# 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' CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE

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CONSTITUTIONAL PROVISIONS

Four amicus briefs have been submitted to the Court in this case, all supporting Respondents. These briefs have been filed by a variety of organizations concerned with Second Amendment and law enforcement issues. Many of the arguments advanced by amici are adequately addressed in the parties' briefs. Appellants will accordingly address only the arguments advanced by amici that merit additional comment.

## INTRODUCTION

By order dated November 6, 2014, this Court authorized the filing of amicus briefs by (1) the National Rifle Association, (2) the National Shooting Sports Foundation, Inc., (3) the Western States Sheriffs' Association, et al. and (4) FFL Guard, LLC and Gun Owners of California, Inc. Time for answering these amicus briefs was extended by order dated December 9, 2014. Pursuant to that order, the State of California, the California Department of Justice, and the Attorney General (collectively, the "State" or "Appellants") answer as follows.

## ARGUMENT

### I. EXTENSION OF THE LENIENT TEST USED FOR FIRST AMENDMENT CASES TO THIS CASE WAS INAPPROPRIATE

The National Rifle Association ("NRA") has filed an amicus brief urging this court to "employ the 'generality of cases' standard" in assessing the statutes at issue in this case. (NRA Br. at p. 5.) The NRA acknowledges that the "void in all applications" standard articulated in *United States v. Salerno* (1987) 481 U.S. 739, 745 has been used by the Supreme Court in "the mine-run facial attack," but maintains that "a vagueness challenge to a criminal statute implicating constitutionally protected conduct is not an ordinary facial challenge." (NRA Br. at p. 6.) The NRA then cites First Amendment cases, which employ the more lenient "generality of cases" standard, and suggests that the instant

challenge "undoubtedly falls within this favored category of vagueness challenges." (NRA Br. at pp. 6-7, citing to *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, *Kolender v. Lawson* (1983) 461 U.S. 352.) Not so.

As explained in Appellants' merits briefs, the mere fact that the statutes challenged in this case involve ammunition and therefore implicitly involve firearms does not require application of a more lenient test. Appellants are not aware of any cases extending the "generality of cases" standard to Second Amendment cases.[1] The NRA's suggestion that existing precedent calls for the use of the more lenient standard in cases implicating the Second Amendment (NRA Br. at p. 4) is belied by the uniform application of the more stringent *Salerno* standard in such cases in federal court. Indeed, there are a host of federal cases applying the *Salerno* "void in all applications" standard to constitutional challenges in firearms cases. (See, e.g., *GeorgiaCarry.Org, Inc. v. Georgia* (11th Cir. 2012) 687 F.3d 1244, 1260-61 [plaintiffs "must show that the Carry Law is unconstitutional in all applications to prevail in their facial challenge"]; *United States v. Decastro* (2d Cir. 2012) 682 F.3d 160, 163 [a facial challenge requires plaintiff "to establish that no set of circumstances exists under which the statute would be valid"]; *United States v. Tooley* (4th Cir. 2012) (per curiam) 468 Fed.Appx. 357, 359 [claimant "must establish that no set of circumstances exists under which the Act would be valid"]; *United States v. Bena* (8th Cir. 2011) 664 F.3d 1180, 1182 [claimant "must establish that no set of circumstances exists under which [the act] would be valid"]; *United States v. Barton* (3d Cir. 2011) 633 F.3d 168, 172 [a facial

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[1] Appellants' Opening Brief on the Merits discusses the policy reasons underlying the limitation of this standard to the First Amendment context at pages 18-19.

challenge requires showing "that the law is unconstitutional in all of its applications"].)

The NRA suggests that the Supreme Court's decision in *District of Columbia v. Heller* (2008) 554 U.S. 570 "recogniz[ing] that the Second Amendment protected individual rights" signals that Second Amendment claims should be treated like First Amendment claims in a facial challenge. (NRA Br. at p. 10.) But "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. (*Hightower v. City of Boston* (1st Cir. 2011) 693 F.3d 61, 80 [collecting cases, "First Amendment doctrines [are] a poor analogy for purposes of facial challenges under the Second Amendment"].) And California courts that have assessed facial challenges to firearms statutes post-*Heller* have continued to apply 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 in absence of assertion 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].) Thus, contrary to the NRA's contention, the *Salerno* test is indisputably the test most used in firearms cases and remains the proper test to be employed here.

Moreover, the suggestion that the challenged statutes implicate the Second Amendment, which underlies the NRA's proposed extension of First Amendment jurisprudence to this case, cannot withstand careful examination. The NRA indicates that "restrictions on the sale or availability of ammunition clearly implicate constitutional rights." (NRA Br. at p. 12.) But the challenged statutes do not alter, in any way, the type of ammunition lawfully for sale in California. The same ammunition could be sold before the statutes were passed as could be sold after they went into

effect. The only "restriction" on ammunition "principally for use" in a handgun relates to its manner of sale, particularly the requirement of a face-to-face sale and the provision of identification by the buyer. But state and federal law have required face-to-face transactions and identification for purchase of handguns for decades. (See *Abramski v. U.S.* (2014) __ U.S. __, 134 S.Ct. 2259, 2263 ["Before completing any sale, the dealer must 'verif[y] the identity of the transferee by examining a valid identification document' bearing a photograph" (citing 18 U.S.C. § 922(t)(1)(C))]; see also Pen. 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"].) None of the amici explain how the requirements of providing identification, or conducting purchases face-to-face, limit or impede the citizenry's Second Amendment rights.

## II. THE STATUTES AT ISSUE PROVIDE SUFFICIENT GUIDANCE FOR LAW ENFORCEMENT

A theme repeated in the amicus briefs is that law enforcement lacks guidance in how to enforce the challenged statutes. Amicus Western States Sheriffs' Association ("WSSA") contends that the phrase "principally for use" in handguns provides "no ascertainable standard to guide law enforcement personnel" to use in enforcing the statute. (WSSA Br. at p. 5.) WSSA maintains that the phrase is akin to the term "loitering" found unconstitutionally vague in *Chicago v. Morales* (1999) 527 U.S. 41. (*Ibid.*) This argument is reiterated by both the NRA and the National Shooting Sports Foundation ("NSSF"). (NSSF Br. at p. 14 [statute "does not mention specific calibers, cartridges, or other objective characteristics" and thus lacks "any ascertainable standard"]; NRA Br. at p. 19 ["the terms 'principally for use' have no fixed meaning"].)

But "principally for use" in handguns is fundamentally different from the standardless proscription in *Morales*: "to remain in any one place with no apparent purpose." (See *Chicago v. Morales*, *supra*, 527 U.S. at p. 47, fn. 2 [quoting ordinance].) In fact, the "principally for use" phrase is more akin to scores of criminal law descriptions that the Supreme Court has expressly approved as *not* "unconstitutionally vague":

> The statutory requirement that an unenumerated crime "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another" is not so indefinite as to prevent an ordinary person from understanding what conduct it prohibits. See *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Similar formulations have been used in other federal and state criminal statutes. See, e.g., 18 U.S.C. § 2332b(a)(1)(B) (defining "terrorist act" as conduct that, among other things, "creates a substantial risk of serious bodily injury to any other person"); Ariz.Rev.Stat. Ann. § 13–2508(A)(2) (West 2001) (offense of resisting arrest requires preventing an officer from effectuating an arrest by "any . . . means creating a substantial risk of causing physical injury to the peace officer or another"); Cal. Health & Safety Code Ann. § 42400.3(b) (West 2006) (criminalizing air pollution that "results in any unreasonable risk of great bodily injury to, or death of, any person"); N.Y. Penal Law Ann. § 490.47 (West Supp. 2007) ("[c]riminal use of a chemical weapon or biological weapon" requires "a grave risk of death or serious physical injury to another person not a participant in the crime").

(*James v. U.S.* (2007) 550 U.S. 192, 210, fn. 6.) As the collection of statutes provided in *James* reveals, no list or formal "guidelines" need to be provided in a criminal statute for it to satisfy due process.

WSSA cautions that police officers "are not experts in making determinations regarding what constitutes handgun ammunition." (WSSA Br. at p. 12.) Accordingly, WSSA contends that a list or guide is needed in order for law enforcement to make arrests under the statute. (*Id.* at pp. 10-11.) But significantly, the enforcement burden of the statutes in question does not fall to law enforcement patrolling the general public, because the

statutes apply to ammunition *vendors*, not to gun owners or ammunition purchasers. (See Pen. Code, § 12061 ["a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without" obtaining identification and keeping specified records.].) In addition, the record below established that the California Department of Justice and its Firearms Bureau were the law enforcement officers most likely to apply and enforce these statutes, not local police or sheriffs. (See JA Vol. X 2751-2752 [testimony of Sheriff Parker that his deputies did not visit gun dealers or ammunition sellers, and instead relied on the Department of Justice to enforce California firearms statutes].)

In any event, the record below showed many ammunition vendors already divide their stock between "handgun" and "rifle" ammunition for marketing purposes. (See JA IX 2306-2369.) These vendors, as well as law enforcement, are on notice that the statute is intended to apply to the cartridges marketed as handgun ammunition, and not to the rifle ammunition. 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.) As observed by the dissent below, "because Internet ammunition vendors and a respected ammunition encyclopedia categorize a number of cartridges as handgun ammunition" one may "conclude that the meaning of 'ammunition principally for use in handguns' can be ascertained objectively." (Dis. Opn., p. 12.) Hence, WSSA's assertions about the lack of guidance are unfounded.

## III. ARGUMENT BASED ON HYPOTHETICAL SCENARIOS IS INAPPROPRIATE IN A FACIAL CHALLENGE

Two of the amicus briefs list hypothetical questions about the application of the statutes in an effort to buttress their vagueness claims. (See, e.g., NRA Br. at pp. 18-19; WSSA Br. at p. 9.) But this approach has

been expressly discredited by the United States Supreme Court, as well as this Court, in the context of a facial challenge. (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 449-450 ["In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases"]; *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-181 ["To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute" but rather "must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions"].)

The unsuitability of analyzing the meaning of a statute via hypothetical scenarios is underscored by the holding in *United States v. Powell* (1975) 423 U.S. 87. In *Powell*, the Supreme Court analyzed the phrase "firearms capable of being concealed on the person" in considering a vagueness challenge to federal law. The Court of Appeals in *Powell* had found the statute unconstitutionally vague, primarily by employing hypothetical questions about what "person" was being referenced in the statute. The Supreme Court rejected this type of analysis:

> 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.*

(*United States v. Powell*, *supra*, 423 U.S. at p. 92, emphasis supplied.) Amici are likewise "straining to inject doubt" into the meaning of a straightforward statute by creating lists of hypothetical questions, and their efforts should be given no weight by this Court.

Even if amici were correct in their contention that some ambiguity exists in the challenged statutes, that would not justify their conclusion that the statutes should be condemned on a facial challenge. "Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear." (*People v. Townsend* (1998) 62 Cal.App.4th 1390, 1401-1402 [internal quotations and citation omitted].) But any ambiguities in statutory language can be ironed out "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* (1988) 44 Cal.3d 1188, 1202, quoting *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 377-378.)

In proceedings below, Respondents dismissed their as-applied challenge and proceeded solely with a facial challenge. (JA XIV 4031.) And 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* (1995) 9 Cal.4th 1069, 1084.) The reliance on hypothetical questions underscores the weaknesses in Respondents' facial challenge, not its strengths. To the extent that the questions identify remaining ambiguities in the statute, they can be assessed in future as-applied challenges, and do not justify a conclusion that the statute is unclear on its face.

## CONCLUSION

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

Dated: December 23, 2014

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANTS' CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE uses a 13 point Times New Roman font and contains 2,485 words.

Dated: December 23, 2014

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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 December 23, 2014, I served the attached **APPELLANTS' CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE** 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 December 23, 2014, at San Francisco, California.

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Signature

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