Case No. S215265

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHERIFF CLAY PARKER, *et al.*,
Plaintiffs and Respondents

v.

THE STATE OF CALIFORNIA, *et al.*,
Defendants and Appellants.

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND RESPONDENTS SHERIFF CLAY PARKER, *et al.*

From an Opinion of the Court of Appeal, Fifth Appellate District,
Case Nos. F062490, F062709

From a Decision by Fresno County Superior Court,
Case No. 10 CECG-02116, The Honorable Jeffrey Y. Hamilton, Judge

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INTRODUCTION

In *District of Columbia v. Heller* (2008) 554 U.S. 570, 635, the U.S. Supreme Court struck down the District of Columbia's handgun ban, holding that the Second Amendment protects an individual right to keep and bear arms. A year later, the Legislature enacted a regulatory scheme for the sale, transfer, and registration of "handgun ammunition" in California (AB 962). Less than a year later, in *McDonald v. City of Chicago* (2010) 561 U.S. 742, 780, the Supreme Court recognized that the Second Amendment applies to the States.

The Court of Appeal, Fifth Appellate District, affirmed a trial court's decision holding the statutory definition of "handgun ammunition" – ammunition "principally for use" in handguns – was unconstitutionally vague, voiding Penal Code sections 16650, 30312, and 30345-30365[1] (the "Challenged Provisions").

Amicus curiae, the National Shooting Sports Foundation, Inc. ("NSSF") respectfully submits that this Court should affirm. This is a prototypical void-for-vagueness case. The Challenged Provisions lack an ascertainable standard to give firearms retailers fair warning. They

[1] All subsequent statutory references are to the Penal Code, except where noted.

fail to provide explicit standards for law enforcement. And they threaten to inhibit fundamental rights and freedoms.

The NSSF is the trade association for the firearms industry, with over 10,000 members, including about 474 federally licensed firearms retailers in California and 6,289 nationwide, adversely affected by the Challenged Provisions, engages in the lawful commerce of firearms and ammunition that makes the exercise of Second Amendment rights possible. Vague laws are particularly detrimental to the NSSF's members.

The Challenged Provisions embody this problem. They regulate federally licensed firearms retailers' operations with regard to ammunition "principally for use in" handguns, notwithstanding that it may be used in "some rifles." But no guidance is given either to firearms retailers or police to determine which ammunition is covered by the statutes. There is no ascertainable standard and the Challenged Provisions do not satisfy the greater specificity required of firearms control laws in a post-*Heller* world.

Appellants fail to demonstrate the Court of Appeal erred. To adopt their position, this Court would have to abandon well-established legal standards, adopt a saving construction divorced from

statutory text and context, and the Challenged Provisions' impact on the constitutional rights to free speech, to keep and bear arms, and to privacy. This Court should affirm.

ARGUMENT

I. APPELLANTS MISCONCEIVE APPLICABLE LEGAL STANDARDS.

Appellants' contentions rest on incorrect premises and faulty reasoning. While the standard for facial challenges is subject to some debate (AOB 7-8), the standard for "facial vagueness challenge[s]" is not. *See People v. Superior Court* (*Caswell*) (1988) 46 Cal.3d 381, 389-390 (statute must provide: (1) "adequate notice of the conduct proscribed"; and (2) "sufficiently definite guidelines" for nonarbitrary enforcement).

Precedent differentiates between statutes containing "imprecise but comprehensible normative standards" and those where "no standard of conduct is specified at all." *Coates v. City of Cincinnati* (1971) 402 U.S. 611, 614. A statute that proscribes "no comprehensible course of conduct" "may not constitutionally be applied to any set of facts." *United States v. Powell* (1975) 423 U.S. 87, 92; *see City of Chicago v. Morales* (1999) 527 U.S. 41, 71 (Breyer, J., concurring) (where it lacks enforcement standards,

"ordinance *is* invalid in all its applications").

Next, Appellants erroneously reason that if at least some ammunition cartridges fall within the Challenged Provisions, the statutes cannot be invalid in all applications (AOB 25-27; ARB 16-18). Appellants reverse the proper order of the inquiry: a statute is vague not because of the difficulty of determining "whether the incriminating fact [the statute] establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams* (2008) 553 U.S. 285, 306. Appellants' hypothetical applications are irrelevant if the statute is facially vague. *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.

Finally, Appellants incorrectly argue that this Court always applies the "all applications" standard to review facial vagueness challenges to penal statutes (ARB 4). "[I]f a law threatens the exercise of a constitutionally protected right a more stringent vagueness test applies." *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109. The Court must determine whether "the law sweeps in a substantial amount of constitutionally protected conduct." *Id.* (citing *Kolender v. Lawson* (1983) 461 U.S. 352, 358-358 & n.8). If so, and the "statute imposes criminal penalties, the standard of certainty is

higher." *Kolender,* 461 U.S. at 358 n.8. Such a statute may be invalidated "on its face even when it could conceivably have had some valid application." *Id.*

II. THE CHALLENGED PROVISIONS FAIL TO GIVE FEDERALLY LICENSED FIREARMS RETAILERS FAIR NOTICE.

Section 16650(a) has two distinct vagueness problems rendering it incomprehensible to ammunition sellers: (i) the broad statutory definition of "handgun," combined with (ii) the undefined "ammunition principally for use" in handguns standard.

Nevertheless, Appellants argue that Section 16650(a) is not vague in light of common understanding and experience. It proposes construing "ammunition principally for use in handguns" to mean "ammunition that is generally recognized as used more often in handguns than in other types of firearms." (AOB 6-7; ARB 12-13).

This construction should be rejected. A valid law must be "sufficiently definite to provide adequate notice of the conduct proscribed." *Caswell*, 46 Cal.3d at 389. There is no such general recognition among retailers. *People v. Linwood* (2003) 105 Cal.App.4th 59, 67 (court must view statute from perspective of reasonable person subject to its terms).

A. Section 16650(a) Cannot Be Construed In Light Of Federally Licensed Firearms Retailers' Common Understanding And Experience.

According to Appellants, Section 16650(a) provides fair notice to federally licensed firearms retailers that the statute covers "handgun ammunition" but not "rifle ammunition," consistent with retailers' common practice (ARB 15). But there exists no such "common practice": every retailer has a different understanding and personal knowledge of ammunition calibers and the prevalence of their use in handguns versus rifles (JA VIII 2039-2050, 2057-2069; XI 3139-3169). (RB 40-45.)

Furthermore, firearms retailers cannot rely on common understanding and experience when the Penal Code defines terms. *Colautti v. Franklin* (1979) 439 U.S. 379, 392 & n.10 (rejecting proposed saving construction of "sufficient reason" contrary to statutory definitions).

When put in proper statutory and factual context, persons "of both common and uncommon intelligence [will be] forced to speculate" on Section 16650(a)'s meaning. *People v. Barksdale* (1972) 8 Cal.3d 320, 330 (statute had vague qualifying terms compounded by uncommon and contradictory definitions).

Section 16650(a) defines "handgun ammunition" to mean:

> [A]mmunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, notwithstanding that the ammunition may also be used in some rifles.

While "ammunition" is given its ordinary meaning[2] in Section 16650, the same cannot be said of "handgun." The ordinary meaning of handgun is "a firearm designed to be held and fired with one hand." (JA V 1321). But the Penal Code defines a "handgun" as any "pistol, revolver, or firearm capable of being concealed upon the person," Section 16640, which, in turn, includes any firearm with "a barrel less than 16 inches in length," Section 16530(a). It also includes any firearm that has a barrel longer than 16 inches, but which is designed to be interchanged with a barrel shorter than 16 inches, *id.*, along with "a short-barreled rifle," or "a short-barreled shotgun," provided it has a barrel shorter than 16 inches. Sections 16530(b), 17170, 17180. *Isobe v. Unemp. Ins. App. Bd.* (1974) 12 Cal.3d 584, 590 (statutes *in pari materia* read together); *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063 (statutory definitions are binding). And, Section 16530 is

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[2] "One or more loaded cartridges consisting of a primed case, propellant and with or without one or more projectiles. Also referred to as fixed or live ammunition." (JA XI 2925).

broadly construed to effectuate the Legislature's purpose of controlling dangerous weapons. *See People v. Heffner* (1977) 70 Cal.App.3d 643, 647-649 (Taser was "concealable firearm" under Section 16530's predecessor).

Thus, "handgun ammunition" is properly construed as:

> Ammunition principally for use in [(1) any firearm that has a barrel less than 16 inches in length; (2) any firearm with a barrel more than 16 inches in length which is designed to be interchangeable with a barrel less than 16 inches in length; (3), a short-barreled rifle; and (4) a short-barreled shotgun], notwithstanding that the ammunition may also be used in some rifles.

Because the statutory definition of "handgun" can include some rifles,[3] it could "trap the innocent" firearms retailer. *E.g., Barksdale*, 8 Cal.3d at 330 (vague statutory term "mental health" defined as its "antithesis: mental illness"); *Katzev v. County of Los Angeles* (1959) 52 Cal.2d 360, 370-371 ("crime comic book" defined to include books with "accounts of crime" and five illustrations).

B. Appellants' Construction Impermissibly Rewrites Section 16650(a).

According to Appellants, "ammunition principally for use in handguns" is "ammunition that is generally recognized as used more

[3] "[A]" firearm having rifling in the bore and designed to be fired from the shoulder." (JA V 1325).

often in handguns than in other types of firearms." (ARB 12-13).

This Court should not adopt Appellants' proposed gloss because it adds qualifying language ("generally recognized") not appearing in the statute.

Appellants adopted their "generally recognized" gloss after it was first articulated by the dissent below. The dissent adopted the phrase from *Erlich v. Municipal Court* (1961) 55 Cal.2d 553 (*see Dis. Op.* 10), which discussed an entirely different statutory scheme. *Id.* at 558-559 ("'every Jewish law and custom,' etc. must be construed to include only such Jewish laws and customs as are generally recognized as among 'the orthodox Hebrew religious requirements'"). Since it does not construe Section 16650(a), the dissent's "generally recognized" gloss must be rejected. *United States v. Reese* (1875) 92 U.S. 214, 219-221 (vague statute cannot be saved by judicial construction inserting specific criteria not in text).

C. The "Principally For Use" Standard Is Unmoored To Common Understanding.

The "principally for use" test is impossible to apply. "Principally for use" is undefined in Section 16650(a). According to its common meaning, this phrase means ammunition which is mainly used in "handguns," even though it may also be used in rifles (RB 37).

In sum, the statute imposes a quantitative/functional standard without any criteria for determining whether 51 percent or more of a particular ammunition caliber or cartridge is used in handguns or in rifles.

Firearms retailers – including NSSF members – do not know how to apply this standard (JA VIII 2040, 2044, 2048, 2058, 2063, 2067; XI 3139-3145, 3169). The reason is simple: firearms retailers (along with enthusiasts, experts and law enforcement) classify ammunition by their caliber and cartridge (JA VIII 2043-2071; XI 3097-3125, 3139-3171, 3185-3267, 3271-3307; XII 3719-3722), not by the type of firearm in which it is "principally" used. Caliber and cartridge denote objective characteristics. Caliber measures bullet width. And cartridges corresponding to any given caliber are classified on the basis of many things, including cartridge length, bullet weight, velocity, power, and intended usage (JA VIII 2033).

Thus, when asked whether certain ammunition cartridges were mainly used in handguns based on their personal knowledge, firearms retailers, law enforcement officers, and experts could not agree (JA VIII 2043-2071; XI 3079-3085, 3089; XII 3719-3722).

Appellants dismiss these concerns, arguing that "principally for use" is a reasonably definite qualifying term similar to "reasonable" or

"substantial." They rely on *Powell*, 423 U.S. at 93 and *People v. Morgan* (2007) 42 Cal.4th 593, 605[4] for the proposition that the law need not be stated with precision, and that common meaning can resolve any uncertainty in application. (AOB 23-24).

But those authorities concerned the application of an imprecise standard, made comprehensible by applying "common understanding and experience" to the defendants' *actus reus* and other case facts. *See Powell*, 423 U.S. at 89, 93 (whether sawed-off shotgun "with a barrel length of 10 inches and an overall length of 22 1/8 inches" was a firearm "capable of being concealed on the person" deliverable by mail); *Morgan*, 42 Cal.4th at 605 (whether forcibly moving victim 248 feet across parking lot, up one flight of stairs, inside concrete enclosure, and behind air conditioning unit was a "substantial distance, that is, a distance more than slight or trivial").

In contrast, where the statute regulates technical or specialized matters, the standard cannot be shored up with common meaning and experience. *United States v. Diaz* (9th Cir. 1974) 499 F.2d 113, 115 ("objects of antiquity" provided "no notice whatsoever . . . that the word 'antiquity' can have reference not only to the age of an object

[4] Appellants incorrectly assert that *Morgan* involved a facial challenge (AOB 21). *Id.* at 605-606 (challenge to CALJIC No. 9.50).

but also to the use for which the object was made and to which it was put, subjects not likely to be of common knowledge").

Moreover, "[q]ualifying words like 'reasonable' or 'substantial'" add certainty to obvious criminal conduct. *Barksdale*, 8 Cal.3d at 328 n.3. Where, as here, qualifying words are used to delineate lawful and unlawful conduct, they "increase the uncertainty." *Id.; see, e.g., People v. Building Maintenance Contractors' Ass'n* (1953) 41 Cal.2d 719, 725 ("reasonable profit" held vague because agreement's legality depended "on whether its purpose is to secure reasonable or unreasonable profits" and no common experience guided analysis).

Complicating matters, "principally for use" is a functional and quantitative test. *The frequency of s*uch use must be established as a fact, without reference to the particular user. *Lanzetta,* 306 U.S. at 453-456 ("known to be" "a gangster" vague without identifying person whose knowledge is relevant).

Appellants contend that Section 16650(a) should be upheld under drug paraphernalia cases like *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489; and *Posters 'N' Things, Ltd. v. United States* (1994) 511 U.S. 513. (AOB 24-25).

But in those cases, the statutory "definition makes clear that whether an item is in the class of drug paraphernalia or not – and therefore whether the offense section is called into play – depends on the intent of the person charged with a violation." *Levas & Levas v. Antioch* (7th Cir. 1982) 684 F.2d 446, 452.

Here, Section 16650(a) does not contain the same terms as *Hoffman* and *Posters*, and the Court cannot assume that the Legislature intended to add such qualifying language. *In re Hoddinott* (1996) 12 Cal.4th 992, 1002 (courts may not insert qualifying language or rewrite statute to conform to assumed intention not supported by language). And, since it does not contain any additional qualifying language or objective factors, Section 16650(a) is not anchored to any particular actor's intent or likely use. *See Posters,* 511 U.S. at 518-519 (absent additional qualifying language, "primarily intended . . . for use" could refer to intent of "manufacturers, distributors, retailers, buyers, or users").

Section 16650(a)'s application depends on whether certain ammunition is *actually used* more than 50 percent[5] in handguns, notwithstanding that it may also be used in some rifles. The

[5] The parties agree that "principally" means "more than 50 percent" or "more often." (RB 37; ARB 6).

Legislature did not give any guidance as to how to find the correct answer. Section 16650(a) does not prescribe a relevant timeframe, market, or geographic region. It does not mention specific calibers, cartridges, or other objective characteristics. It does not even limit relevant uses, *e.g.,* civilian, law enforcement, or military.

Because it lacks "any ascertainable standard for inclusion and exclusion," Section 16650 is vague and conflicts with due process in all applications. *Smith v. Goguen* (1974) 415 U.S. 566, 578.

Even if the standard were definite, firearms retailers cannot reasonably or practicably apply it. *People v. Heitzman* (1994) 9 Cal.4th 189, 199 (valid "laws give . . . a reasonable opportunity to know what is prohibited").

First, it is undisputed that "principally for use" is not a standard or term of art in the firearms industry. There is no commonly accepted definition of "handgun ammunition." And, there is no body of research analyzing whether dual use ammunition is used more frequently in handguns or rifles (JA XI 2915-2917, 2929, 2947-2955).

Second, there are more than one thousand modern, commercially-produced ammunition cartridges, virtually all of which can be safely and interchangeably used in handguns and rifles.

Whether a given cartridge is more often used in a handgun or a rifle may change over time, depending on a host of subjective and objective factors (JA VIII 2035-2036, 2181).

Appellants erroneously rely on *Richmond Boro Gun Club v. City of New York* (2d Cir. 1996) 97 F.3d 681, 684-686 for the proposition that a "designed for" standard in an "assault weapons" ban was not vague because it gave notice that it applied "to [a] core group of weapons," with common generic traits.[6] (AOB 25).

But Section 16650(a) does not identify any core group of ammunition or common generic traits. *See Posters,* 511 U.S. at 518-519 ("primarily intended . . . for use" coupled with statutory examples and characteristics rendered objective "product's likely use" standard). Section 16650(a) "has *no* core." *Smith,* 415 U.S. at 578-579 (proposed distinction between "flags" and "actual flags" did not cure vagueness).

III. THE CHALLENGED PROVISIONS INVITE ARBITRARY ENFORCEMENT.

Because it fails to "provide explicit standards" for enforcement, *Hoffman Estates,* 455 U.S. at 498, Section 16650(a) is vague (RB 33;

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[6] Appellants conflate two different vagueness challenges to two separate statutory provisions. *See Richmond,* 97 F.3d at 683.

Slip. Op. 37).

This is vividly illustrated by the testimony of Blake Graham, a Department of Justice ("Department") firearms expert. While he understood "principally for use" to ask whether ammunition is "more often" used in handguns than rifles, Mr. Graham classified ammunition based in part on "a *feeling* that there are certain calibers that are more often than not handgun calibers" (JA V 1301, 1244-1245) (emphasis added). But he did not consult any empirical evidence of ammunition sales; he merely assessed the popularity of handgun models. (JA V 1411-1415; *see* RB 45-49).

Equally uncertain was Mr. Graham's analysis of "dual-use" ammunition, which he purposefully omitted because it would "cloud the issue." (JA V 1296-1297).

For example, it is undisputed that .22 caliber firearms are among the most popular handguns and rifles, and the .22 Long Rifle cartridge – used in both handguns and rifles – is likely the most popular cartridge in the world (JA XI 2818-2822, 2965). When asked whether .22 caliber was handgun ammunition, Mr. Graham responded: "Not at this time." But he would "not necessarily" classify it as rifle ammunition because it "may not meet the current" statutory

language. And, he was "unable to tell if it was, you know, more likely to be shot out of a rifle or handgun." Because he could not form a "strong opinion," all .22 caliber ammunition "was basically left off" his list. His opinion could change, however, with further research (JA V 1297-1302; XI 2967).

Section 16650(a) offends Due Process because it "vests virtually complete discretion in the hands of the police" to determine the statute's coverage. *Kolender*, 461 U.S. at 358. Mr. Graham's subjective approach is possible because the Challenged Provisions cast a large net. *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 165; and "[entrusts] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Kolender*, 461 U.S. at 360.

Appellants ignore the enforcement prong save to argue that "Internet ammunition vendors and [*Cartridges of the World*]" put police "on notice" about the statute's coverage (ARB 15). But the Legislature "may not so abdicate [its] responsibilities for setting the standards of the criminal law." *Smith,* 415 U.S. at 575. It cannot delegate policy matters "to policemen . . . for resolution on an *ad hoc* and subjective basis." *Hoffman Estates,* 455 U.S. at 498.

These outside materials are not referenced in AB 962 or the legislative history. *Cf. People v. Int'l Steel Corp.* (1951) 102 Cal.App.2d Supp. 935, 938 (statute referenced U.S. Bureau of Mines materials). Nor are they typical "definable sources" to guide enforcement. *See Personal Watercraft Coalition v. Marin County Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 139 (related provisions, other statutes, judicial decisions, common law, legislative history, common sense).

"Internet ammunition vendors" are regulated by AB 962 (JA VIII 2039-2050, 2054-2056, 2057-2065). If Appellants are correct, online vendors could render the Challenged Provisions meaningless by no longer advertising separate "handgun" and "rifle" ammunition categories or by reclassifying ammunition from one advertised category to the other. Appellants urge an absurd result. *See Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1491 (Legislature cannot delegate regulatory authority to regulated parties).

Finally, absent the Legislature's express imprimatur, there is no guarantee that police will follow the "guidelines" set by these private party materials, which have not been proven accurate. While Mr.

Graham relied on these materials, he disagreed with them as to certain ammunition, and omitted that ammunition from his list (JA XI 2945-2947, 2959-2961).

Section 16650(a) fails this "more important" prong. *Kolender,* 461 U.S. at 360; *see also In Newbern* (1960) 53 Cal.2d 786, 796 (statute failed to specify "what inordinate use of intoxicants makes a person a common drunkard").

IV. THE CHALLENGED PROVISIONS THREATEN CONSTITUTIONAL RIGHTS.

Contrary to Appellants' suggestion that the uncertainty doctrine tolerates "benign and reasonable" burdens on constitutional rights (AOB 18-21), this Court applies greater scrutiny to vague laws which "threaten[] the exercise of a constitutionally protected right." *Tobe,* 9 Cal.4th at 1109 (right of travel not implicated).

The doctrine's purpose is to create "an 'insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.'" *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 91. The threat of sanctions caused by a vague penal statute may deter the exercise of fundamental rights "almost as potently as the actual application of sanctions." *NAACP v. Button* (1963) 371 U.S. 415, 433.

Because the doctrine requires greater specificity when a statute implicates or threatens constitutional rights, a substantive violation need not be shown. *See, e.g., Kolender*, 461 U.S. at 358-360 & n.8 ("potential for arbitrarily suppressing" freedom of speech or movement); *Smith,* 415 U.S. at 582 (holding statute uncertain without determining whether plaintiff's speech was protected); *Gowder v. City of Chicago* (N.D. Ill. 2012) 923 F.Supp.2d 1110, 1116 (finding ordinance implicating Second Amendment rights vague and substantively invalid).

A. The Challenged Provisions Burden Firearms Retailers' Second Amendment Rights And Liberty Interests.

In *Heller*, 554 U.S. at 635, the Supreme Court held that the Second Amendment protects a fundamental, individual right to keep and bear arms, which the Court recognized as applicable to the states in *McDonald,* 561 U.S. at 780, 791. Indeed, the Fourteenth Amendment was ratified in part to guarantee the right against the States. *Id.* at 770-787.

"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." *Andrews*

v. State (1871) 50 Tenn. 165, 178, cited with approval by *Heller*, 554 U.S. at 608, 612, 629.[7]

Nevertheless, Appellants contend the Court of Appeal erred because the Challenged Provisions are "conditions and qualifications on the commercial sale of arms" presumptively lawful under *Heller.*[8] (AOB 19).

Appellants misread *Heller.* It confirms the existence of a right to sell arms subject to "conditions and qualifications." J. Blackman, *The 1st Amendment, 2nd Amendment, And 3D Printed Guns* (2014) 81 Tenn. L. Rev. 479, 492. "In other words, if the 'sale of arms' was not a constitutional right, it could be prohibited altogether under the police power, and not just limited by 'conditions and qualifications.'" *Id.* Such "conditions and qualifications" are subject to "a kind of intermediate scrutiny" analogous to commercial speech, J. Blocher,

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[7] *See Peruta v. Cnty. of San Diego* (9th Cir. 2014) 742 F.3d 1144, 1181 n.2 (firearms acquisition); *Heller v. District of Columbia (Heller II)* (D.C. Cir. 2011) 670 F.3d 1244, 1271 (same); *Illinois Ass'n of Firearms Retailers v. City of Chicago (IAFR)* (N.D. Ill. 2014) 961 F.Supp.2d 928, 930 (same); *Bateman v. Perdue* (E.D.N.C. 2012) 881 F.Supp.2d 709, 714 (firearms and ammunition); *see also Montgomery County v. Atlantic Guns, Inc.* (1985) 302 Md. 540, 548 (recognizing "inseparability of handguns and ammunition").

[8] Only longstanding regulatory measures are presumptively lawful. *McDonald*, 561 U.S. at 786. AB 962 is not longstanding. It was enacted one year after *Heller*.

Categoricalism and Balancing in First and Second Amendment Analysis (2009) 84 N.Y.U. L. Rev. 375, 380, 422, or time, place and manner restrictions, *Parker v. D.C.* (D.C. Cir. 2007) 478 F.3d 370, 400, *aff'd, Heller*, 554 U.S. at 629.

Courts vigilantly protect against vague laws chilling free speech. *See, e.g., Baggett v. Bullitt* (1964) 377 U.S. 360, 372. Yet in some ways, the "concerns about the chilling effect of vague laws are even stronger in a Second Amendment context." D.B. Kopel, *The First Amendment Guide to the Second Amendment* (2014) 81 Tenn. L. Rev. 417, 465. Firearms retailers are highly-regulated businesses.[9] Vague laws that endanger their licensure threaten retailers' rights to sell arms and residents' rights to acquire arms. *Id.* Such laws are not tolerated in the First Amendment context, *Perrine v. Municipal Court* (1971) 5 Cal.3d 656, 661-662, nor should they be tolerated here.

In addition, the right to engage in independent business is a fundamental liberty interest. *Bautista v. Jones* (1944) 25 Cal.2d 746, 749. And firearms retailers' licenses are protected property interests. *Spinelli v. City of New York* (2d Cir. 2009) 579 F.3d 160, 169. Here, a

[9] For example, it takes nearly 45 minutes to process a single handgun transaction, notwithstanding background checks and mandatory waiting periods (JA X 2638).

violation of the Challenged Provisions is also a violation of state licensing laws, and will result in the firearms retailer forfeiting his or her state-issued license. Sections 16575, 26715(b)(1), 26830(f). Appellants do not dispute that the Challenged Provisions threaten retailers with harsh deprivation (*see Slip Op.* 29-30).

B. Purchasers' Second Amendment Rights Are Threatened.

It cannot be doubted that vague "conditions and qualifications" on the sale of arms threaten purchaser's rights. Other constitutional rights may be burdened by provider regulations. *See, e.g., Roe v. Wade* (1973) 410 U.S. 113, 163, *overruled on other grounds in Planned Parenthood v. Casey* (1992) 505 U.S. 833 ("attending physician, in consultation with his patient, is free to determine" whether pregnancy should be terminated without State regulation). The Second Amendment is no different. [10] *See, e.g., Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 696 ("supplier of firing-range facilities" is harmed by firing-range ban and may also assert "the rights of third parties who seek access to its services"); *IAFR,* 961

[10] Appellants insist that Second Amendment rights are neither analogous to, nor on equal footing with, speech or abortion rights (AOB 10, 18-19). But, the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780.

F.Supp.2d at 931 n.3 (firearms retailer association could challenge firearms sales ban).

As for buyers, the chilling effect from vague firearms laws "is again even stronger" than speech laws. Kopel, *supra,* at 465. Vague speech laws have a chilling effect on residents' intellectual lives by denying them books; vague firearms laws may prevent law-abiding, responsible persons from exercising their core right to self-defense. *Id.*

This is especially the case where, as here, the Challenged Provisions target "handgun ammunition." As the "quintessential self-defense weapon[s]," handguns are categorically protected by the Second Amendment. *Heller*, 554 U.S. at 581, 624-625, 629; *see Parker,* 478 F.3d at 397, 400 ("Once it is determined – as we have done – that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them.").

Appellants incorrectly insist that the Challenged Provisions do not burden or chill Second Amendment rights because no ammunition is withdrawn from the marketplace (ARB 8). To the contrary, the Challenged Provisions have caused out-of-state vendors to forego all sales to California rather than risk prosecution (JA VIII 2040-2041,

2044-2045, 2048-2049). This effectively bans mail-order and Internet sales, which has at least three negative effects on purchasers. It decreases the supply and increases the cost of ammunition. It increases the cost for rural residents who must travel further to obtain ammunition from a retailer. It also eliminates all purchasers' access to certain kinds of lawful, hard to find ammunition which is only regularly sold over the Internet (*see Slip. Op.* at 31). These residents' Second Amendment rights are threatened, and "it is no answer to say" that they have access to other types of ammunition, *Heller*, 554 U.S. at 629, or could purchase ammunition elsewhere, *Ezell*, 651 F.3d at 697.

C. The Challenged Provisions Implicate The First Amendment.

Appellants concede that greater scrutiny is required when vague laws implicate the First Amendment but erroneously deny that the Challenged Provisions do so (AOB 10-12).

Section 30350 provides that a retailer "shall not sell[,] . . . *offer for sale* . . . , or display for sale . . . any handgun ammunition in a manner that allows" a purchaser to access the ammunition "without

the assistance of the vendor or an employee of the vendor" (emphasis added).

The First Amendment protects speech which "does 'no more than propose a commercial transaction.'" *Welton v. Los Angeles* (1976) 18 Cal.3d 497, 502-504 (ordinance prohibiting "offer for sale").

Provided it is lawful and not misleading, "an offer to sell firearms" is protected commercial speech. *Nordyke v. Santa Clara County* (9th Cir. 1997) 110 F.3d 707, 710-711; *cf. Hoffman Estates,* 455 U.S. at 496 (offer to sell drug paraphernalia not protected because it encourages illegal drug use).

AB 962's legislative history discloses that this provision's purpose is to prevent shoplifting by customers by limiting all offers to sell handgun ammunition to "behind the counter" of retail firearms stores. Sen. Com. on Public Safety, Rep. on AB 962 (2009-2010 Reg. Sess.) as amended June 22, 2009, pp. 20-21 ("Sen. Public Safety Report"). Assuming, *arguendo,* "display for sale" may be construed narrowly to cover in-store displays to prevent shoplifting, the statute nevertheless covers all "offers for sale" of "handgun ammunition.

To the extent Section 30350 is directed to persons who may legally purchase ammunition, it does not cover illegal transactions. *Nordyke,* 110 F.3d at 710.

Section 30350 is also presumptively invalid viewpoint discrimination because it only applies to offers to sell handgun ammunition by firearms retailers, *Sorrell v. IMS Health Inc.* (2011) 131 S.Ct. 2653, 2663-2665 ("content-based burdens must satisfy the same rigorous scrutiny as its content-based bans"). The Challenged Provisions therefore implicate First Amendment rights. *Baggett*, 377 U.S. at 372.

D. The Challenged Provisions Implicate Purchasers' Privacy Rights.

A more lenient standard of review for facial challenges applies where law implicates "fundamental constitutional privacy rights" (e.g., abortion). *See Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 343. Appellants concede the point, but incorrectly argue that the Challenged Provisions will not burden such rights (AOB 10-12).

The Challenged Provisions implicate law-abiding gun owners' privacy rights, Cal. Const. art. I, § 1, by facilitating unlawful police

surveillance of Second Amendment conduct. Voters adopted the right to prevent "government snooping" and "overbroad collection and retention of unnecessary personal information by government and business interests." *White v. Davis* (1975) 13 Cal.3d 757, 773-775.

AB 962 does just that. Sections 30352-30365 create an ammunition registration scheme,[11] which captures sales information and purchasers' personal information. According to AB 962's legislative history, the registration scheme would help identify ammunition purchases by gang members and prohibited persons. Sen. Public Safety Report at 16-18. AB 962 was based on local registration ordinances,[12] one of which was the subject of a RAND Corporation study. *Id.* at 17-18. The study concluded that ammunition registries could be used "as an intelligence gathering tool

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[11] "[R]egistration catalogs all persons with respect to an activity, or all things that fall within certain classifications." *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 857-858 (ordinance required disclosure of gun owners' name and address, firearm description by make, model, manufacturer's number, caliber, and other identifying marks), abrogated on other grounds by Gov't Code § 53071 as stated in *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 862.

[12] While Appellants did not monitor ammunition sales or vendors prior to AB 962, several local jurisdictions did, and these laws served as AB 962's blueprint. Notably, the local ordinances did not differentiate between handgun and rifle ammunition. Sen. Public Safety Report at 16-18.

for law enforcement" to identify prohibited purchasers buying ammunition (presumably for illegal firearms) as well as develop probable cause for search warrants. G.E. Titan, et al., *The Criminal Purchase of Firearm Ammunition* (2006) 12 Injury Prevention 308, 310. The Senate Committee Report noted that Sections 30352-30365 enable police to data mine ammunition registries, cross-reference them against criminal databases, and then "crack down on criminals purchasing ammunition." Sen. Public Safety Report at 16.

The Challenged Provisions' vagueness brings them into direct conflict with the state privacy right. Given modern day computing power, state and local agents could easily compile "dossiers" on gun owners using the registration data without good cause. *See White,* 13 Cal.3d at 767, 774-776. And, it is reasonable to conclude that a firearms retailer's natural response to the uncertain "handgun ammunition" definition would be to register any doubtful purchase, if not all ammunition purchases, out of an abundance of caution. But "the overbroad collection and retention of unnecessary personal information by government and business interests" is precisely what the state privacy right is designed to prevent. *White,* 13 Cal.3d at 775.

Police intelligence gathering strongly implicates privacy rights when it is directed at constitutionally-protected activity. *Id.* at 767-768. And, unlike pawned goods or cold medicine (*Dis. Op.* at 2), such police "monitoring" necessarily chills the exercise of constitutional rights to the extent it is predicated upon the purchase of goods and services. *Id.* at 771-772. Indeed, to the extent that they authorize the collection of information concerning lawful conduct, the Challenged Provisions appear to *prima facie* violate the state constitutional right.[13] *Id.* at 773.

Appellants insist that these provisions are "benign and reasonable," because purchasers disclose the same information when they register a handgun (AOB 20). The two are different in kind and degree. Handgun registration information transmitted to the Department is "personal information" protected from public disclosure. Section 11106(c); Civ. Code §§ 1798.24, 1798.72 ; Cal. Code Regs. tit. 11, § 4035. Such records may be used in an ongoing criminal investigation, but not to gather intelligence on law-abiding

[13] The Challenged Provisions also implicate law-abiding gun owners' Fourth Amendment rights because they indiscriminately subject them to suspicionless police investigation for engaging in facially lawful, constitutionally-protected conduct. *People v. Martin* (1973) 9 Cal.3d 687, 692 ("an arrest and search based on events as consistent with innocent as with criminal activity are unlawful").

citizens. Sections 11105-11106. In contrast, no limitations exist on the use, collection, or dissemination of ammunition records. Sections 30352-30365. State and local agents may review the records to seek information about prohibited persons or to ensure compliance with "any other" firearms and ammunition laws. Section 30357. And, handgun registration occurs only once – when it is purchased following a background check. Sections 11106, 28160. In contrast, the Challenged Provisions require registration of *every* "handgun ammunition" purchase on an ongoing basis. Section 30352.

Assuming, *arguendo,* that the Challenged Provisions would prevent criminals from obtaining "handgun ammunition" (they will not),[14] such "constant police surveillance" will undoubtedly have a chilling effect on purchasers' privacy and Second Amendment rights. *White,* 13 Cal.3d at 771-772; *see Bee See Books, Inc. v. Leary* (S.D.N.Y. 1968) 291 F.Supp. 622, 626 (enjoining law stationing

[14] Criminals will, of course, simply circumvent registration by using straw purchasers or buying ammunition on the black market. To the extent that any prohibited persons actually purchase "handgun ammunition" from a licensed firearms retailer, the Fifth Amendment would prohibit the use of such registries against prohibited persons, either as evidence of a crime or in furtherance of a search warrant. *Haynes v. United States* (1968) 390 U.S. 85, 96–100 (law requiring prohibited person to register short-barreled shotgun); *cf. Craib v. Bulmash* (1989) 49 Cal.3d 475, 489 (unlike *Haynes*, registration for noncriminal regulatory purpose does not implicate Fifth Amendment).

uniformed police officers in adult bookstores; "constant [police] presence" chilled First Amendment rights).

And, vague laws which implicate constitutional privacy rights by subjecting residents to arbitrary official investigation or police surveillance cannot be tolerated *See Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 233 (giving narrow, saving construction to statutory term "immoral" to prevent school officials from probing teachers' private lives in violation of privacy rights); *see People v. North* (2003) 112 Cal.App.4th 621, 634 ("regularly 'located'" phrase in sex offender registration statute vague as applied to transient).

In sum, the Challenged Provisions reach "a substantial amount of constitutionally protected conduct." *Kolender,* 461 U.S. at 358 n.8. Failing to satisfy a higher standard of clarity, they are invalid even if they "could conceivably have . . . some valid application." *Id.*

V. SECTION 16650(a) CANNOT BE RESCUED BY IMPLYING A *SCIENTER* REQUIREMENT.

Respondents demonstrate that the Challenged Provisions are regulatory crimes. (RB 26-32). Because Section 16650(a) lacks a *scienter* requirement, it is "little more than 'a trap for those who act in good faith.'" *Colautti*, 439 U.S. at 395.

Appellants maintain that such requirement may be implied. None of the cases cited by Appellants hold that *scienter* may be implied into a vague statute where no statutory language supports it (AOB 15-16, ARB 4-7). To the contrary, a *scienter* element may save a vague statute, but the Court "may not create [that] standard." *People v. McCaughan* (1957) 49 Cal.2d 409, 414.

And, Penal Code Section 20's default *scienter* is excluded from Section 16650(a) by necessary implication. *People v. King* (2006) 38 Cal.4th 617, 623. First, Section 16650(a) is a definitional statute, AB 962 contains the offense provisions. Some of the offenses specified in AB 962 contain *scienter* elements, *e.g.,* Sections 30300(a)(2), 30300(a)(3), 30306, 30347, 30360, while others do not, *e.g.,* Sections 30300(a)(2), 30312(a), 30350, 30352, 30355, 30362.

The specification of *scienter* in some, but not all, of AB 962's offense provisions evinces legislative intent to require different levels of culpability, ranging from strict liability to actual knowledge, for different conduct. *People v. Baker* (1968) 69 Cal.2d 44, 50 (courts cannot create "offense by enlarging the statute, or by inserting or deleting words . . . .").

Second, Penal Code provisions related to Section 16650(a) define ammunition using "intent" language like the drug paraphernalia laws in *Hoffman Estates* and *Posters*. *See* Section 16650(b)(1) (ammunition "designed and intended to be used in an antique firearm"); Section 16660 (ammunition "designed primarily to penetrate metal or armor"). Such intent language cannot be implied into Section 16650(a). *Cornette v. Dept. of Transp.* (2001) 26 Cal.4th 63, 73 (omission of term from one part of statute included in another part indicates different legislative intent).

Third, implying *scienter* would not cure vagueness. Appellants argue that the Challenged Provisions are similar to deadly weapons statutes and therefore the implied *scienter* standard of *In re Jorge M.* (2000) 23 Cal.4th 866 and its progeny should apply here (ARB 6).

These cases are inapposite. The Challenged Provisions are not possession statutes, and the standards articulated there do not make sense here. *Jorge M.* requires proof that the "defendant *knew or reasonably should have known* the firearm possessed the characteristics bringing it within the" law, such as make and model and other physical features. *Id.* at 887-888.

But "handgun ammunition" has no inherent characteristics or physical dimensions. While it may increase the prosecution's burden of proof, implied *scienter* does not cure Section 16650(a)'s deficiency. *McCaughan*, 49 Cal.2d at 414 (intent defined in the same terms as vague statute to not make it definite).

In any event, an implied *scienter* term only mitigates fair notice issues; it cannot provide sufficient guidelines for law enforcement. *Hoffman* Estates, 455 U.S. at 499.

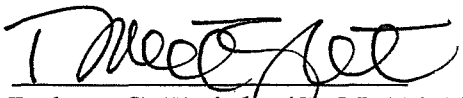
CONCLUSION

For the reasons stated here, and in the Respondent's brief, the Court of Appeal's decision, and the trial court's order, the Challenged Provisions are void for vagueness, and the judgment should be affirmed.

Respectfully submitted,

WRIGHT, L'ESTRANGE & ERGASTOLO

Dated: October 28, 2014

By: 

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520 (c)(1), I certify that, according to the word count feature of Microsoft Word, this *amicus curiae* brief contains approximately 6,661 words, not including the Tables of Contents and Authorities, proof of service, signature blocks or this certification page.

Dated: October 28, 2014

Robert C. Wright (SBN 51864)

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is 402 West Broadway, Suite 1800, San Diego, CA 92101. I am a citizen of the United States and am employed in the City and County of San Diego. On October 29, 2014, I will cause to be served the following documents:

> APPLICATION OF THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. FOR LEAVE TO FILE PROPOSED *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS AND RESPONDENTS SHERIFF CLAY PARKER, *ET AL.*

Upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

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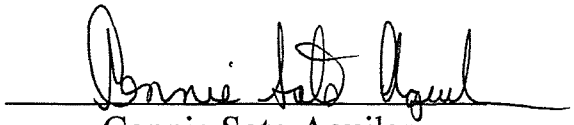
I declare under penalty of perjury under the laws of Appellants of California that the foregoing is true and correct and that this declaration was executed on October 28, 2014, at San Diego, California.



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