In the Supreme Court of the State of California

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

Plaintiffs and Respondents,

v.

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

Defendants and Appellants.

Case No. S215265

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

APPELLANTS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

In its decision upholding a facial vagueness challenge to statutes regulating the commercial sale, display, and transfer of ammunition "principally for use" in handguns, the Court of Appeal has expanded the categories of cases subject to the lenient test usually reserved for First Amendment and reproductive rights cases. The Court of Appeal erred on two primary grounds. First, the Court improperly applied a lenient test to a pre-enforcement facial challenge to a penal statute without justification. Although case law suggests that a less robust test for facial challenges may be proper in First Amendment and reproductive rights cases due to the potential chilling effect on our most fundamental constitutional rights, it was inappropriate to use that more lenient test in this case where there is no analogous policy rationale. Second, the Court of Appeal erred in holding that the term "principally for use" was unconstitutionally vague, since many California penal statutes use similar terminology, and the terminology reflects actual ammunition vendor and purchaser practices.

In their merits brief, Respondents now argue that "application of that more lenient test is inconsequential." (Respondents' Brief on the Merits (RB), p. 1.) In Respondents' view, the statutes at issue "are unconstitutionally vague under *any* test because it is impossible to know in *every* circumstance whether any given ammunition constitutes 'handgun ammunition' under the law." (RB, pp. 1-2, original emphasis.) This argument misunderstands, at a minimum, the ordinary strict test generally applicable to facial challenges. Alternatively, they argue that the more lenient test is justified because the Second Amendment should be viewed as analogous to the First Amendment.

Respondents' arguments must be rejected. In an unbroken string of decisions by this Court, the stricter, invalid-in-all-circumstances test has been applied in facial challenges to penal statutes. Deviating from this

standard on the basis that the Second Amendment was "implicated" by the challenged statutes was error. Any policy justifications for using the more lenient standard can be achieved just as well in any as-applied challenges to the statutes, making expansion of the facial approach unwarranted.

ARGUMENT

This case presents an opportunity for this Court to reaffirm the appropriate test to be used when a penal statute is challenged facially for vagueness.[1] The Court of Appeal chose to apply the lenient test in which a petitioner need only show that a statute is unconstitutionally vague in the generality of cases, as opposed to the more demanding unconstitutional-in-all-applications test. But selecting the more lenient standard in a case not involving the First Amendment or reproductive rights was a departure from established case law and cannot be justified on policy grounds. This Court should reverse the judgment, and reinforce existing case law applying the stricter standard in pre-enforcement facial vagueness challenges to statutes of the type presented here. Alternatively, this Court should confirm that the challenged statutes survive under either standard.

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[1] As noted in the opening brief, this Court has not articulated a single test for determining the propriety of a facial challenge, but instead has presented the governing doctrine in two ways. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Under the "strictest test," the statute must be upheld unless the complaining party establishes the statute is invalid in all of its applications and "'inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.'" (*Ibid.*, quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 181.) Under the "more lenient standard sometimes applied," a party must still establish that the statute conflicts with constitutional principles "'in the generality or great majority of cases.'" (*Ibid.*, italics omitted; see also *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 278 (conc. & dis. opn. of Cantil-Sakauye, C.J.) [recognizing varying standards of review for facial challenges].)

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

Respondents do not dispute that statutes "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*People v. Ervin* (1997) 53 Cal.App.4th 1327, 1328.) Further, they concede that "facial challenges are generally disfavored." (RB at p. 13.) However, they contend that the challenged statutes are "inherently vague," justifying a facial challenge here. (RB at p. 14.) And while they maintain that the challenged statutes are unconstitutionally vague under any test, they contend that the Court of Appeal "correctly selected the 'generality of cases' standard" because of claimed impingement on Second Amendment rights. (RB at p. 1.)

Respondents do not disagree that, to date, the more lenient test has generally been limited to cases involving the First Amendment or reproductive rights. (RB at p. 3.) But they maintain that given that the United States Supreme Court "has recently held that the Second Amendment secures fundamental individual rights that cannot be treated as inferior to other rights," the more lenient test should now be expanded to the Second Amendment context. (RB at pp. 3-4.) And, in the absence of a scienter requirement, Respondents maintain that the challenged statutes must be stricken due to their claimed impact on Second Amendment rights. (RB at p. 18.)

The argument offered by Respondents is deeply flawed. Expansion of the use of the lenient facial challenge test beyond the First Amendment to the Second Amendment is not justified, and particularly is not justified with respect to the Penal Code sections at issue in this case.

A. The Court of Appeal's Three-Part Test for Application of the Lenient Standard Is Not an Appropriate Test and It Exceeds the Scope of This Court's Decisions

Seizing upon the three-part test articulated by the Court of Appeal, Respondents maintain that because the challenged statutes purportedly "impact Second Amendment conduct, impose criminal penalties, and are devoid of any limiting scienter requirement," it is "proper" to employ the "less stringent 'generality of the cases' standard" in analyzing Respondents' facial constitutional challenge. (RB at p. 18.) But no authority from this Court establishes, employs, or references this three element test. Indeed, when this Court has examined facial vagueness challenges to penal statutes in the past, it has applied the strict standard. (See, e.g., *People v. Morgan* (2007) 42 Cal.4th 593, 605-606; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th at 1069, 1084.) The Court of Appeal's conclusion that in *Acuna* this Court created the three element test by citing *Hoffman Estates* is erroneous, and should be corrected. In any event, contrary to the Court of Appeal's resulting assessment, two of the three elements which purportedly justify use of the more lenient test cannot be found in the present case.[2]

B. The Challenged Statues Contain an Implied Scienter Requirement

Although the State conceded that the challenged statutes contained a scienter requirement during proceedings in the Court of Appeal, Respondents strongly resist this concession. Respondents acknowledge, as they must, that "the existence of mens rea is certainly the 'rule' of American criminal jurisprudence." (RB at p. 26.) They attempt to classify

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[2] Only one of the three elements articulated by the Court of Appeal, that the statute impose criminal rather than civil penalties, can be found with respect to the statutes challenged here.

the challenged statutes, however, as strict liability "public welfare offenses" where "the primary goal is regulation for public safety." (RB at p. 28.) They note that "the Court of Appeal wasted little time in determining that no scienter requirement existed or could be inferred" and invite this Court to reach a similar conclusion. (RB at p. 31.)

The mere absence of an express mens rea in the statutes is not dispositive. While it is true that the challenged statutes do "not specifically mention a culpable mental state, this does not mean that the Legislature did not intend to require one. As a general rule, no crime is committed unless there is a union of act and either wrongful intent or criminal negligence." (*People v. King* (2006) 38 Cal.4th 617, 622, citing *In re Jorge M.* (2000) 23 Cal.4th 866, 872 and Penal Code, § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"].) Indeed, this Court has emphasized that the "prevailing trend in the law is against imposing criminal liability without proof of some mental state where the statute does not evidence the Legislature's intent to impose strict liability." (*In re Jennings* (2004) 34 Cal.4th 254, 267.)

Respondents' suggestion that the challenged statutes are "public welfare offenses" and that the Legislature intended to make them strict liability crimes (RB at p. 28) must be rejected. It is true that for "certain types of penal laws, often referred to as public welfare offenses, the Legislature does not intend that any proof of scienter or wrongful intent be necessary for conviction." (*In re Jennings*, *supra*, 34 Cal.4th at p. 267.) But public welfare offenses are usually characterized as "statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations." (*In re Jorge M.*, *supra*, 23 Cal.4th 866, 872.) And public welfare offenses are ordinarily free from "moral obloquy or damage to reputation." (*In re Jennings*, *supra*, 34 Cal.4th at p. 274.) In *In re Jennings*, this Court cataloged examples of public welfare offenses:

> Examples of public welfare offenses for which criminal liability attaches in the absence of any mens rea include improperly labeling and storing hazardous waste (Health & Saf. Code, § 25190; see *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1057–1058), sale of mislabeled motor oil (Bus. & Prof. Code, § 13480; *People v. Travers* (1975) 52 Cal.App.3d 111), sale of food contaminated with fecal matter (*People v. Schwartz* (1937) 28 Cal.App.2d Supp. 775), sale of shortweighted food (*In re Marley* (1946) 29 Cal.2d 525), and use of an unlicensed poison (*Aantex Pest Control Co. v. Structural Pest Control Bd.* (1980) 108 Cal.App.3d 696).

(*In re Jennings*, *supra*, 34 Cal.4th at p. 268, fn. 8.)

The statutes at issue here cannot be characterized as public welfare offenses. They appear in Part Six, Title Four of the Penal Code, entitled "Control of Deadly Weapons," "Firearms." (Pen. Code, § 30312, et seq.) Violation of the challenged statutes is a misdemeanor. (Pen. Code, §§ 30312, subd. (c), 30365, subd. (a).) Restricting access to handgun ammunition to prevent it from falling into the hands of felons or gang members is not comparable to a traffic or regulatory offense, and a conviction for violating it would not be free from moral obloquy. (See *In re Jorge M.*, *supra*, at pp. 879–880.) The challenged statutes are more analogous to other legislative prohibitions or restrictions on dangerous items, for which a knowledge element typically has been required. (See, e.g., *People v. King*, *supra*, 38 Cal.4th at pp. 627–628 [short-barreled rifle]; *In re Jorge M.*, *supra*, 23 Cal.4th at p. 887 [unregistered assault weapon]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [dirk or dagger]; *People v. Westlund* (2001) 87 Cal.App.4th 652, 658 [firearm silencer].)

As observed by the dissent in the Court of Appeal, it was appropriate to read a scienter requirement into the statutes, and limit them to "ammunition that is generally recognized as used more often in handguns than in other types of firearms." (Dis. Op., p. 10.) With this construction of the statutes, "an ammunition purveyor would be liable criminally for

failing to comply with the statutes only when he or she knows or should know that the ammunition displayed, sold, or transferred is ammunition principally for use in handguns because the ammunition is generally recognized as handgun ammunition." (Dis. Op., p. 10.)

C. The Challenged Statutes Do Not Implicate Constitutionally Protected Conduct

In the opening brief on the merits, Appellants noted that the opinion below contained much analysis purportedly assessing whether the statutes reach or "implicate a substantial amount of constitutionally protected conduct" (Slip Op., p. 28), but that it failed to acknowledge that First Amendment principles do not necessarily transfer to other constitutional contexts, here the Second Amendment. (AOB at p. 17.) In response, Respondents maintain that "the Second Amendment is deserving of protections similar to those afforded to the First" and advocates "borrow[ing] First Amendment analyses" in interpreting Second Amendment claims. (RB at p. 20.) Then, Respondents submit that cases such as *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679 which limited application of the more lenient test to "First Amendment freedoms or reproductive rights" must be discounted as "pre-*Heller*" decisions. (RB at p. 22, citing *District of Columbia v. Heller* (2008) 554 U.S. 570.)

But Respondents' suggestion that courts have "directly borrowed First Amendment analyses" (RB at p. 20) in analyzing Second Amendment claims is demonstrably incorrect in the context of facial constitutional challenges. Those federal courts to consider the question have opined that "First Amendment doctrines [are] a poor analogy for purposes of facial challenges under the Second Amendment." (*Hightower v. City of Boston* (1st Cir. 2011) 693 F.3d 61, 80.) Indeed, "every court to have expressly considered the issue" has rejected the post-*Heller* contention that First Amendment facial challenge principles can be imported into the Second

Amendment context. (*Ibid.*, collecting cases.) The California cases to consider facial challenges to firearms statutes post-*Heller* have applied the stricter "incapable of any valid application" standard. (See *People v. Delacy* (2011) 192 Cal.App.4th 1481, 1492, fn. 8 ["facial" constitutional challenge to firearms statute fails for failing to assert that statute was incapable of any valid application]; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 311 [applying "total and fatal conflict" standard to facial challenge to firearms statute].) Respondents' attempt to apply First Amendment principles wholesale to the Second Amendment must be rejected.

Significantly, Respondents fail to answer two of the most noteworthy arguments advanced by Appellants: that the statutes here do not burden the right to acquire ammunition, nor do they actually burden Second Amendment rights. Respondents' characterization of how the challenged statutes interact with the Second Amendment is significant. Respondents do not contend that the statutes directly violate the Second Amendment. Rather, they argue that the statutes "impinge" on it (RB at p. 2), "threaten to inhibit" it (RB at pp. 4, 25), "impact" it (RB at p. 18) or are "implicating" it (RB at p. 22). No ammunition is withdrawn from the marketplace by the challenged statutes. Any Californian who wants to buy handgun ammunition remains free to do so under the statutes; he or she must simply present identification.

Respondents' complaint that the statutes "eliminate[] access" to mail order and internet purchases of handgun ammunition (RB at p. 23) does not implicate the Second Amendment. The statutory requirements that purchases of handgun ammunition be made in person and with valid identification are in step with requirements for buying firearms generally under both state and federal law.

Since the adoption of the Gun Control Act of 1968, 18 U.S.C. § 921 et seq., federal law has required that identification be presented and recorded at the time of the sale of a handgun. As the United States Supreme Court noted in *Abramski v. U.S.* (2014) __ U.S. __, 134 S.Ct. 2259, 2263, "prior to selling a handgun to an individual 'transferee,' a licensed dealer must, under § 922(s)(3), obtain a statement from that transferee which contains 'the name, address, and date of birth appearing on a valid identification document . . . of the transferee and a description of the identification used.' 18 U.S.C. § 922(s)(3). Further, the dealer must verify the transferee's identity by examining the identification document described in the transferee's statement." Federal law also contains a requirement that handgun purchases be consummated in person:

> Section 922(c) brings the would-be purchaser onto the dealer's "business premises" by prohibiting, except in limited circumstances, the sale of a firearm "to a person who does not appear in person" at that location. Other provisions then require the dealer to check and make use of certain identifying information received from the buyer. Before completing any sale, the dealer must "verif[y] the identity of the transferee by examining a valid identification document" bearing a photograph. § 922(t)(1)(C).

(*Ibid.*)

As Appellants point out in their opening brief (AOB at p. 20), California law also contains a face-to-face transaction with identification requirement to purchase a handgun. (See Penal Code, § 26845, subd. (a) ["No handgun may be delivered unless the purchaser, transferee, or person being loaned the firearm presents documentation indicating that the person is a California resident"].) Extending the requirement to the purchase of ammunition for the handgun is not onerous, and does not intrude on the right to bear arms. (See Dis. Op., p. 7 ["requiring the ammunition seller or transferor to record the buyer's identification information" is a "minor

inconvenience to the buyer" and not a "threat to inhibit his or her right to possess an operable handgun for self-defense"].)

Moreover, the challenged statutes are in the category of legislation that does not implicate the Second Amendment. In describing the contours of the Second Amendment in a case involving a total ban on possession of handguns in Washington D.C., the Supreme Court was careful to cabin its analysis and confirm that statutes of the type at issue did not run afoul of the right to bear arms. Even as it confirmed that the Second Amendment right to bear arms was an individual right, the Court warned that it did not intend to "cast doubt" on laws "imposing conditions and qualifications on the commercial sale of arms" because such laws were "presumptively lawful regulatory measures." (*District of Columbia v. Heller*, *supra*, 554 U.S. at pp. 626-627 and fn. 26.) The Court elected to "repeat those assurances" two years later, stating directly that "this constitutional right is subject to regulation." (*McDonald v. Chicago* (2010) 561 U.S. __, [130 S.Ct. 3020, 3047].)

Respondents dismiss these passages as "dicta" which "speaks only to legal challenges to the direct violation of Second Amendment rights." (RB at p. 25.) Respondents cite no authority for this atypical reading of *Heller*. Federal cases to consider the point have uniformly found that statutes of the type described as "presumptively lawful regulatory measures" reach conduct "unprotected by the Second Amendment." (*U.S. v. Barton* (3rd Cir. 2011) 633 F.3d 168, 172 [analyzing felon firearm dispossession statute listed as presumptively lawful in *Heller* and collecting cases].) And California cases have reached a similar conclusion: "Stated otherwise, the right announced in *Heller* does not render invalid otherwise lawful statutes of the types enumerated." (*People v. Delacy*, *supra*, 192 Cal.App.4th at p. 1491.)

For more than forty years, the federal government has placed identification and face-to-face requirements on the purchase of firearms. As recently as earlier this year, these requirements were upheld by the United States Supreme Court in *Abramski.* The notion that California's statutes requiring similar identification protocols for the purchase of handgun ammunition run afoul of, or unduly burden, the Second Amendment, must be rejected.

II. THE CHALLENGED STATUTES VALIDLY USE TERMS OF COMMON UNDERSTANDING TO DESCRIBE THE PROHIBITED CONDUCT

The Court of Appeal found that the challenged statutes "provide no guidance or objective criteria" to determine whether ammunition is "principally for use" in a handgun. (Slip Op., p. 36.) Respondents take this a step further, and maintain that it "is impossible to know" what is meant by ammunition "principally for use" in handguns. (RB at pp. 1-2.) To Respondents, one "can never know" which ammunition transactions are subject to the statutes, and "[t]he best anyone can do is venture a guess based on his or her subjective understanding of the statutory language and his or her subjective knowledge of ammunition usage in any given jurisdiction, at any given time." (RB at p. 33.)

For a statute to be impermissible under the Fourteenth Amendment due to vagueness, it must be found that a person of ordinary intelligence would be unable to understand what conduct was prohibited, and that the statute encouraged arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-358.) Put another way, "due process of law in this context requires two elements: a criminal statute must be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567,

internal quotations and citations omitted.) A statute must provide at least "minimal guidelines" to prevent "standardless" enforcement that allows the law to be applied by the whim or personal predilections of the police. (*Kolender*, *supra*, 461 U.S. at p. 358.)

But the fact that a statute contains "one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face." (*In re Jorge M.*, *supra*, 23 Cal.4th at p. 886.) "Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201.)

Here, Respondents complain that the meaning of the statutory definition of handgun ammunition "depends on a variety of considerations." (RB at p. 2.) Respondents submit that the definition "relies on usage by unidentified third-party consumers in some unspecified geographic location during some undefined period of time." (RB at pp. 55-56.) They complain that there is no "source" or "resource" to determine the meaning of the definition. (RB at pp. 9, 58.)

Respondents are improperly "straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader." (*United States v. Powell* (1975) 423 U.S. 87, 93.) The United States Supreme Court has found the type of approach taken by Respondents inappropriate in a vagueness challenge:

> Petitioners proffer hypertechnical theories as to what the statute covers, such as whether an outstretched arm constitutes "approaching." And while "[t]here is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question," *American Communications Assn. v. Douds*, 339 U.S. 382, 412, 70 S.Ct. 674, 94 L.Ed. 925 (1950), because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language," *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

(*Hill v. Colorado* (2000) 530 U.S. 703, 733, footnote omitted.)

Due process does not require that a statute contain a list of all of its applications, or the use of a source for consultation.[3] Respondents do not answer Appellants' citation of *People v. Morgan*, which rejected an argument that the requirement in the statute defining kidnapping that the victim be carried a "substantial distance" was unconstitutionally vague. (*People v. Morgan*, *supra*, 42 Cal.4th at p. 606.) The reasoning in *Morgan* rejected an argument very similar to that advanced by respondents here:

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

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[3] While there may not be a definitive source, there are several sources that can be accessed in determining whether ammunition is covered by the statutes. For example, the record below indicates that ammunition vendors divided their ammunition offered for sale into two main categories: "handgun" ammunition and "rifle" ammunition. (See JA IX 2306-2369.) In fact, respondents expressly conceded that many ammunition vendors market or brand "some ammunition as 'handgun ammunition.'" (JA XI 2897.) Accordingly, as the dissent points out, both "Internet ammunition vendors and a respected ammunition encyclopedia categorize a number of cartridges as handgun ammunition," reinforcing the conclusion that "the meaning of 'ammunition principally for use in handguns' can be ascertained objectively." (Dis. Opn., p. 12.)

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

Respondents likewise fail to respond to Appellants' citation of *United States v. Powell*, which rejects the type of approach offered by Respondents. In *Powell*, the statute at issue criminalized the mailing of "firearms capable of being concealed on the person." (423 U.S. at p. 90.) The Court of Appeals accepted the argument that the statutory language was impermissibly vague: "the court held that, although it was clear that a pistol could be concealed on the person, 'the statutory prohibition as it might relate to sawed-off shotguns is not so readily recognizable to persons of common experience and intelligence.'" (*Ibid.*) The Supreme Court reversed, condemning the speculative reasoning of the lower court:

> The Court of Appeals questioned whether the "person" referred to in the statute to measure capability of concealment was to be "the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season." 501 F.2d, at 1137. But we think it fair to attribute to Congress the commonsense meaning that such a person would be an average person garbed in a manner to aid, rather than hinder, concealment of the weapons. Such straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the "void for vagueness" doctrine, and we will not indulge in it.

(*Id.* at p. 93.)

The Court dismissed use of "marginal fact situations" to manufacture vagueness where none existed:

> While doubts as to the applicability of the language in marginal fact situations may be conceived, we think that the statute gave respondent adequate warning that her mailing of a 22-inch-long sawed-off shotgun was a criminal offense. Even as to more doubtful cases than that of respondent, we have said that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it,

some matter of degree." *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232 (1913).

(*Ibid.*)

Contrary to Respondents' contention, the challenged statutes provide adequate notice to citizens as well as law enforcement. Indicating that the statutes apply to ammunition "principally for use" in handguns provides notice that the statutes are not directed at rifle ammunition. Ammunition vendors, many of whom already divide their stock between "handgun" and "rifle" ammunition (see JA IX 2306-2369), are on notice that the statute is intended to apply to the former, not the latter. And since this "language sufficiently warns of the proscribed conduct when measured by common understanding and experience, the statute is not unconstitutionally vague." (*People v. Ellison* (1998) 68 Cal.App.4th 203, 207–208.) In a similar vein, law enforcement is on notice about which cartridges are covered. As noted by the dissent, "because Internet ammunition vendors and a respected ammunition encyclopedia categorize a number of cartridges as handgun ammunition" it is appropriate to "conclude that the meaning of 'ammunition principally for use in handguns' can be ascertained objectively." (Dis. Opn., p. 12.) Thus, both the notice and law enforcement "elements" of the vagueness test are satisfied here. (*Williams v. Garcetti*, *supra*, 5 Cal.4th at p. 567.)

Respondents' repeated suggestion that it is "impossible" to ascertain the meaning of ammunition "principally for use" in a handgun is based upon their desire to elevate marginal hypothetical concerns over a plain reading of the statute. This argument is in the tradition of asking which seasonal clothes are being worn when firearm concealment is considered (*Powell*) or questioning the specificity of a statute defining kidnapping as moving a person a "substantial distance" under threat of harm (*Morgan*).

This Court should reaffirm the Legislature's ability to use terms of common understanding such as are at issue here by reversing the Court of Appeal.[4]

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

The statutes challenged here should survive even under the more lenient "generality of cases" standard employed by the Court of Appeal. The conclusion that a reasonable person cannot understand what is meant by ammunition "principally for use" in handguns, and that therefore the more lenient standard has not been met, is wrong.

In their brief, Respondents concede that each of them testified at deposition regarding "their personal experience" with cartridges they believed were "chambered more often in a handgun." (RB at p. 43, emphasis omitted.) Respondents suggest that "the limited, personal experience and knowledge of four people [i.e. themselves] provides no meaningful insight into what ammunition is 'principally for use' in handguns." (RB at p. 44) Respondents argue that the fact that "a few cartridges that three or four people might have similar estimations on based on their subjective experience cannot save the Challenged Provisions under any test." (*Ibid.*) Respondents misunderstand how the type of challenge

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[4] Respondents assure the Court that there is "genuine" confusion about the meaning of the statute. (RB at pp. 40-41.) Significantly, however, Respondents dismissed their as-applied challenge on the eve of the hearing on the merits, and proceeded solely with a facial challenge. (JA XIV 4031.) Although they developed a factual record for their as-applied challenge, its utility in propping up the facial challenge is dubious: "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.) Respondents do not explain how their lengthy factual citations to the record developed to support their dismissed as-applied challenge (RB at pp. 40-49) have any utility in assessing their facial challenge.

they have brought—a facial challenge—interacts with the record in this case.

The record must be considered in light of the fact that this is a pre-enforcement facial challenge. There is a strong presumption against pre-enforcement facial challenges and in favor of as-applied challenges. (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 450.) The factual record here establishes, at best, that the meaning of the statutes can be ambiguous in certain situations, but also some general agreement about what is meant. And "when situations in which the statutory language is ambiguous arise, the statute's application can be resolved by trial and appellate courts 'in time-honored, case-by-case fashion,' by reference to the language and purposes of the statutory scheme as a whole" in as-applied challenges on a going forward basis. (See *Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at p. 1202, quoting *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 377–378.)

The record developed in the trial court shows that there was a general understanding among witnesses about which cartridges were covered by the language of the statute. (Compare JA VIII 2205, JA X 2717-18 [identifying .25 ACP, .45 GAP, 9mm Federal, 10mm Auto, .357 SIG, .44 Auto Mag, and .38 S&W as handgun ammunition] with JA VIII 2257 [identifying sixteen specific cartridges in calibers .45, 9mm, 10mm, .357, .38, .44, .380, .454, .25, and .32 as loaded more frequently in handguns].) Specifically, on this record, there is a large group of ammunition cartridges for which there is no dispute about whether it is "principally for use in handguns." (See JA VIII 2207 [fifteen different cartridges of ammunition described as used more often in handguns than in rifles].) The presence of this substantial collection of cartridges that are indisputably within the definition means that the statutes are constitutional even under the less

stringent "generality of cases" standard employed below, and any remaining ambiguity can be assessed in future as-applied challenges, if necessary.

CONCLUSION

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

Dated: September 29, 2014

Respectfully submitted,

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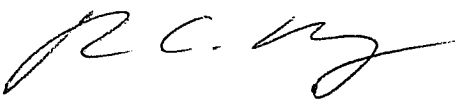

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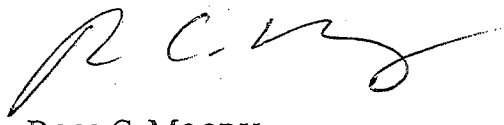
CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANTS' REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5,368 words.

Dated: September 29, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

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

No.: **S215265**

I declare:

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

On September 29, 2014, I served the attached **APPELLANTS' REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 29 2014, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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