IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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. S215265

Fifth Appellate District, Case Nos. F062490, F062079
Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeffrey Y. Hamilton, Judge

APPLICATION OF NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. TO FILE AMICUS CURIAE BRIEF & PROPOSED AMICUS CURIAE BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF THE RESPONDENTS

H. THOMAS WATSON
(CAL. BAR. NO. 160277)
15760 Ventura Blvd.
18TH Floor
Encino, CA 91436
(818) 995-0800
htwatson@horvizlevy.com

PAUL D. CLEMENT*
BANCROFT PLLC
1919 M Street NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com
*Application for admission *pro hac vice* pending

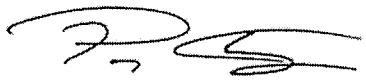
Counsel for Amicus Curiae

October 29, 2014

CERTIFICATE OF INTERESTED PERSONS

The National Rifle Association of America, Inc. has no parent company. It has no stock, and therefore no publicly held company owns 10 percent or more of its stock. The undersigned certifies that the NRA knows of no entity that must be listed under Rule 8.208(e)(1) or (2).

October 29, 2014



Paul D. Clement*

*Application for admission *pro hac vice* pending

APPLICATION OF NATIONAL RIFLE ASSOCIATION TO FILE BRIEF AS AMICUS CURIAE

To the Honorable Tani Cantil-Sakauye, Chief Justice of the Supreme Court of California, and Associate Justices: The National Rifle Association of America, Inc. respectfully applies for permission, pursuant to California Rules of Court, rule 8.520(f), to file the accompanying *amicus curiae* brief in support of the Respondents.

I. Interest Of Amicus Curiae

The National Rifle Association of America, Inc. is one of America's oldest civil rights organizations and is widely recognized as America's foremost defender of the Second Amendment. Union veterans of the Civil War founded the NRA in 1871 to promote riflery and marksmanship for civilians and law enforcement. Today the NRA is not only the leading provider of marksmanship and safety training, but also is at the forefront in litigation involving Second Amendment rights.

The NRA has identified this appeal as one of particular importance. If the vague definition of "handgun ammunition" goes into effect in California, countless NRA members in California will have to undertake an impossible task each time they purchase or

sell ammunition—namely, determining whether that ammunition is "principally for use in" handguns. More importantly, the State has argued in this appeal that the Second Amendment is a second-class fundamental right. To the contrary, the fundamental rights enshrined in the Second Amendment implicate void-for-vagueness standards in the same way that First Amendment rights and reproductive rights do. The NRA submits the attached brief in support of the Respondents and urges the Court to affirm the decision below.

II. This Amicus Brief Will Assist The Court

The NRA has extensive experience litigating firearms and ammunition–related cases at both the state and federal level. The NRA participated as *amicus curiae* in the landmark decisions of the Supreme Court, *District of Columbia v. Heller* (2008) 554 U.S. 570, and *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742. The NRA has also participated as *amicus curiae* in the California Supreme Court (*see, e.g.*, *Harrott v. Cnty. of Kings* (2001) 25 Cal.4th 1138) and in the Ninth Circuit Court of Appeals (*see, e.g.*, *Richards v. Prieto* (9th Cir. 2014) 560 F. App'x 681; *Peruta v. Cnty. of San Diego* (9th Cir. 2014) 742 F.3d 1144; *Nordyke v. King* (9th Cir. 2012) 681 F.3d 1041 (en banc)). Counsel too brings special

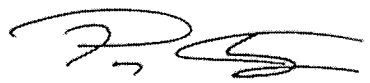
expertise to this appeal; it has previously represented the NRA as a party or *amicus curiae* in other high-stakes, Second Amendment litigation. (*See e.g.*, *McDonald*, *supra*, 561 U.S. 742; *Kachalsky v. Cnty of Westchester* (2d Cir. 2012) 701 F.3d 81; *Peruta*, *supra*, 742 F.3d 1144.)

Amicus curiae, through its counsel, will provide this Court with a thorough analysis of the implications of the Second Amendment on the void-for-vagueness doctrine. The proposed brief will assist the Court by clarifying which standard of review applies for facial attacks of criminal laws that implicate the fundamental rights protected by the Second Amendment.

III. Rule 8.520(F) Certification

No party's counsel authored this brief in whole or in part, and counsel for *amicus curiae* did not author Respondents' brief in whole or in part. No party or party's counsel, and no person other than *amicus curiae*, their members, or their counsel, contributed money to fund the preparation or submission of this brief.

October 29, 2014



Paul D. Clement*

*Application for admission *pro hac vice* pending

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

APPLICATION OF NATIONAL RIFLE ASSOCIATION TO FILE BRIEF AS AMICUS CURIAE ii

I. Interest Of Amicus Curiae ii

II. This Amicus Brief Will Assist The Court iii

III. Rule 8.520(F) Certification iv

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF FACTS 3

ARGUMENT 4

I. The Ammunition Laws, Which Impose Criminal Penalties And Implicate Fundamental Constitutional Rights, Are Unconstitutionally Vague In The "Generality Of Cases." .. 4

II. Even If This Court Requires That The Ammunition Laws Be Unconstitutionally Vague In All Cases, Plaintiffs Have Made That Showing. 14

CONCLUSION 21

CERTIFICATE OF COMPLIANCE

PROOF OF SERVICE

SERVICE LIST

TABLE OF AUTHORITIES

Cases

Am. Acad. of Pediatrics v. Lungren (1997)
16 Cal.4th 307 ..... 7, 9, 14

Cal. Teachers Assn. v. California (1999)
20 Cal.4th 327 ..... 3, 5, 9

City of Chicago v. Morales (1999)
527 U.S. 41 ..... 6, 19

Clay v. United States (2003)
537 U.S. 522 8

Coates v. City of Cincinnati (1971)
402 U.S. 611 11

Connally v. Gen. Const. Co. (1926)
269 U.S. 385 ..... 4, 15, 18

District of Columbia v. Heller (2008)
554 U.S. 570 ..... 10, 12

Evangelatos v. Superior Court (1988)
44 Cal.3d 1188 5

Ezell v. City of Chicago (7th Cir. 2011)
651 F.3d 684 9

Gregory v. City of Chicago (1969)
394 U.S. 111 20

Harrott v. Cnty. of Kings (2001)
25 Cal.4th 1138 20

In re Guardianship of Ann S. (2009)
45 Cal.4th 1110 ..... 9, 17

Jackson v. City & Cnty. of San Francisco
(9th Cir. 2014) 746 F.3d 953 12

Kasler v. Lockyer (2000)
23 Cal.4th 472 ..... 2, 5

Kolender v. Lawson (1983)
461 U.S. 352 ..... passim

Lanzetta v. New Jersey (1939)
306 U.S. 451 ..... 4, 18

McDonald v. City of Chicago, Ill. (2010)
561 U.S. 742 ..... 8, 10

Pac. Legal Found. v. Brown (1982)
29 Cal.3d 168 17

Parker v. State (2013)
221 Cal. App.4th 340 ..... 5, 7

People ex rel. Gallo v. Acuna (1997)
14 Cal.4th 1090 ..... 5, 13, 20

People v. Morgan (2007)
42 Cal.4th 593 14

Russello v. United States (1983)
464 U.S. 16 8

San Remo Hotel L.P. v. City & Cnty. of San Francisco
(2002) 27 Cal.4th 643 ..... 5, 10

Smith v. Goguen (1974)
415 U.S. 566 ..... 15, 20

Tobe v. City of Santa Ana (1995)
9 Cal.4th 1069 7

Today's Fresh Start, Inc. v. Los Angeles Cnty. Office of Educ. (2013) 57 Cal.4th 197 5

United States v. Chester (4th Cir. 2010)
628 F.3d 673 9

United States v. Chovan (9th Cir. 2013)
735 F.3d 1127 9

United States v. Marzzarella (3d Cir. 2010)
614 F.3d 85 9

United States v. Salerno (1987)
481 U.S. 739 6

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489 ..... 6, 7, 12, 13

Ward v. Rock Against Racism (1989)
491 U.S. 781 11

Wash. St. Grange v. Wash. St. Republican Party (2008) 552 U.S. 442 2

Washington v. Glucksberg (1997)
521 U.S. 702 10

Statutes and Other Authority

Pen. Code § 16650 1

Pen. Code § 30312 ..... 1, 2, 7

Pen. Code § 30347 1

Pen. Code § 30350 1

Pen. Code § 30352 1

Pen. Code § 30355 1

Pen. Code § 30357 1

Pen. Code § 30360 ..... 1, 8

Pen. Code § 30362 1

Pen. Code § 30365 ..... 2, 7

Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing* (2000) 113 Harv. L.Rev. 1321 14

INTRODUCTION

This appeal turns on a single "definition," if it can even be called that. California law defines "handgun ammunition" as "ammunition *principally for use* in pistols, revolvers, and other firearms capable of being concealed upon the person, notwithstanding that the ammunition may also be used in some rifles." (Pen. Code § 16650, subd. (a), italics added.) If particular ammunition is "handgun ammunition," California law imposes a litany of requirements on sellers, purchasers, transferors, and transferees of that ammunition.[1] While the onerous nature of

---

[1] The ammunition laws require that "the delivery or transfer of ownership of *handgun ammunition* may occur only in a *face-to-face transaction* with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee." (Pen. Code § 30312, subd. (a), italics added.) When selling "*handgun ammunition*," the seller must record (1) the date of the sale or transaction; (2) the purchaser's or transferee's driver's license or other identification number; (3) the brand, type, and amount of ammunition sold or transferred; (4) the purchaser's or transferee's signature; (5) the name of the salesperson who processed the transaction; (6) the right thumbprint of the purchaser or transferee; (7) the purchaser's or transferee's residential address and telephone number; and (8) the purchaser's or transferee's date of birth. (§§ 30352, subd. (a), 30360.) The vendor must maintain those records for at least five years, (§ 30355,) and law enforcement may inspect those records during normal business hours, (§§ 30357, 30362). The ammunition laws also limit where "*handgun ammunition*" may be stored and bar certain employees from handling, selling, or delivering "*handgun ammunition*." (§§ 30350, 30347, italics added).) Violation of any of

those statutory requirements is clear, what triggers them is far from it. No seller or purchaser could accurately predict what ammunition is "principally for use in" handguns. The Due Process Clause will not tolerate the guesswork required by the existing definition of "handgun ammunition" in California.

California's definition of "handgun ammunition" is unconstitutionally vague no matter how the Court evaluates this facial challenge. While facial attacks are often "disfavored" because they "rest on speculation" and require the interpretation of statutes on a "factually barebones record[]," (*Wash. St. Grange v. Wash. St. Republican Party* (2008) 552 U.S. 442, 450,) the only speculation required here is by those subject to this impossibly vague law. The record makes absolutely clear that the definition of "handgun ammunition" is vague under any applicable test. Even though varying standards for facial challenges have ignited "controversy" in other appeals, (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502,) the applicable standard here is clear. The Due Process Clause has little tolerance for vagueness when laws—such as this one—threaten criminal penalties and implicate fundamental

---

these laws results in misdemeanor criminal penalties. (§§ 30312, subd. (c), 30365.)

constitutional rights. As a result, laws that are unconstitutionally vague in the "generality of cases" cannot survive a facial attack. (*Cal. Teachers Assn. v. California* (1999) 20 Cal.4th 327, 347, quotation marks omitted.) The ammunition laws in this appeal impose criminal penalties and undeniably implicate Californians' fundamental Second Amendment rights, including the right to self-defense. Accordingly, those laws cannot withstand this facial attack because in the "generality of cases" they are unconstitutionally vague.

But even if this Court were to impose the more stringent standard endorsed by the State and require a "total and fatal" conflict with the Due Process Clause, the laws are still invalid because the definition of "handgun ammunition" is unconstitutionally vague and thus defective in *all cases*. That definition provides zero guidance to law enforcement and risks arbitrary enforcement based on individual officers' personal predilections. The ammunition laws using the term "handgun ammunition" are thus void on their face *under any applicable test.*

STATEMENT OF FACTS

Amicus curiae adopts the statement of facts as set forth in the Respondents' brief on the merits.

ARGUMENT

I. The Ammunition Laws, Which Impose Criminal Penalties And Implicate Fundamental Constitutional Rights, Are Unconstitutionally Vague In The "Generality Of Cases."

The Court of Appeal correctly decided that the California ammunition laws violate due process because the definition of "handgun ammunition" is unconstitutionally vague in the "generality of cases." Plaintiffs' facial challenge to those laws rests on the fundamental principle that no one—especially buyers and sellers of ammunition engaged in the exercise of fundamental constitutional rights—"may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) Instead, due process requires that the ammunition laws "be so clearly expressed that the ordinary person can intelligently choose, in advance, what course . . . is lawful for him to pursue." (*Connally v. Gen. Const. Co.* (1926) 269 U.S. 385, 392–93.)

The State urges this Court to subject the plaintiffs' facial attack to a more stringent standard, but doing so would violate the precedents of this Court and the Supreme Court of the United States. To be sure, what standard governs facial challenges "has

been the subject of controversy within this court." (*Kasler, supra,* 23 Cal.4th at p. 502; *see Today's Fresh Start, Inc. v. Los Angeles Cnty. Office of Educ.* (2013) 57 Cal.4th 197, 218). In some instances, the Court has required plaintiffs to prove that the law is vague in "all of its applications." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116, quotation marks omitted; *see also Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1200–01.) In others, the Court has required plaintiffs to prove only that the law is vague in the "generality or great majority of cases." (*San Remo Hotel L.P. v. City & Cnty. of San Francisco* (2002) 27 Cal.4th 643, 673; *Cal. Teachers Assn., supra,* 20 Cal.4th at p. 347.)

Despite that confusion, the applicable standard here is clear. The decision of the Court of Appeal to employ the "generality of cases" standard was undoubtedly correct. The Court of Appeal reasoned that three factors required this more lenient standard: the ammunition laws can trigger criminal penalties; they have no *mens rea* requirement; and they implicate constitutionally protected conduct. (*Parker v. State* (2013) 221 Cal. App.4th 340, 364–67.) The State baldly asserts that the court devised these factors from whole cloth. (Petitioners' Br. at 14–15.) Precedent

proves otherwise. The Supreme Court has relied on these exact factors to evaluate facial, void-for-vagueness challenges.

In the mine-run facial attack, the Supreme Court has applied the so-called *Salerno* test, under which "the challenger must establish that *no set of circumstances* exists under which the Act would be valid." (*United States v. Salerno* (1987) 481 U.S. 739, 745, italics added.) But a vagueness challenge to a criminal statute implicating constitutionally protected conduct is not an ordinary facial challenge. Due process protection is at its peak when unduly vague laws subject violators to criminal penalties or burden constitutionally protected conduct. (*Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 498–99.) As a result, when a plaintiff facially attacks an allegedly vague law that "reaches 'a substantial amount of constitutionally protected conduct,'" especially one that "imposes criminal penalties," the Supreme Court has expressly *rejected* the notion that a law must be vague "in all of its possible applications." (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8 (quoting *Hoffman Estates*, *supra*, 455 U.S. at p. 497); *see also City of Chicago v. Morales* (1999) 527 U.S. 41, 55 (plur. opn. of Stevens, J.).) Instead, the Supreme Court has invalidated such a "statute

on its face *even when it could conceivably have had some valid application.*" (*Kolender, supra,* 461 U.S. at p. 358, fn. 8, italics added.)[2]

Plaintiffs' challenge undoubtedly falls within this favored category of vagueness challenges. As such, the "generality of cases" standard governs this appeal. No party disputes that failure to abide by those laws subjects violators to criminal penalties. (Pen. Code §§ 30312, subd. (c), 30365.) And, contrary to Petitioners' assertions, those laws most certainly implicate constitutionally protected conduct, namely the fundamental right to self-defense embodied in the Second Amendment.[3]

---

[2] In this Court, too, when a statute "broadly impinges upon fundamental constitutional rights," a facial challenge "may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied." (*Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 343 (plur. opn. of George, C.J.); *see also Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109 [laws that "threaten[] the exercise of a constitutionally protected right" require a "more stringent vagueness test"].)

[3] The Court of Appeal treated the absence of a scienter requirement as a third and required factor to trigger the "generality of cases" standard. (*Parker, supra,* 221 Cal. App.4th at p. 365.) In *Hoffman Estates*, the Supreme Court mentioned only that the "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." (*Hoffman Estates, supra,* 455 U.S. at p. 499.) Neither Respondents nor *amicus curiae* contends that the absence of scienter is a factor *required* to trigger the "generality of cases" standard. But if this Court decides it is,

The State disagrees. It contends that any facial challenge to the ammunition laws demands a more stringent standard. In essence, the State asks this Court to treat the fundamental right to self-defense as a second-class right, notwithstanding the Supreme Court's recognition of it as a fundamental right and express rejection of efforts to dilute it by converting it to second-class status. (*See, e.g., See McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 780–81 (plur. opn. of Alito, J.)[4].) The State urges the

---

only one provision of the ammunition laws contains a scienter requirement: sellers cannot knowingly make a false record of purchaser or transferee information. (Pen. Code § 30360.) Contrary to the Petitioners' argument, the Court should not read in a scienter requirement to the other provisions. The presence of a scienter requirement in section 30360, but the absence of one in section 30312(a) [requiring face-to-face sales], for example, implies that the Legislature intentionally omitted a scienter requirement for the other provisions of the ammunition laws. (*See Clay v. United States* (2003) 537 U.S. 522, 528–29 ["When '[a legislature] includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States* (1983) 464 U.S. 16, 23)].) It would be all the more nonsensical to read in a scienter requirement for the "handgun ammunition" definition itself. (*See* Respondents' Br. at 26–32.)

[4] Justice Thomas separately concurred in *McDonald* and agreed that the Second Amendment right is fundamental. (*See McDonald, supra*, 561 U.S. at p. 806 (conc. opn. of Thomas, J.) [The Court "concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is 'fundamental' to the American 'scheme of

Court to limit the more lenient "generality of cases" standard to facial attacks implicating only First Amendment rights or reproductive rights. (Pet. Br. 10–11.)

No authority of this Court or the Supreme Court permits that limitation.[5] (*See, e.g.*, *Kolender*, *supra*, 461 U.S. at p. 358 [noting that a loitering statute implicated, *inter alia*, the constitutional "freedom of movement"].) When this Court has described the "generality of cases" standard, it has likewise spoken in broad strokes. (*See, e.g.*, *Cal. Teachers Assn.*, *supra*, 20 Cal.4th at p. 347 [due process requirements for termination hearings]; *Lungren*, *supra*, 16 Cal.4th at p. 343 (plur. opn. of George, C.J.) ["fundamental constitutional privacy rights"]; *see also In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126 [stating

---

ordered liberty'. . . . I agree with that description of the right."].) His separate concurring opinion explained "a more straightforward path to th[at] conclusion." (*Id.* at pp. 805–06.)

[5] Contrary to the State's conclusion, First Amendment rights are not "largely unfettered." (Pet. Br. 18.) No right is absolute, and in recent years the federal courts of appeals have used the same means-ends framework that limits the exercise of First Amendment rights to evaluate the limitations of Second Amendment rights. (*See, e.g.*, *United States v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1138; *Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 703, 706–07; *United States v. Chester* (4th Cir. 2010) 628 F.3d 673, 682; *United States v. Marzzarella* (3d Cir. 2010) 614 F.3d 85, 89, fn. 4.)

generally that the "generality or great majority of cases" standard is the "more lenient standard sometimes applied" to facial challenges]; *San Remo Hotel*, *supra*, 27 Cal.4th at p. 673 [same].)

At bottom, the State's effort to dismiss Second Amendment interests as insufficiently weighty to trigger the "generality of cases" standard repeats an error that the Supreme Court has already corrected once. After the Supreme Court recognized that the Second Amendment protected individual rights in *District of Columbia v. Heller* (2008) 554 U.S. 570, the City of Chicago attempted to resist the obvious implications of the *Heller* decision by arguing that the Second Amendment was not the kind of fundamental right that qualifies for incorporation. The Supreme Court would have none of it. (*See McDonald*, *supra*, 561 U.S. at pp. 780–81.) The Court recognized that the Second Amendment protects rights that are "deeply rooted in this Nation's history and tradition." (*Id.* at pp. 767–70 (quoting *Washington v. Glucksberg* (1997) 521 U.S. 702, 721).) And because it is a fundamental right, the Second Amendment is "fully binding on the States." (*Id.* at p. 784 (plur. opn. of Alito, J.)[6].)

[6] See *supra* note 4.

The State next asserts that even if the Second Amendment could trigger the more lenient "generality of cases" standard, the ammunition laws "do not burden the right to acquire ammunition," (Pet. Br. 20,) but that cannot be so. Under the State's logic, a person is not engaged in constitutionally protected conduct at all if that conduct can be permissibly regulated. The State conflates constitutional violations and constitutionally protected conduct. Under virtually every constitutional provision there is far more of the latter than the former. In the First Amendment context, no one would argue that a group who puts on concerts to promote antiracism is not engaged in protected speech. A city may nevertheless impose regulations limiting concert noise. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781.) The group engages in constitutionally protected speech, whether that speech is permissibly or impermissibly burdened. But critical to this appeal, those burdens must be clearly defined because they implicate constitutionally protected conduct. An ordinance outlawing "loud concerts," permissible or not under the First Amendment, cannot leave it to the whims of law enforcement to decide what "loud" might mean. (*See Coates v. City of Cincinnati* (1971) 402 U.S. 611, 614.)

Here too, no one can reasonably argue that a purchaser of ammunition is not engaged in constitutionally protected activity. The Second Amendment right to "bear arms" necessarily requires ammunition, and restrictions on the sale or availability of ammunition clearly implicate constitutional rights. (*See Heller*, *supra*, 554 U.S. at p. 650 ["We must also address the District's requirement . . . that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional."]; *Jackson v. City & Cnty. of San Francisco* (9th Cir. 2014) 746 F.3d 953, 967–68.) To be sure, the right to purchase ammunition is not "unlimited, just as the First Amendment's right of free speech was not." (*Heller*, *supra*, 554 U.S. at p. 595.) But under either amendment, the relevant question is whether these burdens "reach[] 'a substantial amount of constitutionally protected conduct.'" (*Kolender*, *supra*, 461 U.S. at p. 358 (quoting *Hoffman Estates*, *supra*, 455 U.S. at p. 494).) The fact that the constitutionally protected conduct is not wholly immune from permissible regulation is entirely beside the point.

The State's conclusion that the "challenged statutes are benign and reasonable" regulations of Second Amendment conduct

is question begging. (Pet. Br. 19.) Vague regulations of constitutionally protected conduct that carry criminal penalties are neither benign nor reasonable. To the contrary, they violate the Due Process Clause. The fact that the State might be able to enact regulations that are both clear and constitutional is a reason to insist that it do so, not a reason to give a pass to regulations that are impermissibly vague. As the Court said in *Hoffman Estates*, the Due Process Clause "demands" far more clarity when laws throw into limbo constitutionally protected conduct. (*Hoffman Estates*, *supra*, 455 U.S. at p. 499.)

* * *

Because the ammunition laws impose criminal penalties *and* implicate fundamental constitutional rights, this appeal is undeniably different from others in which this Court has invoked the more demanding *Salerno* standard for facial attacks. (*See, e.g.*, *Acuna*, *supra*, 14 Cal.4th at pp. 1112, 1116 [employing "in all cases" standard after clarifying that gang members had *no* constitutional right of association with fellow gang members].) The "generality of cases" standard clearly applies here. Simply put, courts will not go looking for some hypothetical situation where such vague laws *might clearly* apply to save them from

facial attack. (*See, e.g.*, *Lungren, supra*, 16 Cal.4th at p. 343 (plur. opn. of George, C.J.); *see also* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing* (2000) 113 Harv. L.Rev. 1321, 1342–48.) This facial challenge requires only that the definition of "handgun ammunition" is unduly vague in the "generality of cases." It is, and the ammunition laws are invalid under the United States Constitution and California Constitution.

II. Even If This Court Requires That The Ammunition Laws Be Unconstitutionally Vague In All Cases, Plaintiffs Have Made That Showing.

The ammunition laws fail even the more rigorous test for facial challenges—the definition of "handgun ammunition" is "impermissibly vague in all of its applications." (*People v. Morgan* (2007) 42 Cal.4th 593, 605–06.) A 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." (*Ibid.*, quotation marks omitted.) If it does not, the statute is unconstitutional in all of its applications. Here, no seller or purchaser could possibly discern what forms of ammunition constitute "handgun ammunition" and what do not. And "more important[ly,]" the definition fails to provide guidelines for law enforcement. (*Kolender*, *supra*, 461 U.S. at pp. 357–58; *see*

also Connally, *supra*, 269 U.S. at pp. 392–94.) "Where the legislature fails to provide such minimal guidelines [for law enforcement], a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (*Kolender*, *supra*, 461 U.S. at p. 358, alteration in original (quoting *Smith v. Goguen* (1974) 415 U.S. 566, 575).) That unlimited discretion violates the Due Process Clause.

The State asserts that the record establishes "a general understanding among witnesses about which cartridges were covered by the language of the statute," (Pet. Br. 26,) but the record tells a different story. The State points out that each expert could name a handful of specific cartridges that were, in his estimation, primarily used in handguns. (*Ibid.*)[7] Beyond these off-hand references to specific cartridges—based on only the experience of the expert, not on any common understanding—the record

[7] The State also makes a last-ditch argument that sellers sometimes market ammunition as "'handgun' ammunition" or "'rifle' ammunition." (Pet. Br. 26–27.) That might be so, but the definition chosen by the California legislature requires sellers and purchasers alike to discern what kinds of ammunition are "principally *for use*" in handguns. Even if a particular cartridge is *marketed* as "handgun" ammunition, end users may well *use* that ammunition more in rifles. (*Cf.* Decl. of Stephen Helsley, ¶ 21.)

establishes that virtually all ammunition can be safely used in either handguns or rifles. Tellingly, the State's expert came up with his list of 16 specific cartridges "principally for use in" handguns *only after* he consulted a nonpublic database of handgun sales.[8] (Decl. of Blake Graham, ¶¶ 11–12.) Based on that database, the State's expert decided that ammunition fit for the most commonly sold handguns qualified as ammunition "principally" used in handguns. Surely the results of that multistep research project demonstrate the vagueness problems plaintiffs face and cannot constitute "common understanding." As the plaintiffs' expert—without access to nonpublic databases and with only his fifty years of firearms experience—explained, "[w]hether a given cartridge is used more often in a handgun than in a rifle may change and fluctuate over time, depending on the changing popularity and usage of different types of firearms which utilize that cartridge, or vice-versa." (Helsley Decl. at ¶ 67.) And whether a consumer uses a particular cartridge in a handgun or a rifle depends too on preference; he might not use a large cartridge

[8] Notably, the State's expert did not cross-reference the database of handgun sales with a database of rifle sales; it is not clear that one even exists.

in a handgun because of recoil, but "not because of design or strength limitations" of the firearm itself. (*Id.* at ¶ 21.) The plaintiffs' expert could not even begin to discern what cartridges were "principally for use" in handguns because ammunition has been regularly interchanged between handguns and rifles since the middle of the nineteenth century. (*Id.* at ¶¶ 26, 29–51, 65–73; *see also* Graham Decl. at ¶ 14.)

In all events, even if sellers and purchasers of ammunition and law enforcement commonly understood that one specific cartridge (of thousands) fit the definition of "handgun ammunition," the definition nonetheless presents a "total and fatal conflict" with the Due Process Clause. (*In re Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1126 (quoting *Pac. Legal Found. v. Brown* (1982) 29 Cal.3d 168, 181).) One example of "handgun ammunition" is no help to sellers and purchasers *or* law enforcement who must decide which of the thousands of cartridges for sale in California fall within the ammunition laws.

First, even if experts could agree that a specific cartridge was "handgun ammunition," that agreement cannot remedy the vagueness inherent in the terms used by the California legislature. Those terms present a "total and fatal" conflict with the Due

Process Clause because they provide no guidance to the purchasers and sellers of ammunition about what ammunition is "principally for use in" handguns. Even if a specific cartridge arguably comes within those terms, the terms themselves fail to "prescribe[] the rule to govern conduct and warn[] against transgression." (*Lanzetta, supra*, 306 U.S. at p. 453.)

The definition invites the same problem as that identified in the textbook void-for-vagueness decision of *Connally v. General Construction Company* (1926) 269 U.S. 385. There, an employer challenged an Oklahoma law requiring it to pay its contractors "not less than the current rate of per diem wages in the locality where the work is performed." (*Id.* at p. 388.) But those terms could not "denote a specific or definite sum" because the "current rate of . . . wages" could be the minimum, the maximum, or the average wage paid by other employers. (*Id.* at p. 393.) The Supreme Court ruled that this indeterminacy rendered the law unconstitutionally vague and enjoined its enforcement. (*Id.* at p. 394.) Here too, all parties agree that the term "principally" means more than 50 percent, but more than 50 percent of what "use"? Usage determined by handgun purchases in California? Or nationwide? Usage determined by a survey of retail purchasers of

ammunition? Or by commercial purchasers and law enforcement too? Sellers and purchasers of ammunition can only guess what ammunition is "principally for use in" handguns. That guesswork cannot survive this facial challenge. As they are currently written, the terms "principally for use" have no fixed meaning.[9]

Second, *in all circumstances*, the "handgun ammunition" is in total and fatal conflict with the Due Process clause because it invites the "exercise of unchecked discretion" by law enforcement. (*Morales*, *supra*, 527 U.S. at p. 72 (conc. opn. of Breyer, J.); *see Kolender*, *supra*, 461 U.S. at p. 358; Decl. of Tom Allman, ¶¶1–5; Decl. of Clay Parker, ¶¶ 1–5.) Even if it was clear that a particular cartridge constituted "handgun ammunition," that lone cartridge cannot guide law enforcement's authority to prosecute unlawful sales of countless other cartridges that might or might not constitute "handgun ammunition." Each officer may arbitrarily decide what ammunition is "principally" used in handguns when

[9] The State points out that other legislation using the term "principally" or its synonyms has survived Due Process challenges. (Pet. Br. 24–25.) But here, no party contends that the term "principally" is always vague. Instead, the legislature's failed attempt to define a category of ammunition based on its "principal[]" *usage* renders the ammunition laws unconstitutionally vague. Ammunition is simply not sorted by its usage in either handguns or rifles.

he inspects a seller's books or when he investigates ammunition sales. The legislature cannot delegate such lawmaking "to the moment-to-moment judgment of the policeman on his beat." (*Goguen*, *supra*, 415 U.S. at p. 575 (quoting *Gregory v. City of Chicago* (1969) 394 U.S. 111, 120 (conc. opn. of Black, J.)); *see also Harrott v. Cnty. of Kings* (2001) 25 Cal.4th 1138, 1147–48 [noting that "[w]himsical and capricious" prosecution for possession of vaguely defined "assault weapons" could turn a hunter into a felon].)

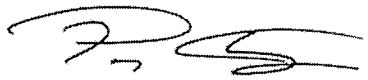
The Due Process Clause requires only "reasonable specificity," but the definition of "handgun ammunition" falls far short of that standard. (*Acuna*, *supra*, 14 Cal.4th at p. 1117, quotation marks omitted.) Like *Kolender*, "this is not a case where further precision in the statutory language is either impossible or impractical." (*Kolender*, *supra*, 461 U.S. at p. 361; *see* Decl. of Clinton B. Monfort, ¶¶ 13–14 [describing legislative attempts to specify particular kinds of ammunition]) For example, the State could put its expert's extensive research to use: list the 16 cartridges as examples of "handgun ammunition" in the code. At the very least, the State must use objective, observable criteria to define "handgun ammunition" so sellers, purchasers, and law

enforcement can readily understand what specific cartridges meet that definition. Until the California legislature does so, the definition of "handgun ammunition" cannot survive the challengers' facial attack under any test.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision below.

Respectfully submitted,



PAUL D. CLEMENT*
BANCROFT PLLC
1919 M Street NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com
Counsel for Amicus Curiae

*Application for admission
pro hac vice pending

October 29, 2014

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations required by Rule 8.204(c). The brief contains 4,429 words, including footnotes.

2. This brief complies with the typeface requirements of Rule 8.204(b). It has been prepared in a 13-point, proportionally spaced typeface and contains 1.5-inch margins.

October 29, 2014

Paul D. Clement*

*Application for admission *pro hac vice* pending

PROOF OF SERVICE

I, Paul D. Clement, declare as follows:

I am employed with Bancroft PLLC located at 1919 M. Street, Ste. 470, NW, Washington, D.C. 20036. I am over the age of eighteen years and am not a party to the within action.

On October 29, 2014, I served the following: described as

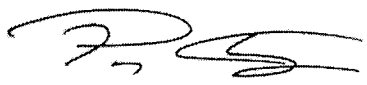
APPLICATION OF NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. TO FILE AMICUS CURIAE BRIEF & PROPOSED AMICUS CURIAE BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF THE RESPONDENTS

on the interested parties in this action by placing a true and correct copy thereof enclosed in sealed envelope(s) addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

X (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be sent through FedEx.
Executed on October 29, 2014, at Washington, D.C.

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 October 29, 2014, at Washington, D.C.



PAUL D. CLEMENT*

*Application for admission *pro hac vice* pending

SERVICE LIST

C. D. Michel
Clinton B. Monfort
Anna M. Barvir
Michel & Associates, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Attorneys for Plaintiffs-Respondents

Kamala D. Harris
Attorney General of California
Peter A. Krause, Deputy Attorney General
Ross Moody, Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244-2550
Attorneys for Defendants-Petitioners

Hon. Jeffrey Hamilton
Fresno County Superior Court
B.F. Sisk Courthouse
11300 Street
Fresno, CA 93721-2220
Department 402
Judge of the Superior Court

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

California Court of Appeal
2424 Ventura Street
Fresno, CA 93721
California Court of Appeal

Bruce Edward Colodny
P.O. Box 10787
San Bernardino, CA
Attorney for Amicus Curiae

Align top of FedEx Express® shipping label here.

earthsmart
FedEx carbon-neutral envelope shipping

FedEx Express

RT 548 1 D
FZ B95
5830
10.30

ORIGIN ID:OXDA (513) 677-5044
BRETT GRIFFIS
BECKER GALLAGHER
8790 GOVERNOR HILL DRIVE
SUITE 102
CINCINNATI, OH 452491374
UNITED STATES US

SHIP DATE: 29OCT14
ACTWGT: 0.5 LB
CAD: 0966224/CAFE2805

BILL SENDER

TO C.D. MICHEL
MICHEL & ASSOCIATES, P.C.
180 EAST OCEAN BLVD.
SUITE 200
LONG BEACH CA 90802

REF:
INV:
PO: DEPT:

521C1/DF64/6FB3

FedEx Express

J141214053001uv

TRK# 0201 6186 8262 5830

THU - 30 OCT 10:30A
PRIORITY OVERNIGHT

XH LGBA

90802
CA-US LGB

Part # 156148-434 RIT2 09/13

Align bottom of peel-and-stick airbill or pouch here.