of ammunition are unquestionably handgun ammunition. (JA VIII 2205, JA X 2717-18 [identifying .25 ACP, .45 GAP, 9mm Federal, 10mm Auto, .357 SIG, .44 Auto Mag, and .38 S&W as handgun ammunition].) And these concessions by respondents must be considered in the context of expert testimony from the state that sixteen different ammunition cartridges were loaded more frequently in handguns than in rifles. (JA VIII 2257 [identifying sixteen specific cartridges in calibers .45, 9mm, 10mm, .357, .38, .44, .380, .454, .25, and .32 as loaded more frequently in handguns].) Finally, respondents expressly conceded below that one ammunition cartridge, the .25 automatic, is used *exclusively in pistols*, and neither respondents nor appellants are aware of any rifle chambering this type of cartridge. (JA XI 2893; see also JA X 2737.)

In addition, the record in this case indicates that ammunition vendors divided their ammunition offered for sale into two main categories: "handgun" ammunition and "rifle" ammunition. (See JA IX 2306-2369.) Indeed, respondents expressly conceded that many ammunition vendors market or brand "some ammunition as 'handgun ammunition.'" (JA XI 2897.) Thus, as the dissent points out, both "Internet ammunition vendors and a respected ammunition encyclopedia categorize a number of cartridges as handgun ammunition," reinforcing the conclusion that "the meaning of

'ammunition principally for use in handguns' can be ascertained objectively." (Dis. Opn., p. 12.) On this record, there is a large group of ammunition cartridges for which there is no dispute about whether it is "principally for use in handguns." The presence of this substantial collection of cartridges that are indisputably within the definition means that the statutes are constitutional even under the less stringent "generality of cases" standard employed below.

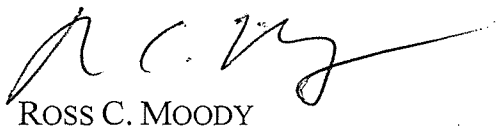
CONCLUSION

For the reasons stated above, appellants respectfully ask that the judgment entered below be reversed, and that judgment in favor of appellants be entered.

Dated: May 6, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
KATHLEEN A. KENEALY
Chief Assistant Attorney General
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General



ROSS C. MOODY
Deputy Attorney General
Attorneys for Defendants and Appellants

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CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANTS' OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,051 words.

Dated: May 6, 2014

KAMALA D. HARRIS
Attorney General of California

ROSS C. MOODY
Deputy Attorney General
Attorneys for Defendants and Appellants

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Sheriff Clay Parker, et al. v. State of California, et al.***

No.: **S215265**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 6, 2014, I served the attached **APPELLANTS' OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Carl Dawson Michel, Esq.
Clinton Barnwell Monfort, Esq.
Anna M. Barvir, Esq.
Michel & Associates, P.C.
180 East Ocean Blvd., Ste. 200
Long Beach, CA 90802
Attorney for Respondents

Court of Appeal of the State of California
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

County of Fresno
B.F. Sisk Courthouse
Superior Court of California
1130 O Street
Fresno, CA 93721-2220

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 6, 2014, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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