IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; 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. F062490

Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeffrey Y. Hamilton, Judge

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, FIFTH APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
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APPELLANT/PETITIONER: THE STATE OF CALIFORNIA ET AL. RESPONDENT/REAL PARTY IN INTEREST: SHERIFF CLAY PARKER ET AL.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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

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1. This form is being submitted on behalf of the following party (*name*): SHERIFF CLAY PARKER ET AL.

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

Full name of interested entity or person	Nature of interest (*Explain):*
(1) "SEE ATTACHMENT 2"	
(2)	
(3)	
(4)	
(5)	

[X] Continued on attachment 2.

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

Date: August 16, 2012

C.D. Michel
(TYPE OR PRINT NAME)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

ATTACHMENT 2

	Full Name of Interested Entity or Person	**Nature of Interest (Explain):**
1.	Barry Bauer	Herb Bauer Sporting Goods, Shareholder
2.	Reagan K. Bauer	Herb Bauer Sporting Goods, Shareholder
3.	Sheryle J. Bauer	Herb Bauer Sporting Goods, Shareholder
4.	Ray T. Giles	RTG Sporting Collectibles, LLC, Owner
5.	Tiffany Perdue	Able's Sporting Inc., Co-owner
6.	Lamar Ward	Able's Sporting Inc., Co-owner
7.	Greg Wright	Able's Sporting Inc., Co-owner
8.	Randy Wright	Able's Sporting Inc., Co-owner

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INTRODUCTION

This case presents a constitutional vagueness challenge to three new criminal statutes that would have regulated the transfer of "handgun ammunition" in California – Penal Code sections 12060, 12061, and 12318[1] (collectively, "the Challenged Provisions").

Respondents' challenges are based on the failure of these laws to sufficiently define "handgun ammunition" such that ordinary persons cannot determine what conduct is prohibited, making "arbitrary and discriminatory" enforcement of the law inevitable.

Confusion over what ammunition would be regulated by these statutes abounds. Although the Challenged Provisions purport to regulate only ammunition that is "principally for use" in handguns, ammunition is not limited to use in either handguns or rifles. So while "handgun ammunition" under the Challenged Provisions might be understood as ammunition that is used, or for use, more often in handguns, whether any given type of ammunition might be used more often in handguns than in rifles is not constant, and it depends upon a variety of considerations.

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[1] Effective January 1, 2012, Senate Bill 1080 altered the numbering of the statutes at issue. For the Court's convenience, Respondents herein use the prior numbering scheme to correspond with Appellants' Opening Brief and the proceedings below.

Respondents do not – and cannot – know what criteria will be used to determine whether any particular ammunition is "principally for use" in handguns. It is unclear whether the "principally for use" standard considers how any given ammunition has been used over time, or whether it considers only uses over the most recent year or years. The Challenged Provisions likewise include no guidance as to whether only usage in California should be considered, where the sale of many models of handguns are prohibited, or whether the analysis should consider usage in other jurisdictions since the laws prohibit the sale of "handgun ammunition" by out-of-state ammunition shippers. Whether or not a given type of ammunition is subject to regulation under the Challenged Provisions depends largely upon what test(s) are actually set forth by the "principally for use" standard, and what information is appropriately looked to in order to satisfy those test(s).

Ultimately, different types of ammunition are subject to varying usage trends in a given jurisdiction, over a given time period, by different classes of persons, and depending upon the availability and popularity of different firearms. And, as the lower court correctly noted, if an individual, ammunition vendor, or law enforcement officer is forced to consider and rely upon his or her own subjective interpretations of the Challenged Provisions, each is likely to conceive of a definition of "handgun

ammunition" that is in part, or to a great extent, different from any other person's. (Joint Appendix, volume XIV ["J.A. XIV"] 4043.) In failing to set forth the criteria that the "principally for use" standard is determined by, the Challenged Provisions provide neither individuals nor law enforcement with the vital information they need to determine what ammunition might be covered and to conform their behavior to the law.

Moreover, even if the meaning of the "principally for use" standard were ascertainable, the Challenged Provisions assign individuals and law enforcement with the impossible task of determining whether any given ammunition has been used, or will be used, "principally" in handguns. The record is clear on this point. In an attempt to identify ammunition that is regulated by the Challenged Provisions, the *ammunition expert* for the very agency charged with enforcing the laws undertook an extensive, multi-step research process, relying on information not generally available to the public and on several arbitrary assumptions about the scope of the "principally for use" standard. In reality, whether any given ammunition has been used, or will be used, more often in handguns than rifles cannot be ascertained, for that information simply does not exist.

Although the Court should review the Challenged Provisions under a heightened vagueness standard because they impinge upon

constitutionally protected conduct, under threat of criminal prosecution, and are devoid of any mens rea requirement, the Challenged Provisions are unconstitutionally vague under *any* test – because they fail to provide notice of whether *any* ammunition is subject to regulation under the law.

Ultimately, the trial court properly held that, because no objective standard exists to determine what ammunition is regulated, the Challenged Provisions are unconstitutional on their face. The Court should thus uphold the judgment entered in the court below.

STATEMENT OF THE CASE

Passed in 2009, Assembly Bill 962 ("AB 962") added sections 12060, 12061, and 12318 to the California Penal Code. Section 12060 contains the definitions applicable to sections 12061 and 12318. Section 12061 requires "handgun ammunition" vendors[2] to: (1) preclude prohibited employees from accessing "handgun ammunition;" (2) store "handgun ammunition" out of the reach of customers; and (3) record specific information about every transfer of "handgun ammunition" made by the vendor and obtain a thumb print from the customer. Section 12318 requires

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[2] Section 12060, subdivision (c) defines a "vendor" as: "any person, firm, corporation, dealer, or 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."

that all transfers of "handgun ammunition" be conducted in a "face-to-face" transaction, effectively prohibiting all internet and mail order sales. Sections 12061 and 12318 each impose misdemeanor criminal liability, punishable by imprisonment not exceeding six months, or by fine not exceeding $1,000, or by both. (Pen. Code, §§ 19, 12061, subd. (c)(1), 12318, subd. (a).)

Section 12060, subdivision (b) provides the definition of "handgun ammunition" applicable to sections 12061 and 12318. It provides:

" 'Handgun ammunition' means handgun ammunition as defined in subdivision (a) of Section 12323, but excluding ammunition designed and intended to be used in an 'antique firearm' as defined in Section 921(a)(16) of Title 18 of the United States Code." Section 12323, subdivision (a), in turn, defines "handgun ammunition" as: "ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person [hereafter, "handguns"], as defined in subdivision (a) of Section 12001, notwithstanding that the ammunition may also be used in some rifles."

Taken together then, "handgun ammunition" is defined as all ammunition "*principally for use* in [handguns] . . . , notwithstanding that the ammunition may also be used in some rifles," but excluding

"ammunition designed and intended to be used in an 'antique firearm.' " (Pen. Code, § 12060, subd. (b), italics added.)[3]

Soon after the passage of AB 962, widespread confusion surfaced regarding which ammunition transfers would be regulated by the newly passed law. That confusion was shared by individuals and ammunition vendors, who contacted Respondents' attorneys seeking advice on how to comply with the Challenged Provisions. (J.A. VIII 2008.) Those calls prompted Respondents' attorneys to contact a member of the Bureau of Firearms for Appellant, the California Department of Justice, who stated that she did not know and can not say whether certain ammunition would be considered "handgun ammunition" under the Challenged Provisions. (J.A. IV 0955-0959.)

On June 16, 2010, Sheriff Clay Parker, Herb Bauer Sporting Goods, California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Stephen Stonecipher (collectively, "Respondents") filed a complaint in the Fresno Superior Court challenging

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[3] Although section 12323, subdivision (a) was enacted in 1982 and is referred to by section 12316, subdivision (a)(1)(B) and others, the enactment of sections 12061 and 12318 mark the first time the "principally for use" in handguns standard has been employed as the sole mechanism by which to determine what ammunition is regulated by California firearms statutes. (See *infra* fn. 7.)

the validity of Penal Code sections 12060, 12061, and 12318 on the grounds that the laws were void for vagueness under the due process clause of the Fourteenth Amendment. (J.A. I 0014.) Appellants the State of California, Kamala Harris, and the California Department of Justice (collectively "DOJ") filed their Answer on August 2, 2010. (J.A. I 0052-0074.)

On August 19, 2010, purportedly to "bring some clarity to the law for ammunition vendors" who had pointed out the vagueness problems inherent in AB 962, Assemblyman Kevin de León amended then pending Assembly Bill 2358 ("AB 2358") by replacing Penal Code section 12323, subdivision (a)'s "principally for use" in handguns language with a "list of ammunition calibers." (J.A. III 0835-0836, IV 0921-0932, 0934, VII 1928-1944, quoting *Hearing on A.B.* 2358 *Before the S. Pub. Safety Comm.*, 2010 Leg., 2009-2010 Reg. Sess. (Cal. 2010) (statement of Assem. Kevin de León, Sponsor).) AB 2358 ultimately failed, and the unintelligible standard of the Challenged Provisions remained. (J.A. III 0835, IV 0914-0919, 0921-0932, 0934, VII 1918-1926, 1928-1944.)

Respondents thereafter moved for preliminary injunction, seeking to prevent the enforcement of the Challenged Provisions pending a decision of this case on the merits. (J.A. I 0076-0078.) At the hearing on November 17, 2010, Respondents withdrew that motion, and the parties, with the

participation of the trial court, negotiated an expedited briefing schedule by which summary judgment could be heard, a trial could be held, and a decision would be rendered before the majority of the provisions took effect in February 2011. (J.A. XIV 4192.)

In preparation for summary judgment, the parties conducted extensive discovery in early December 2010. (J.A. V 1194-1219, 1221-1225, 1227-1239, 1241-1336, 1338-1422, XI 3089, 3093-3127, 3131-3173, 3177-3267, 3271-3311, 3719-3722.) In his deposition, DOJ's designated *ammunition expert* admitted that he undertook an extensive, multi-step research process to determine what ammunition is "principally used in handguns." That process involved looking at five years of California handgun sales records – *without comparing rifle sales* – and determining the "most popular" calibers of handguns to identify the calibers of ammunition he felt were "principally for use" in handguns. (J.A. V 1352-1378; see also *infra* Part I.B.4.) DOJ's expert then reviewed websites and written materials, and he considered his own subjective experience to further assist him in his determination. (J.A. V 1352-1378; see also *infra* Part I.B.4.) The result of DOJ's ammunition expert's research was ultimately a list of sixteen cartridges (out of thousands) that DOJ asserts the Challenged Provisions apply to – although DOJ's interpretation of which

ammunition is encompassed by the Challenged Provisions changed over the course of this litigation. (J.A. V 1263-1265, 1277-1279, VIII 2257-2258; see also *infra* Part I.B.4 & fn. 15.)

On January 31, 2011, the court granted Respondents' motion for summary adjudication on their facial vagueness claim seeking declaratory and injunctive relief against the Challenged Provisions (J.A. XIV 4032.) In its written order, the court held that the Challenged Provisions are unconstitutionally vague on their face because they "failed to be definite enough to (1) provide a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." (J.A. XIV 4050, 4033-4055.) On February 22, 2011, the court entered judgment in Respondents' favor. (J.A. XIV 4055-4060.) DOJ thereafter filed a timely notice of appeal. (J.A. XV 4271.)

Following entry of judgment, Respondents filed a memorandum of costs seeking $11,355.63 for litigation expenses related to filing and motions, depositions, service of process, and necessary travel. (J.A. XIV 4122-4128.) DOJ filed a motion to tax costs, asking the court to strike a number of expenses, including filing fees for Respondents' Motion for Preliminary Injunction. (J.A. XIV 4151-4175). The trial court granted DOJ's motion in part, and denied it in part, taxing costs by $2,517.18. (J.A.

XV 4277-4279.) The trial court declined to tax costs for the filing fee associated with Respondents' Motion for Preliminary Injunction, reasoning that DOJ had failed to meet its burden of showing Respondents' "motion for preliminary injunction was unnecessary or unreasonable." (J.A. XV 4277.) On June 10, 2011, DOJ appealed that denial. (J.A. XV 4281-4286.)

BACKGROUND REGARDING AMMUNITION

Due to the technical subject matter of this litigation, Respondents here provide a brief overview of ammunition and its usage in modern firearms for the Court's convenience and information.

Modern rifles and pistols fire "self-contained metallic ammunition." All such ammunition consists of essentially the same components: A metal casing that holds a bullet, a charge of powder, and a primer to ignite the powder. (J.A. IV 0982, VIII 2022, 2179-2180.) Three terms, in order of increasing specificity, are used to describe self-contained metallic ammunition: "ammunition," "caliber," and the given "cartridge" name. (J.A. VIII 2033, 2180.) Reference to the caliber only is not an accurate method of identifying a particular type of ammunition.[4] Instead,

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[4] Indeed, "caliber" may be defined simply as "the size of a bullet or shell as measured by its diameter," Webster's New World Dict. (3d college ed. 1991), page 198, or as "a numerical term, without the decimal point, included in a cartridge name to indicate a rough approximation of the bullet diameter," Glossary of the Association of Firearm and Toolmark Examiners

ammunition is typically and accurately referred to by its cartridge name because the caliber often does not reflect the cartridge's actual bullet diameter and other characteristics specific to that ammunition. (J.A. VIII 2032-2033, 2180-2181.) Within any given caliber, there is generally a number of cartridges of varying lengths, bullet weights, velocities, and true bullet diameters, some of which may be used more often in handguns, and some of which may be used more often in rifles. (J.A. VIII 2033, 2181.)

Virtually all modern self-contained metallic ammunition, of which there are literally thousands of varieties, can be used safely in both handguns and rifles. (J.A. VIII 2035, 2181.) This is generally referred to as "cartridge interchangeability." (J.A. VIII 2022.) Thus, a single box of cartridges may be consumed by use in a rifle, a pistol, or both. (J.A. VIII 2022.) Ultimately, whether a given cartridge is used more often in handguns than rifles changes over time, depending on the introduction of new models of handguns and rifles and the changing popularity of different firearms that utilize that cartridge. (J.A. VIII 2036.) The use of different ammunition in handguns and rifles also varies widely by geographic region depending on the types of firearms that are lawfully possessed and the types of shooting applications popular at the time. Further, public and privatized military and

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(2d ed. 1985), page 32.

law enforcement use of various firearms can impact whether different varieties of ammunition are used more frequently in handguns or in rifles. (J.A. VIII 2036-2037.)

The takeaway is that whether a particular cartridge is used in a handgun or a rifle, and whether it is used *more often* in handguns or rifles, is ultimately determined by the changing needs and desires of the end user and the marketplace. (J.A. VIII 2022.)

Respondents (and their expert) do not know of any source from which it can be determined which ammunition is used, or will be used, more often in handguns. (J.A. VIII 2037.)

STANDARD OF REVIEW

The Court considers the constitutionality of the Challenged Provisions, the first issue on appeal, de novo. "Ultimately, the interpretation of a statute is a question of law for the courts to decide." (*People v. Cole* (2006) 38 Cal.4th 964, 988.) "In such cases, appellate courts apply a de novo standard of review." (*People v. Health Labs. of N. Am.* (2001) 87 Cal.App.4th 442, 445, citing *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801.)

DOJ's challenge to the trial court's partial denial of their motion to tax costs is reviewed under the more lenient abuse of discretion standard.

(*Ladas v. Cal. State Auto Assn.* (1993) 19 Cal.App.4th 761, 774. ["Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion."].) A trial court abuses its discretion only when "its decision is beyond the bounds of reason" and it acts in an "irrational or illogical" manner so as to "transgress the confines of the applicable principles of law.' " (*Horsford v. Bd. of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 393.)

ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THAT THE CHALLENGED PROVISIONS ARE UNCONSTITUTIONALLY VAGUE ON THEIR FACE

A. Standard Governing Facial Vagueness Challenges

The due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution, each guarantee " 'a reasonable degree of certainty in legislation, especially in the criminal law . . . .' " (*People v. Heitzman* (1994) 9 Cal.4th 189, 199, quoting *In re Newbern* (1960) 53 Cal.2d 786, 792.) This is particularly true "where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." (*Colautti v. Franklin* (1979) 439 U.S. 379, 391; see also *People v.*

Barksdale (1972) 8 Cal.3d 320, 327 ["stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on fundamental rights"], internal quotations omitted.)

"A regulation is constitutionally void on its face when, as a matter of due process, it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.' " (*Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 773-774 [hereafter *Gatto*], quoting *Connally v. Gen. Const. Co.* (1926) 269, U.S. 386, 391 [hereafter *Connally*].) To pass constitutional muster, a law must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited *and* in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357 [hereafter *Kolender*], italics added.)

Accordingly, to prevail, Respondents were required to establish that *either*: (1) the Challenged Provisions failed to provide notice to persons of ordinary intelligence as to what ammunition, and therefore what ammunition transactions, are regulated; or (2) that the Challenged Provisions' definition of "handgun ammunition" is so vague that, without more, it fails to provide sufficient standards to prevent arbitrary and discriminatory enforcement of the law. (See *Kolender*, *supra*, 461 U.S. at p.

357.) The trial court properly found that the Challenged Provisions fail on *both* counts, rendering them unconstitutionally vague on their face. (J.A. XIV 4073, 4078-4079, 4084.)

DOJ attempts to inject another hurdle into the analysis, arguing that the Challenged Provisions must be unconstitutionally vague in every conceivable application and that if there is even one valid application (out of thousands of invalid ones), the Challenged Provisions must be upheld. (See Appellants' Opening Br. ["A.O.B."] 10.) DOJ draws support from case law addressing *general* facial challenges wherein California state courts have applied one of two standards. (A.O.B. 6.) Under the more lenient standard, a party need only establish that the challenged law is unconstitutional "in the generality" of cases. (*Gaurdianship of Ann S.* (2009) 45 Cal.4th 1110, 1126, quoting *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673.) Under the stricter test, the facial challenger must establish the statute is void in all of its applications. (*Gaurdianship of Ann S.*, *supra*, 45 Cal.4th at p. 1126.)

Precedent, however, does not command application of either test in the specific context of facial *vagueness* challenges – and particularly as to criminal laws with the potential to inhibit constitutionally protected conduct like the right to keep and bear arms. (See *infra* Part I.A.1.) If the Court

nonetheless opts to adopt one of the general facial tests, the "generality of cases" standard must apply. (See *infra* Part I.A.2.)

1. The Court Should Reject DOJ's Attempt to Apply a General Facial Test in the Vagueness Context; It Should Review Respondents' Challenge Under an Appropriately Rigorous Vagueness Test

In the specific context of a facial vagueness challenge, courts have routinely rejected the application of general tests requiring invalidity in either all or the generality of applications. (See, e.g., *Kolender*, *supra*, 461 U.S. at p. 355-356 [facial vagueness challenge to law requiring the production of "credible and reliable" identification upon demand by law enforcement]; *Heitzman*, *supra*, 9 Cal.4th 194 [facial vagueness challenge to law imposing criminal liability for "wilfully . . . permit[ting]" an elder or dependant adult to suffer pain]; *Gatto*, *supra*, 98 Cal.App.4th at p. 774 [facial vagueness challenge to county fair dress code]. They instead focus solely on the two prongs of the void for vagueness test – sufficient notice to persons of ordinary intelligence and the potential for "arbitrary and discriminatory enforcement." (See e.g., *Kolender*, *supra*, 461 U.S. at p. 356; *Heitzman*, *supra*, 9 Cal.4th at p. 199; *Gatto*, *supra*, 98 Cal.App.4th at p. 774.) And the rigor with which the prongs of the vagueness doctrine are applied increases if the court has before it a challenge to a law that, among other things, abuts upon constitutionally protected conduct, imposes

criminal penalties, and/or lacks a scienter requirement. (See *Village of Hoffman Estates v. Flipside* (1982) 455 U.S. 489, 499 [hereafter *Hoffman Estates*].)

In *Kolender v. Lawson*, the United States Supreme Court invalidated a law as "unconstitutionally vague on its face" without reference to whether it was vague in all or most of its applications. There, the statute at issue authorized law enforcement officers to stop a person on the street and demand that he or she provide "credible and reliable" identification. (*Kolender*, *supra*, 461 U.S. at pp. 355-356.) But the statute contained no standard for determining whether a person had indeed provided identification of sufficient credibility or reliability, "vest[ing] virtually complete discretion in the hands of the police . . . ." (*Id.* at p. 358.) Because the law encouraged "arbitrary and discriminatory enforcement," the Court deemed it unconstitutionally vague on its face. (*Id.* at p. 361.)

The *Kolender* Court found the law facially vague despite *at least* one unquestionably valid application of the law – namely, the flat refusal to provide any identification upon request. (See *Kolender*, *supra*, 461 U.S. at p. 372 (dis. opn. of White, J.).) Even though sharply criticized by the dissent, which urged the expansion of the "vague in all applications" rule articulated in *Hoffman Estates* to cases challenging laws with the potential

to impinge upon constitutional rights, *ibid.*, the clear majority rejected an invitation to save the law on the grounds that one or more valid applications could be imagined. Because the statute failed to provide any objective standard guiding its enforcement, thus encouraging the arbitrary and discriminatory application of the law, the majority invalidated it on its face. (*Id.* at p. 361. (maj. opn.).)

It was important in *Kolender* that the challenged law implicated the "constitutional right to freedom of movement" and had the "potential [to] arbitrarily suppress[] First Amendment liberties." (*Kolender*, *supra*, 461 U.S. at p. 358, citing *Shuttleworth v. City of Birmingham* (1965) 382 U.S. 87, 91, and *Kent v. Dulles* (1958) 357 U.S. 116, 126.) Just the previous year, the Supreme Court stated in *Hoffman Estates*, that a "law that does *not* reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. (455 U.S. at p. 497, italics added.) To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications." (*Ibid.*) *Kolender* did not overturn *Hoffman Estates*, so the Court's stark departure from the void-in-all-applications test strongly suggests that when an uncertain law *does* implicate constitutional conduct – even outside the First Amendment

context – a vagueness challenger need not establish that the law is vague in every conceivable application of the law to prevail.

It is also important to note that even in *Hoffman Estates*, the United States Supreme Court, in reviewing a law under the vague-in-all-applications standard, instructed that heightened vagueness review is appropriate where the challenged law imposes criminal penalties and/or lacks a mens rea requirement. (455 U.S. at pp. 498-500.) The Court in fact noted that a "relatively strict [vagueness] test" may be warranted where the law was merely quasi-criminal in nature – even under a void-in-all-applications analysis. (*Id.* at p. 499.)

Here, the Challenged Provisions abut upon Second Amendment conduct, they impose criminal penalties for violations, and they are devoid of any limiting scienter requirement. It is therefore proper to consider Respondents' vagueness challenge under the analysis undertaken by the United States Supreme Court in *Kolender* and similar cases.

a. The Court Should Apply a Heightened Vagueness Standard Because the Challenged Provisions Abut Upon Conduct Protected by the Second Amendment

"[T]he vice of unconstitutional vagueness is further aggravated where . . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." (*Bagget v.*

Bullitt (1964) 377 U.S. 360, 372 [hereafter *Baggett*], internal quotations omitted.) As the Court signaled in *Kolender*, where the Court applied heightened vagueness review to a law impacting the fundamental right to travel, laws that abut upon any constitutionally protected freedom – not only First Amendment conduct – demand greater clarity. (See *Hoffman Estates*, *supra*, 455 U.S. at p. 199; *Kolender*, *supra*, 461 U.S. at pp. 358-362.) But even if heightened vagueness review were appropriately limited to certain fundamental rights, the Supreme Court recently confirmed that the Second Amendment is deserving of protections similar to the First Amendment. (*District of Columbia v. Heller* (2008) 554 U.S. 570, 592-595 [hereafter *Heller*]; *McDonald v. City of Chicago* (2010) __ U.S. __, 130 S. Ct. 3020, 3042 [hereafter *McDonald*].)

Heller and *McDonald* confirmed that the Second Amendment protects an individual, fundamental right to possess functional firearms for self-defense. (*Heller*, *supra*, 554 U.S. at p. 635; *McDonald*, *supra*, 130 S. Ct. at p. 3042.) And handguns are constitutionally protected arms. Indeed, they "are the *most* popular weapon chosen by Americans for self-defense in the home." (*Heller*, *supra*, 554 U.S. at p. 629, italics added.) The right to arms necessarily includes the right to acquire firearms *and* ammunition, a necessary component of a functional firearm. (See *Andrews v. State* (1871)

50 Tenn. 165, 178 [8 A. Rep. 8, 13] ["The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms. . . ."]; see also *United States v. Marzzarella* (3d Cir. 2010) 614 F.3d 85, 92 fn. 8 [prohibiting the commercial sale of protected arms is untenable under *Heller*]; Order at 10, *Bateman v. Perdue*, No. 5:10-265 (E.D. N.C. Mar. 29, 2012) [laws prohibiting the purchase of firearms and ammunition conflict with the Second Amendment, regardless of whether they restrict the possession of such arms].)

It is important to note that the Second Amendment need not be violated in order to trigger heightened vagueness review. To be sure, such an approach would defeat the purpose of requiring a higher standard of clarity, as challengers would simply bring suit under the violated right.

Here, the Challenged Provisions abut upon the fundamental, individual right to keep and bear arms. More specifically, they impinge upon the right to purchase ammunition that is necessarily encompassed by the Second Amendment bundle of rights. In addition to regulating ammunition purchases by requiring registration of all "handgun ammunition" sales, the Challenged Provisions flatly ban all internet and mail-order sales of "handgun ammunition." In doing so, the Challenged

Provisions completely prohibit an extremely common and popular means of purchasing "handgun ammunition."

Moreover, the blanket prohibition on mail-order access to ammunition effectively eliminates access to protected ammunition in remote areas and to rare ammunition generally sold only via internet or mail-order catalogues. The Challenged Provisions would also drive up the cost of ammunition sold at in-state, brick-and-mortar ammunition retailers.

And the record in this cases demonstrates that out-of-state vendors had already ceased or planned to cease selling and shipping *all* ammunition to potential consumers in California, out of fear of prosecution under the Challenged Provisions, because they could not determine which ammunition was prohibited. (J.A. VIII 2040-2041, 2044-2045, 2048-2049.)

So, while the question of whether the Challenged Provisions and similar restrictions violate the Second Amendment is not before this Court, the Challenged Provisions plainly abut upon and threaten to inhibit the exercise of rights protected by the Second Amendment.

Accordingly, the Court should conduct its review of the Challenged Provisions under a more rigorous vagueness test, and uphold them only if they provide the highest standards of clarity.

b. The Court Should Apply a Heightened Vagueness Standard Because the Challenged Provisions Impose Criminal Sanctions *and* Lack a Scienter Requirement

Laws that impose criminal sanctions likewise require more exacting review. (*Hoffman Estates*, *supra*, 455 U.S. at pp. 498-499.) On the other hand, courts have recognized that a scienter requirement may mitigate a law's vagueness. (*Id.* at pp. 497-499.) Because the Challenged Provisions impose criminal sanctions *and* lack a scienter requirement, the constitution demands the greatest clarity.

Here, the Challenged Provisions impose misdemeanor criminal sanctions. (Pen. Code, § 12061, subd. (c).) Nothing in the law requires one to know that he or she is transacting in "handgun ammunition" to be guilty of a violation. And nothing permits one to rely on his or her subjective understanding or personal experience of what constitutes "handgun ammunition" in his or her defense. Indeed, a vendor who inadvertently sells and fails to register the sale of even one round of ammunition that a law enforcement officer deems "handgun ammunition" faces misdemeanor charges "punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both." (See Pen. Code, §§ 19, 12061, subd. (c).)

Because the Challenged Provisions levy criminal penalties and lack a

scienter requirement, the Court should only uphold the Challenged Provisions if they meet an appropriately higher standard of clarity.[5]

2. If the Court Chooses to Adopt a General Facial Test, the "Generality of Cases" Standard Must Apply

Should the Court be inclined to apply one of the tests used for general facial challenges, it must apply the more lenient, "generality of cases" standard. Typically, "[u]nless a statute facially tenders a present total conflict with constitutional provisions, any overbreadth in a statute is *ordinarily* cured through case-by-case analysis." (*In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 49, citing *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 672, italics added.) An important exception to this

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[5] DOJ contends that arbitrary and discriminatory enforcement of the Challenged Provisions is unlikely because law enforcement must have "probable cause to show that the ammunition at issue is used principally [in handguns] consistent with the terms of the Challenged [Provisions]" before making an arrest. That argument misses the point.

Surely, *no* criminal law could be invalidated on vagueness grounds if the requirement of probable cause to arrest served as a check on arbitrary and discriminatory enforcement – because *all* arrests require probable cause in the first place. Further, the Challenged Provisions do not give law enforcement unbridled discretion without probable cause that a violation of the law has taken place. (See J.A. XIV 4047.) Instead, they provide no method by which law enforcement personnel can determine what ammunition is properly "handgun ammunition" consistent with the Challenged Provisions, the transfer of which gives rise to criminal liability. (See J.A. XIV 4047.)

rule is recognized when statutes impinge upon constitutional rights and impose criminal liability – most often in First Amendment challenges, but in other contexts as well. (*Ibid.*) Such statutes may be declared invalid on their face if case-by-case, "as applied" analysis "would entail the vague or uncertain future application of the statute, thereby inhibiting the exercise of constitutional rights." (*Ibid.*, citing *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 543-544, and Tribe, American Constitutional Law (1978) §§ 12-24, 12-25, pp. 710-714.)

Because the Challenged Provisions both impinge upon conduct protected by the Second Amendment and levy criminal sanctions for their violation, the Challenged Provisions should be confirmed invalid if they are vague in even the "generality of cases." Moreover, case-by-case analysis will simply inundate the courts with countless suits asking whether a particular cartridge is covered by the Challenged Provisions. This will give rise to inconsistent rulings and the "uncertain future application of the law." Adoption of the more lenient standard is thus appropriate here.

a. The "Void in All Applications" Test Is Inappropriate Because the Challenged Provisions Impinge Upon Constitutional Conduct and Levy Criminal Sanctions

As discussed above, laws that levy criminal sanctions and have the potential to impinge or abut upon constitutionally protected conduct

demand the greatest clarity. (*Bagget*, *supra*, 377 U.S. at pp. 371-372; *Hoffman Estates*, *supra*, 455 U.S. at pp. 497-499.) In such circumstances, the vagueness challenger generally need not establish that the law is "vague in all of its applications" to prevail. (See *Kolender*, *supra*, 461 U.S. at pp. 357-358; *Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495, 498-499.) In California – although typically arising in the context of a general facial challenge – this amounts to application of the more lenient, "generality of cases" standard. Because, as described above, the Challenged Provisions touch upon conduct affirmatively protected by the Second Amendment and levy criminal sanctions for each violation, the "generality of cases" standard must apply if the Court opts to choose between the tests typical of general facial challenges.

In a footnote, DOJ argues that *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679, forecloses application of this more lenient standard because it "has been limited to cases involving the First Amendment or abortion rights." (A.O.B. 7 fn. 6.) DOJ's reliance on *Sanchez* is misplaced. That case involved a general facial challenge to the city's at-large election system that allegedly precluded Latino voters from electing the candidate of their choice in violation of the California Voting Rights Act. (*Sanchez*, *supra*, 145 Cal.App.4th at p. 679.) The court there

adopted the *Salerno* standard that, to succeed, a facial challenger must establish the law is "void in all applications," and stated that it would continue to apply *Salerno* to cases outside the First Amendment and abortion contexts. (*Ibid.*) But *Salerno*, aside from almost never actually being applied by the Supreme Court,[6] is simply not the appropriate test for facial *vagueness* challenges to laws that impinge upon constitutionally protected conduct. (See, e.g., *Kolender*, *supra*, 461 U.S. 352 [refusing to apply "all applications" test in a facial vagueness challenge to a law implicating constitutionally protected conduct outside the First Amendment in the face of at least one undoubtedly valid application of the law].)

Indeed, *Chicago v. Morales* (1999) 527 U.S. 41, rejected the

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[6] As Justice Stevens explained in *Washington v. Glucksberg* (1997) 521 U.S. 702:

> The appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this Court. [Citation.] Upholding the validity of the federal Bail Reform Act of 1984, the Court stated in *United States v. Salerno* [(1987) 481 U.S. 739], that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." [*Id.* at p. 745.] *I do not believe the Court has ever actually applied such a strict standard*, even in *Salerno* itself, and the Court does not appear to apply *Salerno* here.

(*Id.* at pp. 739-740 (conc. opn. of Stevens, J.), italics added.)

dissent's view that "to mount a successful facial challenge, a plaintiff must establish that no set of circumstances exists under which the Act would be valid.' " (*Id.* at p. 55, fn. 22 [citing *id.* at pp. 78-79 (dis. opn. of Scalia, J.), and *United States v. Salerno* (1987) 481 U.S. 739, 745].) "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . ." (*Id.* at p. 55, fn. 22 (plur. opn. of Stevens, J.).) "Since we . . . conclude that vagueness permeates the ordinance, a facial challenge is appropriate." (*Ibid.*)

Moreover, the Second Amendment has only recently been confirmed as protecting an individual right to keep and bear arms and deserving of protections similar to the First Amendment. (*Heller*, *supra*, 554 U.S. at pp. 595, 634-35; *McDonald*, *supra*, 130 S. Ct. at p. 3042.) After *Heller*, it makes little sense to require the application of the strictest test for analyzing general facial challenges in the specific context of a facial vagueness challenge to a law abutting upon Second Amendment conduct. That suggestion runs counter to case law demanding the highest standards of clarity of laws that abut upon constitutional rights, *Hoffman Estates*, *supra*, 455 U.S. at page 499, and rejecting the application of the "vague in all applications" standard (a *Salerno*-type test) in that very context, *Kolender*,

supra, 461 U.S. at p. 358 & fn. 7.)

Because the Challenged Provisions abut upon fundamental rights affirmatively protected by the Constitution and impose criminal sanctions, the Court should apply the "generality of cases" standard to Respondents' vagueness challenge.

b. The "Void in All Applications" Test Is Inappropriate Because Piecemeal Adjudication of the Challenged Provisions Will Inundate the Courts and Promote Uncertain Future Application of the Law

DOJ hides behind the *Salerno* standard to insulate the Challenged Provisions from facial invalidity, claiming that there might be one or more ammunition cartridges (out of thousands) to which the law validly applies. But the law is so vague that essentially every ammunition transfer gives rise to a constitutional vagueness challenge. Instead of drafting a statute providing sufficient notice as to what ammunition is regulated, the Legislature seems to have impermissibly delegated that responsibility to the courts. (See *City of Chicago v. Morales* (1999) 527 U.S. 41, 60.) But "[t]he Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.' " (*Ibid.*, quoting *United States v. Reese* (1876) 92 U.S. 214, 221; *Kolender*, *supra*,

461 U.S. at p. 358, fn. 7.)

Suggesting that the court proceed on a "cartridge-by-cartridge" basis to determine the sweep of the Challenged Provisions is untenable. Such a course threatens to mire the courts in thousands of suits to determine on a case-by-case basis whether, at any given time, *every single ammunition cartridge* sold in or shipped to California is ammunition "principally for use" in handguns. So many individual judgments will no doubt lead to the "uncertain future application of the [law]" as each court relies on its own interpretation of the "principally for use" standard and its own application of that standard. The bounds of a criminal law should not be left so uncertain under any circumstances, but particularly when the exercise of rights affirmatively protected by the constitution are at stake.

Because piecemeal adjudication will promote the "uncertain future application of the law," the Challenged Provisions should be confirmed invalid if they are vague in the "generality of cases." (See *In re Marriage of Siller*, *supra*, 187 Cal.App.3d at p. 49.)

B. The Challenged Provisions Are Unconstitutionally Vague Under *Any* Test

Regardless of which test the Court ultimately applies, the Challenged Provisions are invalid because they fail even the strictest test. They " 'inevitably pose a present total and fatal conflict with applicable

constitutional prohibitions,' " for it is impossible to know how the law applies to *all* persons and to *all* ammunition, and not merely in some "marginal" or even "hypothetical" situation. (See *Arcadia Unified Sch. Dist. v. Dept. of Educ.* (1992) 2 Cal.4th 251, 267, quoting *Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180-181.)

The Challenged Provisions are vague in all applications because the "principally for use" in handguns language does not provide clarification as to the meaning of, or what is required by, this standard, and it is impossible to determine whether any given ammunition actually meets that standard at any given time.[7]

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[7] At the trial court, DOJ improperly argued that the Challenged Provisions were not "invalid in all . . . applications" because the "principally for use" language has a valid application in section 12316, subdivision (a)(1)(B) (a law not challenged in this lawsuit pertaining to the sale of "handgun ammunition" to those adults under 21 years of age). DOJ abandons this argument on appeal – and understandably so.

To establish that the Challenged Provisions are unconstitutionally vague, Respondents need not establish that any provision that might reference section 12323's "handgun ammunition" definition or that might use words included in that statute are vague in all applications of *those* statutes. In isolation, the definition of "handgun ammunition" *is* unconstitutionally vague. But section 12316, subdivision (a)(1)(B), defines "ammunition" as:

> [H]andgun ammunition as defined in subdivision (a) of Section 12323. Where ammunition or reloaded ammunition may be used in both a rifle and a handgun, it may be sold to a person who is at least 18 years of age, but less than 21 years

The Challenged Provisions expose individuals, ammunition retailers, and ammunition shippers to criminal liability for *every* transfer of "handgun ammunition." But those bound to follow the law and those bound to enforce it can *never* know which ammunition transfers rightly give rise to that liability. The best anyone can do is venture a guess based on their subjective understanding of the statutory language and their subjective knowledge of ammunition usage in any given jurisdiction, at any given time.

The trial court rightly recognized that individuals, ammunition vendors, and law enforcement personnel are all unable to determine what constitutes "handgun ammunition" under the Challenged Provisions, and held that no objective standard exists for determining what ammunition fits

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> of age, if the vendor reasonably believes that the ammunition is being acquired for use in a rifle and not a handgun.

It thus brings some clarity to the statute's scope beyond that provided for by section 12323, subdivision (a), because it includes additional language authorizing the retailer to determine whether any given ammunition is "handgun ammunition" based on a subjective understanding of the *purchaser's intended use*.

Conversely, the Challenged Provisions do not consider the intended usage of the purchaser, and they provide no guidance beyond section 12323, subdivision (a). Instead, they mark the first time that the "principally for use" standard has been employed as the sole mechanism for determining what ammunition is "handgun ammunition." (See *supra* fn. 3.) Ultimately, the Challenged Provisions are vague in all applications, regardless of the constitutionality of section 12316.

DOJ's definition of "handgun ammunition." (J.A. XIV 4042-4047.) Instead, the court found, those bound to follow the law and those bound to enforce it are each left to determine what ammunition meets the statutory definition based on their individual, subjective understanding. (J.A. XIV 4042-4043.) This gave the court pause when it astutely recognized that "[i]f a person (Law Enforcement or citizen) or ammunition vendor is forced to consider and rely upon their subjective experiences . . . , each person or ammunition vendor is likely to conceive of a definition of 'handgun ammunition' that is in part, or to a great extent, different from any other person's . . . ." (J.A. XIV 4043.) When each person has a different understanding of a law's meaning, they necessarily differ as to its application, making it impossible for persons of ordinary intelligence to comply with the law and vesting law enforcement with "virtually complete discretion" to impose it.

The trial court thus properly declared the Challenged Provisions unconstitutionally vague on their face, finding that they are neither "definite enough so that ordinary people can understand what conduct is prohibited," nor "definite enough to [discourage] arbitrary and discriminatory enforcement" of the law. (J.A. XIV 4083, citing *Kolender*, *supra*, 461 U.S. at p. 357.) An objective and accurate review of the record below fully supports the trial court's conclusions, and the court's decision should be

upheld.

1. It Is Impossible to Know What Conduct Is Regulated by the Challenged Provisions

The Challenged Provisions pose two distinct vagueness problems. First, they provide no way of knowing what the "principally for use" test actually requires, leaving those bound to follow the law and those bound to enforce it with only their own subjective understanding of what standard applies. Second, there is no objective means for determining which ammunition actually meets that standard. As such, it is impossible for anyone to know what conduct is regulated by the law, in violation of due process.

a. It Is Unclear What Standard Is Actually Imposed by the "Principally for Use" Language and What Information Is Needed to Satisfy that Test

To determine whether a statute is clear enough to provide adequate notice, courts generally look to the language of the statute, its legislative history, and court decisions construing the statutory language to interpret its meaning. (*Heitzman*, *supra*, 9 Cal.4th at p. 200.) Here, however, none of these tools of statutory interpretation provide sufficient clarity as to what the "principally for use" standard requires or what ammunition is regulated by the Challenged Provisions.

As the trial court recognized, there are no state or federal cases interpreting the definition of "handgun ammunition" as established in Penal Code sections 12060, subdivision (b), and 12318, subdivision (b)(2). (See J.A. XIV 4039.) The court noted that AB 962's legislative history is of similarly little guidance, there being neither a legislative purpose clause indicating the Legislature's intent, nor a discussion in the legislative history regarding which types of ammunition the Legislature intended to include in its definition of "handgun ammunition." (J.A. XIV 4039-4040.)

Finally, the text of the Challenged Provisions fails to provide reasonable people with an objective standard by which to determine whether any given ammunition is "principally for use" in handguns. (J.A. XIV 4040-4042.) Here, the individual words of the statute alone do not *necessarily* create confusion. The term "principally" is defined as "chiefly, mainly, [or] primarily." (Webster's Revised Unabridged Dictionary (G. & C. Merriam Co. 1913) p. 1138.) And the terms "mainly" and "primarily," have been found to mean quantifiably more than 50 percent. (See, e.g., *In re Kelly* (9th Cir. 1988) 841 F.2d 908, 913; *State ex rel. Martin v. Kansas City* (1957) 181 Kan. 870, 876 [317 P.2d 806, 811].) "Handgun ammunition," under the Challenged Provisions, might thus be understood as ammunition that is used, or for use, more than 50 percent of the time in handguns. (J.A.

XIV 4041.) However, as the term "principally" has not yet been interpreted by the courts, it could indicate that some greater percentage is required.

Regardless, it remains entirely unclear what esoteric information is actually required to establish that any given ammunition is "principally for use" in handguns. Does "principally for use" consider only how any given ammunition is *currently* being used? Or does it encompass any or all *past* uses? What about *future* uses? And what geographical regions inform the "principally for use" standard – all of California, the community or communities in which parties to the transfer reside, all of the United States? What about uses outside of the country for that matter? What about ammunition manufactured in one jurisdiction (city, state, country) but used in another? Is "principally for *use*" limited to lawful uses, unlawful ones, or both – even though criminals are prohibited from buying ammunition under the law? Does the standard factor in the extensive use of certain ammunition by law enforcement, military, and/or non-exempt privatized military and police organizations? What types of firearms are included? Many firearms are unlawful in California that are legal elsewhere in the United States. (See, e.g., Pen. Code, § 31900 et seq.) Are out-of-state dealers expected to know changing ammunition usage statistics in California based on what firearms are legal in California at the time? Are

California residents expected to know this? Does the number of rifles versus the number of handguns that are in circulation in a particular jurisdiction that are capable of firing a particular cartridge inform the decision? And does the "principally for use" standard recognize the distinction between cartridges and calibers? Given that "caliber" just means the measurement of the diameter, are all cartridges within a given caliber considered "handgun ammunition" if its caliber is?[8] Even if the cartridge is used more often in a rifle? The Challenged Provisions leave these and other questions unanswered, and they give no agency the authority to provide clarity. But these are not questions that ordinary citizens should be expected to answer at their own peril – under the threat of criminal penalty – without the benefit of guidelines to assist them.

Ultimately, Respondents do not – and cannot – know what ultimate criteria will cause a particular type of ammunition to be deemed "handgun ammunition" under the Challenged Provisions. And they're not alone.

DOJ has itself displayed great difficulty in applying a uniform

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[8] At one point, it was presumably DOJ's ammunition expert's opinion that any cartridge that falls within a given caliber would be regulated as "handgun ammunition" if the caliber class to which it belonged was considered "principally for use" in handguns, regardless of whether a particular cartridge within that class is used more often in rifles. (See *infra* fn. 15 [DOJ's expert initially verified that eleven *calibers* of ammunition were "handgun ammunition" under the Challenged Provisions].)

understanding of the "principally for use" standard. On some occasions, it indicated the Challenged Provisions apply to ammunition that is "used principally" in handguns, seemingly taking into account the *actual* usage of the particular ammunition in handguns versus rifles. (J.A. V 1200, VIII 2198.) But at other times, DOJ suggests that it has more to do with the number of handguns in circulation chambered in a particular caliber versus the total number of rifles that are chambered in that same caliber. (J.A. V 1385-1386,VIII 2198-2199.) Once, DOJ's expert interpreted it to mean "ammunition that is chambered, or loaded, more frequently in handguns than in rifles." (J.A. VIII 2257.) And yet, at other times, DOJ's expert suggests the determination is guided by a mix of factors. (J.A. V 1416-1417, VIII 2199, XI 3031.)

The bottom line is this: The Challenged Provisions provide no way of knowing what the "principally for use" test actually requires. That deficiency alone makes the law unconstitutionally vague, for it provides neither individuals nor law enforcement personnel with the vital information they need to determine what ammunition might be covered by that standard and to conform their behavior to the law.

b. It Is Impossible for Individuals, Ammunition Vendors, and Law Enforcement to Determine What Ammunition Satisfies the "Principally for Use" Standard

Even if it could be determined by what criteria the "principally for use" test is measured, there is no objective way to determine whether any given ammunition is used, or will be used, more than 50 percent of the time in handguns in any given jurisdiction, at any given time, by law-abiding citizens, criminals, and/or law enforcement. Virtually all ammunition can be, and is in fact, used safely in both handguns and rifles. (J.A. VIII 2035, 2181.) There is no generally accepted delineation between "handgun ammunition" and other ammunition that clarifies which ammunition is "principally for use" in handguns. (J.A. VIII 2036, 2085.) The record establishes that Respondents and the parties' experts themselves could not agree that any ammunition about which they were questioned is used more than 50 percent of the time in handguns. (J.A. XI 3089, XII 3719-3722.) And there is nothing to consult that could reliably inform those to whom the law applies and those bound to enforce it what ammunition is used more often in handguns at any given time, and in any given jurisdiction.

2. Genuine Confusion Exists as to What Constitutes "Handgun Ammunition" Under the Challenged Provisions, and that Confusion Is Well Documented

As the record amply demonstrates, there are vastly differing views as

to what standards are set forth by the "principally for use" language and as to which ammunition is encompassed by that standard. (J.A. VIII 2040, 2044, 2048, 2052, 2055, 2058, 2063, 2067, 2071, XI 2915, 3089, 3097-3125, 3139-3171, 3185-3267, 3271-3307, XII 3719-3722.) The confusion is genuine and it is real. Neither individuals, nor vendors, nor experts in the field can agree as to which ammunition is intended to be regulated as "handgun ammunition" by the Challenged Provisions. (J.A. VIII 2089-2043, XI 3079-3085, 3089, XII 3719-3722.)

a. Individuals and Ammunition Vendors Have Indicated They Do Not Know What Ammunition Is Regulated by the Challenged Provisions

Soon after the passage of AB 962, widespread and openly voiced confusion regarding the meaning of the newly passed law surfaced. That confusion was shared by individuals and ammunition vendors, and it was recognized by the bill's author himself.

For example, Respondents' attorneys began to receive numerous inquiries from non-parties regarding what ammunition was covered by the law and seeking advice on how to comply with it. (J.A. VIII 2008.) AB 962 sponsor, Assemblyman Kevin de León, testified before the Senate Public Safety Committee that the Legislature "had been listening to gun dealers, as well as vendors, regarding their concerns about AB 962," and he revealed

that the *most common* complaint is that the "existing definition of 'handgun ammunition' is *too vague*." (J.A. III 0835-0836, quoting *Hearing Before the S. Pub. Safety Comm. on A.B. 2358*, 2010 Leg., 2009-2010 Reg. Sess. (Cal. 2010) (statement of Assem. Kevin de León, Sponsor).) And ammunition shippers, unable to determine which ammunition was actually covered by the law, made plans to cease shipping *all* ammunition to California to avoid prosecution under the vague law. (J.A. VIII 2040-2041, 2044-2045, 2048-2049.)

b. The Varied Responses of Both DOJ and Respondents as to What Ammunition Is Used More Often in Handguns Illustrate the Confusion Fomented by the Challenged Provisions

DOJ itself was unable to articulate with any consistency what ammunition fell within the statutory definition of "handgun ammunition." When AB 962 was first enacted, and a member of the DOJ Bureau of Firearms was asked, she responded that she did not know and could not say whether a certain type of ammunition would constitute "handgun ammunition" under the law. (J.A. IV 0955-0959.) Later, DOJ's ammunition expert, when asked to identify all ammunition the Challenged Provisions applied to, responded that they apply to ammunition falling within an identified list of *eleven calibers*. (J.A. V 1198, 1222, XI 2931.) And later

still, DOJ's ammunition expert declared that only *sixteen cartridges*, out of thousands, were subject to the Challenged Provisions. (J.A. V 1263-1265, 1277-1279, VIII 2257-2258, XI 2961.) Just as DOJ and its *ammunition expert* were incapable of applying the statutory definition uniformly, lay individuals, ammunition vendors, and law enforcement cannot – and they should not be expected to.

DOJ misleadingly suggests that Respondents collectively identified fifteen cartridges that are used more often in handguns than rifles. (A.O.B. 9.) And they label that an admission "that the Challenged [Provisions have] several valid applications." (A.O.B. 7-10.) In reality, Respondents' answers varied widely, and a comparative analysis of all deposition testimony reveals that only one cartridge was *estimated* by all deponents as *likely*, not definitively, being chambered more often in a handgun *based on their personal experience*. (J.A. XI 3045, 3047, 3049, XI 3079-3083, 3089, XII 3719-3722.)

DOJ also claims that Respondents conceded that .25 automatic (i.e., .25 ACP) "is used exclusively in pistols," and they suggest that neither party is "aware of any rifle chambering this type of cartridge." (A.O.B. 9.) This is a gross misrepresentation of the record. Respondents stated only that .25 ACP "was estimated by all deponents as likely being chambered more often

in a handgun based on their experience." (J.A. XI 2893.) And, in fact, one deponent even testified that he had indeed seen it fired from *both* handguns and rifles. (J.A. XI 3089, 3291.) This is a far cry from stating that it is used exclusively in pistols.

In any event, this line of inquiry is irrelevant. Although the questions and the responses elicited indicate there is no common understanding as to what ammunition is "principally for use" in handguns even among the Respondents in this case, the limited, personal experience and knowledge of five people provides no meaningful insight into what ammunition is "principally for use" in handguns.[9]

DOJ's attempt to point to a few cartridges, out of thousands, that three or four people might have similar estimations on is irrelevant and it cannot save the Challenged Provisions. To be sure, the record more than amply illustrates that no one can agree on what the "principally for use" in handguns standard means or what ammunition might fall under it.

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[9] Respondents objected to DOJ's introduction of this testimony below as irrelevant, improper lay opinion, lacking foundation, speculative, and/or vague and ambiguous. (J.A. XII 3424-3450.) The trial court, however, summarily denied all evidentiary objections. (Rep.'s Tr. ["R.T."], Mot. Summ. J. Hrg. 35:18-22.) As DOJ relies on this testimony as evidence that individuals, law enforcement, and ammunition vendors, "know what cartridges are used more often in handguns than rifles" and that Respondents concede that the Challenged Provisions have at least one valid application (A.O.B. 9-11), Respondents preserve their objections.

c. A Previous Legislative Attempt to Rely Solely on the "Principally for Use" in Handguns Standard Exposed the Vagueness Problem

There is revealing language in the legislative history of Senate Bill 1276 ("SB 1276"), a failed measure introduced in 1994 to implement provisions regulating the transfer of "handgun ammunition" substantially similar to those appearing in the Challenged Provisions. (J.A. IV 0944-0945, VII 1446-1466, XI 2919, 2921.) The Bill Analysis conducted by the Senate Committee on Judiciary for SB 1276 contains a "comment" on section 12323's definition of "handgun ammunition" which reads, in relevant part:

> Existing Penal Code section 12323 was added in 1982 and defines handgun ammunition as "ammunition principally for use in pistols and revolvers . . . notwithstanding that the ammunition may also be used in some rifles. . . ." However, it may not be suitable for defining handgun ammunition in general. It may be assumed that many ammunition calibers are suitable for both rifles and handguns. *Without additional statutory guidance, it may be very difficult for dealers to determine which ammunition is "handgun ammunition"* for purposes of the requirements added to Penal Code section 12076.

(J.A. IV 0945, XI 2921, italics added.) The legislative history of SB 1276 provides compelling evidence of the same definition's vagueness and failure to provide clarity when solely relied upon to identify ammunition that would be regulated by a predecessor of the Challenged Provisions.

d. The Legislature Recognized the Vagueness of the Challenged Provisions and Tried, But Failed, to Fix It Through Subsequent Legislation

Since the filing of this suit, the legislature has attempted on multiple occasions to amend the definition of "handgun ammunition" in order to bring much needed clarity to the admittedly vague Challenged Provisions.

Subsequent to the filing of this litigation, the author of AB 962, Assemblyman Kevin de León, worked with the Department of Justice to revise the Challenged Provisions by amending then-pending AB 2358. The revised bill sought to replace the "principally for use" language in section 12323, subdivision (a), with a "list of ammunition calibers" in an attempt to clarify the law. (J.A. III 0835-0836, IV 0918, 0934, V 1255-1257, VII 1924-1925, XI 2921, 2923.)

Later, in an attempt to salvage the vague law, (now) Senator de León introduced Senate Bill 124 ("SB 124"), which would have struck the term "principally" from the "handgun ammunition" definition, covering all ammunition capable of being used in handguns notwithstanding that it may also be used in rifles. (Sen. Bill 124 (2011-2012 Reg. Sess.) § 3.) That attempt to fix the vagueness ended when the bill was gutted and amended. (Assem. Amend. to Sen. Bill 124 (2011-2012 Reg. Sess.) Aug. 6, 2012.)

Finally, through multiple amendments to Senate Bill 427 ("SB 427")

in early 2011, Senator de León again attempted to bring clarity to the definition, by listing a number of calibers (later amended to cartridges), any variety of which would be "handgun ammunition" notwithstanding that they may also be used in rifles. (Sen. Bill No. 427 (2011-2012 Reg. Sess.) § 2.)

Each of these attempts were unable to forge a workable definition of "handgun ammunition" and accordingly failed to survive the legislative process. The introduction of these bills alone represents an acknowledgment by the Legislature of the Challenged Provisions' failure to identify the ammunition transfers they purport to regulate.

3. The Challenged Provisions Cannot Be Saved by Any "Common Understanding" Alleged by DOJ

No reasonable construction can be given to the "principally for use" standard by reference to a "common understanding" shared by ammunition vendors as to what the standard requires or what ammunition might be encompassed by that standard. (See *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 766 [hereafter *Cranston*].) The problem here is two-fold. First, the "common understanding" of the profession standard is inapplicable because the Challenged Provisions apply to *all* people, not just those in the firearms and ammunition industry. Second, even if it were properly invoked, there is simply no "common understanding" within the firearms industry as to what ammunition is "principally for use" in handguns.

a. The "Common Understanding" Standard Does Not Apply Because the Challenged Provisions Are Not Limited to the Members of Any Profession and Apply to Millions of Individual Ammunition Purchasers

Generally, when a statute fails to provide objective standards "the required specificity may nonetheless be provided by the common knowledge and understanding of members of the *particular vocation or profession to which the statute applies*." (*Cranston*, *supra*, 40 Cal.3d at p. 766, italics added.) In *Cranston*, a police officer challenged his dismissal, claiming that a regulation allowing discipline for "conduct unbecoming an employee of the City Service" was vague. (*Id.* at p. 759.) The California Supreme Court found that, in isolation, such a standard lacks objective standards to guide behavior. (*Id.* at p. 765.) But, when "applied to a specific occupation and given context by reference to fitness for the performance of that vocation," the regulation is sufficiently clear. (*Id.* at p. 766, internal quotations omitted.) The court ultimately found that any police officer would understand that the phrase referred to "conduct which indicates a lack of fitness to perform the functions of a police officer," and upheld the regulation. (*Id.* at p. 769.)

Here, contrary to DOJ's assertion, the law does not chiefly apply to those in any particular vocation or profession. In fact, the definition of

"handgun ammunition" must be understood not only by ammunition retailers, but also by general sporting goods retailers and their employees less familiar with the ammunition industry and by shipping companies and their employees with no special familiarity with firearms or ammunition. More importantly, the law applies to *each and every* purchase of ammunition made *by every single layperson* who purchases ammunition via popular online websites or from mail order catalogues – accounting for potentially millions of transfers annually.[10] These individuals certainly cannot be charged with the "common knowledge and understanding" DOJ attempts to assign to firearms and ammunition retailers.

Because the law purports to regulate the conduct of persons not within any "particular vocation or profession," see *Cranston*, *supra*, 40 Cal.3d at page 766, clarity cannot be provided simply by looking to any knowledge shared by ammunition vendors as to what ammunition is "principally for use" in handguns. DOJ cites to no authority which invokes a knowledge standard commensurate with members of a particular vocation

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[10] Section 12318 reads: "Commencing February 1, 2011, 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. A violation of this section is a misdemeanor." Such language imposes criminal liability not only on the ammunition vendor or transferor, but also on the purchaser or transferee.

when the statute applies so far beyond them.

b. There Is No "Common Understanding" Among Ammunition Vendors as to What Ammunition Is "Principally for Use" in Handguns

Even if *Cranston's* "common understanding" test were validly applied to some or all of those expected to follow the Challenged Provisions, the law remains void for vagueness because ammunition vendors simply do not share any "common understanding" as to what the "principally for use" test requires or which ammunition might be covered by it. Ammunition vendors, like everyone else, are unable to determine what ammunition is regulated. This is amply supported by testimony not only from Respondents, but also from multiple non-party shippers who, before the law was scheduled to take effect, unilaterally made the costly decision to cease shipping all ammunition to individuals in California because they could not determine which ammunition was actually regulated by the Challenged Provisions. (J.A. VIII 2040-2041, 2044-2045, 2048-2049.)

DOJ nonetheless claims that ammunition vendors "generally have superior knowledge as to which calibers and cartridges of ammunition are used more often in handguns than in rifles." (A.O.B. 13.) That "superior knowledge," it claims, furnishes sufficient clarity to save the Challenged

Provisions from unconstitutional vagueness. (A.O.B. 13.) For support, DOJ cites to evidence illustrating that a few ammunition vendors market their ammunition as "handgun ammunition" or "rifle ammunition." (A.O.B. 11.)[11] But DOJ wholly fails to explain how the marketing classifications of some vendors are at all relevant to a determination of what ammunition is "principally for use" in handguns. Further, DOJ provides no foundation for assessing why, or on what basis, the vendors make those classifications.[12] As DOJ's expert admitted during deposition, no effort was made to determine what each of the vendors meant when listing certain ammunition as "handgun ammunition." (J.A. XI 3364-3365; XII 3454-3459.) DOJ did not endeavor to determine whether such designation was merely puffery

[11] Respondents objected to DOJ's introduction of this internet evidence as hearsay, lacking foundation, and/or not the proper subject of judicial notice. (J.A. XII 3454-3459.) The trial court, however, summarily denied all evidentiary objections. (R.T., Mot. Summ. J. Hrg. 35:18-22.) As DOJ relies on these printouts as evidence that "most commercial ammunition vendors, . . . listed 'handgun ammunition' as a discrete category along with a catalog of calibers and cartridges available" and that "vendors know what cartridges are used more often in handguns than in rifles," A.O.B. 11, 13, Respondents preserve their objections.

[12] DOJ also fails to disclose that the printout provided from the website of Able's Sporting, Inc., is an alteration of the normal operation of the site, insofar as it does not contain a category for "handgun ammunition." (J.A. XII 3454-3458.) Rather, DOJ caused the site to list certain cartridges by manually entering the term "handgun ammunition" into the site's search feature. (J.A. XII 3454.) In fact, Able's Sporting's website lists ammunition without distinction as to its suitability for use in either handguns or rifles.

designed to encourage buyers to purchase certain stock, whether it reflected a vendor's understanding of the ammunition uses popular with its particular consumer base, whether it reflected ammunition usage in handguns versus rifles in their community, whether it reflected that such ammunition was sold for use in both handguns and rifles, or whether it was simply *suitable* for use in handguns.

In short, that an ammunition vendor markets or brands some ammunition as "handgun ammunition" is not determinative of whether that ammunition is "principally for use" in handguns. Nor does it disprove that there is confusion among vendors (and everyone the law applies to) as to what ammunition is regulated by the law.

4. The Extensive, Multi-Step Research Process Undertaken by DOJ's *Ammunition Expert* to Determine What Ammunition Is Covered by the Challenged Provisions and His Arbitrary Conclusions Further Illustrate Vagueness

Respondents' concerns are further illustrated by an examination of the complex, multi-step research process DOJ's *ammunition expert* employed to determine which ammunition he believes falls within the definition of "handgun ammunition," see J.A. V 1374-1375, 1420, XI 2935, and the absurd conclusions reached as a result.

As a "starting point," DOJ's expert consulted the California Dealer

Record of Sales (DROS) database – information that is not generally available to the public – to determine which "calibers of ammunition" should be further researched to determine whether they are "handgun ammunition" under the Challenged Provisions.[13] (J.A. XI 2935, 2937, V 1200, 1289-1290, 1293-1294, 1302, 1340-1341.) The DROS records contain California statistics about the number of "handguns" chambered in various calibers sold in a particular year. (J.A. V 1200, 1289, 1290, 1302, XI 2935.)

DOJ's expert arbitrarily limited his review to California handgun sales records for the past five years – but admitted that if he had an opportunity to review the records of a larger period, his views as to what ammunition is covered by the Challenged Provisions might have changed. (J.A. V 1307-1308, 1378, 1408-1411, XI 2933, 2935, 2937.) He considered only "handgun sales" and did not conduct any comparative analysis with rifle sales for firearms chambered in that same caliber. (J.A. V 1295-1296, 1391, XI 2941.) In fact, he admitted that such records *do not even exist.* (J.A. V 1295-1296, XI 2941.) He arbitrarily limited his interpretation of the

[13] DOJ's interpretation suggests a cartridge's status may change according to the usage trends of different states. So, according to DOJ's expert, shippers in states where hunting with a certain cartridge in rifles may be more prevalent would also be required to know usage trends in California that, DOJ admits, may change over time.

"principally for use" standard to civilian use of firearms in California. (J.A. V 1200, 1408-1410, XI 2935, 2937, 2957.) He admitted that he did not take into account the number of rifles chambered for ammunition he considers "handgun ammunition" that are in use by the military. (J.A. V 1402-1404, XI 2957.) He admitted that he does not know what percentage of total guns in circulation are represented by the handgun sales data relied upon. (J.A. V 1410-1411, XI 2937-2938.) And finally, he admitted that he picked only the most popular selling calibers of handguns in California and, for whatever reason, those most often used in crime to determine which calibers should be researched further to determine whether they are subject to regulation under the Challenged Provisions. (J.A. V 1307-1310, 1340-1341, 1374-1375, XI 2937.)

Then, after consulting incomplete data that is not generally available to the public and selecting only the most popular calibers and those prevalently used in crime, DOJ's expert researched written materials,[14] websites of ammunition vendors (several of whom declared they did not

[14] *Cartridges of the World*, an encyclopedia of ammunition relied on by both parties below, describes some of the handguns and rifles in which given ammunition has been used throughout history. It also describes the types of firearms for which certain cartridges were originally produced. But it makes no representation as to any cartridge's "principal use," in any given jurisdiction, at any given time, by any given class of users (e.g., law-abiding citizens, criminals, privatized military or police).

know what ammunition is regulated by the Challenged Provisions), and online encyclopedias to determine what ammunition is "principally for use" in handguns. (J.A. V 1200, 1310, VIII 2256-2257, XI 2931, 2935.) Finally, DOJ's expert pulled from his subjective experiences to round out the list. (J.A. V 1244-1245, 1248, 1298, 1309-1310, 1352, 1355, 1374-1375, 1377-1378, 1381, 1420, XI 2935, 2947, 2955-2957.) And, after all that, DOJ's *ammunition expert* concluded that only *sixteen cartridges* out of thousands – a fraction of a percent – were regulated by the Challenged Provisions as "principally for use" in handguns.[15]

But how did DOJ divine such a process for determining which ammunition is regulated? The Challenged Provisions certainly do not prescribe it, nor do they signal the sorts of limitations DOJ placed on the "principally for use" standard. In fact, they are silent as to what considerations inform that standard, and they provide no mechanism by

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[15] It is also important to note that, in just under a month of litigation, DOJ's expert significantly changed his opinion as to the meaning of the Challenged Provisions no fewer than *three* times. In response to written discovery, he initially verified that eleven *calibers* of ammunition were "handgun ammunition" under the Challenged Provisions. (J.A. V 1198, XII 3719-3720; see also *supra* fn. 8.) His deposition testimony revealed a slightly different list of eleven calibers. (J.A. V 1256-1257, XII 3719-3720.) And finally, in a declaration submitted in support of DOJ's opposition to summary judgment, he asserted that only *sixteen cartridges* are regulated. (J.A. IX 2257, XII 3719, 3722.) That DOJ's own expert could not uniformly apply the "principally for use" standard in such a short period is revealing.

which to create regulations to clarify the scope of the Challenged Provisions. (See *supra* Part I.B.1.a.) Instead, citizens and law enforcement must rely on their own *subjective understanding* of the "principally for use" standard, and then on their own *subjective application* of that standard. This is incompatible with due process. If, as DOJ suggests, sixteen cartridges are regulated as "handgun ammunition," there must be guidelines to inform individuals, ammunition vendors, and law enforcement that those cartridges are regulated and how the thousands of other cartridges that are either used more often in handguns or in rifles were deemed not to be regulated.[16]

Respondents do not disagree with DOJ's assertion that reasonable people might be expected to "do a little due diligence to find out what cartridges of ammunition or handgun ammunition are . . . within the meaning of the statute." (R.T., Mot. Summ. J. Hrg. 11:1-3; see also A.O.B. 15.) But *no* amount of diligence could inform anyone as to what the

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[16] The California Supreme Court has found that requiring ordinary citizens to determine whether a firearm that has "minor" differences from firearms statutorily listed as "assault weapons" is itself an "assault weapon" would be unconstitutional. (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138 [explaining that "ordinary citizens are not held responsible for answering [that] question"].) Here, those who must follow the law, and those who must enforce it, are left to decipher the meaning of the Challenged Provisions without even the benefit of being able to compare a given type of ammunition to ammunition that is expressly covered, revealing that the Challenged Provisions are even more problematic than the requirement signaled as unconstitutional in *Harrott*.

"principally for use" standard requires or what ammunition meets it. Contrary to DOJ's assertions (A.O.B. 15), there is nothing to consult for an answer – no official list, no statistics identifying whether ammunition is used or will be used more often in handguns, and no regulatory agency that is authorized to provide clarification.[17] (J.A. IV 0906-0908, 0910-0911, 0955, 0957, 0959, 0961, 0965, 0968, XI 2919, 2923, XIV 4041.)

That the Department of Justice's own *expert* in firearms and ammunition undertook such a painstaking research process – consulting statistics not generally available to the public, making significant assumptions about the scope of the "principally for use" in handguns standard, and drawing further assumptions about long gun sales for which sales statistics are unavailable – demonstrates the Challenged Provisions' glaring failure to provide notice to persons of *ordinary* intelligence as to

[17] In *State of Tennessee ex rel. Rayburn v. Cooper*, a court struck as a vague a law authorizing the carrying of firearms by patrons in establishments where "the serving of meals" was the "principal business conducted." (J.A. VII 1884-1885, 1896.) There, the court found that whether the serving of meals is a business' principal business is not something that can be known to the ordinary citizen – and that inquiry would not be satisfactory. (J.A. VII 1885, 1896.) Here, the vagueness problem is even more severe, as there is no way of making an effective inquiry into whether any given ammunition is used more often in handguns than rifles. For, while a patron might be able to turn to the owner of a dining establishment who would presumably know whether the service of meals makes up the majority of business operations, ammunition vendors are not privy to whether any ammunition they sell will be used in a handgun, a rifle, or both.

what conduct is regulated by the law.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED COSTS ASSOCIATED WITH RESPONDENTS' THE MOTION FOR PRELIMINARY INJUNCTION

Code of Civil Procedure section 1033.5, subdivision (a)(1), expressly provides that "filing, motion and jury fees" are allowable as costs under section 1032. To be recoverable, costs must be "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5, subd. (c)(2).) The party seeking to tax costs has the burden of showing that, from a "pretrial vantage point," the cost was unnecessary "*at the time . . . incurred* or [was] unreasonable." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 132, italics added.) Only when an item is properly objected to does the burden shift to the party claiming them as costs to establish that the cost was "necessary to the conduct of the litigation." (*Ladas v. Cal. State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774-77.) Because DOJ failed to establish that, at the time the cost was incurred, the preliminary injunction was "unnecessary," the burden never shifted to Respondents to prove otherwise. In any event, the motion *was* "necessary to the conduct of the litigation" – in fact, it was essential. Respondents are thus entitled to recovery of the costs associated with pursuing it, and the trial court's decision should be upheld.

Here, several considerations informed Respondents' decision to move for temporary relief, establishing that a reasonable attorney would have sought preliminary injunction. Such considerations included, but are not limited to, founded concerns that a summary judgment motion would face delays from DOJ, such that their claims would not be decided before the Challenged Provisions' effective date, exposing Respondents to criminal liability every minute they remained unable to comply with the vague laws. (J.A. XIV 4178, 4180, 4191-4192.) The motion also provided an opportunity to receive valuable input from the court on the legal issues and to flesh out and discern arguments made by DOJ. It was a *combination* of these justifications and others that made Respondents' pursuit of preliminary injunction reasonable. And DOJ does not argue, let alone provide evidence on the record, that a reasonable attorney would not have pursued a preliminary injunction under the circumstances.

The fact that Respondents ultimately withdrew their motion at the hearing is of no consequence. The filing and consideration of Respondents' motion alone led the trial court to invite Respondents to withdraw their motion in favor of an extremely expedited briefing schedule for summary judgment, ensuring that hearing and decision would occur before the Challenged Provisions took effect. (J.A. XIV 4192.) This was exactly what

Respondents required in order to protect their interests – and it was precisely the course of action Respondents requested and would have pursued had DOJ agreed to shortening the time line for summary judgment. (J.A. XIV 4191.) In light of this outcome, it cannot be said that withdrawal of the motion truly left the record "as though it had not been made." (A.O.B. at 17-18, quoting *Hammons v. Table Mountain Ranches Owners Assn., Inc.* (Wyo. 2003) 72 P.3d 1153, 1157; *Altsman v. Kelly* (Pa. 1939) 9 A.2d 423, 488.) Indeed, Respondents' motion, even though it was withdrawn, was the very catalyst that brought about the efficient resolution of this case in the trial court before the Challenged Provisions took effect.

Respondents are thus entitled to recovery of the costs incurred in pursuing preliminary injunction. The trial court's decision to award Respondents' filing fees is supported by the record and, because it is not "beyond the bounds of reason," it should be upheld. (See *Horsford v. Bd. of Trustees of Cal. State Univ.*, *supra*, 44 Cal.3d at p. 478.)

CONCLUSION

Ultimately, the root of the vagueness doctrine is a rough idea of fairness. (*Colton v. Kentucky* (1972) 407 U.S. 104, 110.)

Here, the Challenged Provisions fail to provide sufficient notice to inform an analysis of whether any given ammunition is subject to

regulation. This failure is revealed by the struggles encountered by the Department of Justice's own *ammunition expert* over the meaning of the "principally for use" standard and whether it is dependent on a number of variables unspecified by statute or regulation. It is unfair to place such a heavy burden on persons of ordinary intelligence and everyday law enforcement officers on their beat.

And even if the requirements of the "principally for use" test could be ascertained, the Challenged Provisions impermissibly task the public and law enforcement with determining whether any given cartridge of ammunition has been used, or will be used, principally in handguns over a given time period, in a given jurisdiction, or by given groups of ammunition users. Although a commendable attempt was made by the Department of Justice's *ammunition expert* to determine what ammunition is covered by the Challenged Provisions – as demonstrated by his tedious, multi-step research process – such information concerning ammunition usage simply does not exist. It is unfair to place such a heavy, and in fact impossible, burden on those who must comply with the law and those who must enforce it.

Finally, under no circumstance is it fair to conclude that the Challenged Provisions provide the level of clarity required of laws that

touch upon constitutionally protected conduct, impose criminal sanctions, and are devoid of any mens rea requirement.

Accordingly, Respondents respectfully request the Court affirm the lower court's holding that the Challenged Provisions are unconstitutionally vague and affirm its award of costs.

Dated: August 16, 2012 **MICHEL & ASSOCIATES, P.C.**

By: _____
C. D. MICHEL
Attorney for Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204, subdivision (c)(1), of the California Rules of Court, I hereby certify that the attached Respondents' Brief is double-spaced, typed in Times New Roman proportionally spaced 13-point font, and the brief contains 13380 words of text, including footnotes, as counted by the WordPerfect word-processing program used to prepare the brief.

Dated: August 16, 2012 **MICHEL & ASSOCIATES, P.C.**

By: 
C. D. MICHEL
Attorney for Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200 Long Beach, CA 90802.

On August 16, 2012, I served the foregoing document(s) described as

RESPONDENTS' BRIEF

on the interested parties in this action by placing

[ ] the original

[X] a true and correct copy

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

SEE ATTACHED "SERVICE LIST"

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

Executed on August 16, 2012, at Long Beach, California.

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

Executed on August 16, 2012, at Long Beach, California.

CLAUDIA AYALA

SERVICE LIST

SHERIFF CLAY PARKER ET AL. v. STATE OF CALIFORNIA ET AL.
CASE NO. F062490

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California Supreme Court	Via Electronic Service (CRC 8.212 (c)(2)