IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiff and Respondent, **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,** Defendant and Appellant.	Case No. F062490

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

APPELLANTS' ANSWER TO AMICUS BRIEFS OF FFL GUARD, LLC. AND GUN OWNERS OF CALIFORNIA, INC., AND LAW ENFORCEMENT ALLIANCE OF AMERICA, INC.

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COURT RULES

By order dated October 12, 2012, this Court authorized the filing of amicus briefs by (1) FFL Guard, LLC. and Gun Owners of California, Inc. and (2) the Law Enforcement Alliance of America, Inc., and further permitted appellants to file an answer to these briefs within 30 days. 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.

The amicus briefs at issue have been submitted by avowed gun control opponents. The briefs fail to properly analyze the relevant legal standards, cite a depublished case, and improperly attempt to expand the scope of the appeal. The briefs lack legitimate persuasive power, fail to illuminate any issue of consequence in the action, and need not be considered by the Court.

I. AMICUS LAW ENFORCEMENT ASSOCIATION OF AMERICA FAILS TO ACKNOWLEDGE THE APPROPRIATE STANDARD OF REVIEW

The Law Enforcement Association of America, Inc. ("LEAA")[1] contends that "a very stringent vagueness test" should be applied in this case because the statutes at issue "abut upon constitutional rights." (LEAA Br. at pp. 5-6.) LEAA suggests that, accordingly, appellants have erred in urging the Court to apply the "void in all applications" standard articulated in *United States v. Salerno* (1987) 481 U.S. 739, 745 in reviewing the instant facial vagueness challenge, contends that "it is entirely immaterial

[1] Although the LEAA identifies itself in its brief as a "non-profit, non-partisan advocacy and public education organization," (LEAA Br. at p. 1), and contends that it offers "the perspective of law enforcement professionals," its website makes it plain that one of LEAA's primary activities is "fighting gun control." (See http://www.leaa.org/index.html ; see also http://www.leaa.org/leaafaq.html ["Part of LEAA's core mission is telling the truth from the law enforcement perspective, that gun control is NOT crime control"].)

whether there might be one (or even several) potentially valid applications of the law." (LEAA Br. at p. 6.) LEAA is incorrect.

First, as explained in appellants' merits briefs, the fact that the statutes challenged in this case involve ammunition and therefore implicitly involve firearms does not require application of a more stringent test. LEAA fails to address or acknowledge the multiple citations to federal cases applying the *Salerno* "void in all applications" standard to constitutional challenges in firearms cases in appellants' reply brief. (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 challenges requires showing "that the law is unconstitutional in all of its applications"].) Thus, far from being a "seldom-used" test (LEAA Br. at p. 6), the *Salerno* test is indisputably the test most used in firearms cases and the proper test to be employed here.

Second, the notion that a different standard should be employed because the statutes at issue lack a *scienter* requirement is simply wrong. (LEAA Br. at p. 6.) Apart from simple regulatory violations and public welfare offenses, California criminal laws generally do not provide for strict liability. The California Supreme Court has plainly stated as much: "The prevailing trend in the law is against imposing criminal liability without proof of some mental state where the statute does not evidence the

Legislature's intent to impose strict liability." (*In re Jennings* (2004) 34 Cal.4th 254, 267.) "In other words, there must be a union of act and wrongful intent, or criminal negligence. 'So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication.' (*In re Jorge M.* (2000) 23 Cal.4th 866, 872.)" (*Ibid.*)

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

Amicus LEAA contends that the "phrase 'principally for use' in handguns" does not "establish minimal guidelines" for law enforcement to use in enforcing the statute. (LEAA Br. at p. 8.) LEAA maintains that the phrase is akin to the term "loitering" found unconstitutionally vague in *Chicago v. Morales* (1999) 527 U.S. 41. (*Ibid.*) 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." (*Chicago v. Morales*, *supra*, 527 U.S. at p. 47, n. 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, n. 6.) As the catalog of statutes provided by the high court ably demonstrates, no list or formal "guidelines" need to be provided in a statute for it to pass constitutional muster.

LEAA cautions that police officers "are not experts in the uses of ammunition." (LEAA Br. at p. 10.) Accordingly, LEAA contends that a list or guide is needed in order for law enforcement to make arrests under the statute. (*Id.*, at pp. 10-11.) Significantly, the enforcement burden of the statutes in question do not fall to law enforcement generally, 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 officials 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 weapons laws].) Hence, even if LEAA's assertions were legally relevant (and they are not in a facial challenge), they are unfounded.

Both amicus briefs resort to the use of lists of hypothetical questions about the application of the statutes in an effort to buttress their vagueness claims. (See, e.g., LEAA Br. at p. 8; Gun Owners Br. at pp. 18-19, 22-23.) But this approach has been expressly discredited by the United States Supreme Court. In *United States v. Powell* (1975) 423 U.S. 87, 92, 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.) Both amici are clearly "straining to inject doubt" into the meaning of a straightforward statute, and their efforts should not be countenanced by this Court.

III. LEAA'S RELIANCE ON A DEPUBLISHED CASE IS INAPPROPRIATE

Although it concedes that the opinion is "depublished and no longer has precedential value," amicus LEAA nevertheless cites *People v. Saleem* (2009) 180 Cal.App.4th 254 because it supposedly "illustrates" some of the same harms found in the challenged statutes. (LEAA Br. at p. 15.) LEAA's citation of *Saleem* is improper. It is well understood that if a "case has been depublished [it] is not citable as authority." (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1119, n.6; see also Cal. Rules of Court, rule 8.1115(a) ["an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published

must not be cited or relied on by a court or a party in any other action."].) In fact, citation of a depublished case even "with a caveat it was not being relied upon" is a basis for imposition of sanctions by an appellate court. (*Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885; see also *People v. Williams* (2009) 176 Cal.App.4th 1521, 1529 ["We realize that depublished and unpublished decisions are now as readily available as published cases, thanks to the Internet and technologically savvy legal research programs. That does not give counsel an excuse to ignore the rules of court.") This Court should ignore the citation to *Saleem*, and admonish counsel for LEAA to remember its obligations under the California Rules of Court.[2]

Even if it was citable authority, the utility of *Saleem* is questionable. *Saleem* dealt with a prohibition on felons wearing "body armor," and the court found that the lack of "an official list of prohibited vests" was needed to provide fair notice as well as meaningful law enforcement guidelines. (*Saleem*, *supra*, 180 Cal.App.4th at p. 274.) In contrast to a term like "body armor," the statutes at issue refer to ammunition "principally for use in a handgun." As established in the trial court, ammunition vendors divide their stock offered for sale between "handgun" ammunition and "rifle"

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[2] LEAA also misrepresents the procedural posture of the *Saleem* case, suggesting that the opinion became depublished due to the Supreme Court's grant of review, then simply remained depublished after the appeal became "moot" due to a change in statute. (LEAA Br. at p. 16, n. 9.) What LEAA does not inform this Court is that after the appeal was dismissed, a request was made by respondents' counsel C.D. Michel on behalf of the California Rifle and Pistol Association Foundation to republish the Court of Appeal opinion, but the request was denied by the Supreme Court. (See Supreme Court Docket, S179660, Request to Republish dated October 13, 2010 and Order Denying Request to Republish dated November 10, 2010, available online at: http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1931966&doc_no=S179660.)

ammunition. (See JA IX 2306-2369.) And simple Internet research showed that most commercial ammunition vendors, including those that submitted declarations in support of respondents' vagueness challenge, listed "handgun ammunition" as a discrete category along with a catalog of calibers and cartridges available. (See JA IX 2367-68, 2370-71, and 2373.) Thus, unlike "body armor," the challenged definitions provide sufficient notice and guidance for enforcement.

IV. THE GUN OWNERS OF CALIFORNIA AMICUS BRIEF IMPROPERLY EXPANDS THE ISSUES ON APPEAL

The amicus brief filed by FFL Guard, LLC[3] and Gun Owners of California, Inc.[4] ("Gun Owners Br.") challenges the California Penal Code's use of "barrel length or barrel interchangeability" in defining pistols. (Gun Owners Br., p. 7.) Gun Owners concedes that the statute at issue defines "handgun ammunition" as ammunition principally for use in "pistols, revolvers, and other firearms capable of being concealed upon the person." (Gun Owners Br. at p. 8, quoting Penal Code section 16650 subdivision (a).) Gun Owners notes that another statute, Penal Code section 16530, defines "capable of being concealed on the person" as a

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[3] Counsel for respondents herein, C.D. Michel, is a member of FFL Guard's "Consulting & Advisory Group," and is described as "FFLGuard's Preferred Counsel for California Legislation and Litigation, provides all FFLGuard clients with guidance on selling into and out of California, a highly-specific and complex legal arena..." (See http://www.fflguard.com/who-we-are/consulting-advisory-group/)

[4] Gun Owners of California, Inc. describes itself as "the hardest hitting, most effective, toughest fighting pro-gun organization in the state of California." (See http://www.gunownersca.com/about/missionmenu/item/21-about-the-gun-owners-of-california.) It vows to continue working "until the last anti-gun legislator is defeated." (*Ibid.*) It is no surprise that the National Rifle Association is providing "[s]ome funding" for the preparation of the Gun Owners amicus brief. (See Gun Owners Br. at p. 3.)

device with a barrel length under 16 inches. (Gun Owners Br. at p. 9.) Gun Owners then argues that this use of barrel length is "[c]ontrary to ordinary usage" and therefore "creates an incomprehensible, inherently vague standard under which ammunition is classified by the barrel lengths" of guns. (Gun Owners Br. at p. 7.)

Gun Owners is attempting to broaden the litigation beyond the scope of the issues pled by respondents. No party to this litigation advanced any argument below or in this Court on the issue of barrel length. This Court may disregard an amicus curiae's attempts to expand the issues on appeal. (*Eggert v. Pacific States S. & L. Co.* (1943) 57 Cal.App.2d 239, 251.) This is particularly appropriate when an amicus puts forth an argument that "was not among the issues that the parties raised." (*Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 461.) This Court should not accept Gun Owners' invitation to expand the issues in this appeal.

Of course, even if considered, Gun Owners' argument about the vagueness of California's "concealable firearm" and barrel length statutes must be rejected. Precedent from the United States Supreme Court establishes that the phrase "capable of being concealed on the person" is not vague. Specifically, in *United States v. Powell*, *supra*, 423 U.S. at p. 92, the Supreme Court found that the phrase "firearms capable of being concealed on the person" in a federal statute was not unconstitutionally vague. This finding settles the issue with respect to California's use of that terminology. Similarly, California's statute referencing barrel length in defining handguns has withstood challenge for vagueness. (*People v. Heffner* (1977) 70 Cal.App.3d 643, 653-654.) In sum, there is no basis for concluding that either statute is infirm.

CONCLUSION

These amicus briefs by avowed gun control foes lack persuasive force. The relief sought in Appellants' Opening Brief should be granted.

Dated: November 13, 2012

Respectfully submitted,

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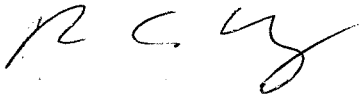

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CERTIFICATE OF COMPLIANCE

I certify that the attached **APPELLANTS' ANSWER TO AMICUS BRIEFS OF FFL GUARD, LLC. AND GUN OWNERS OF CALIFORNIA, INC., AND LAW ENFORCEMENT ALLIANCE OF AMERICA, INC.** uses a 13 point Times New Roman font and contains 2,592 words.

Dated: November 13, 2012

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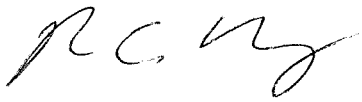

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Sheriff Clay Parker, et al. v. The State of California (On Appeal)**
No.: **F062490**

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 November 13, 2012, I served the attached **APPELLANTS' ANSWER TO AMICUS BRIEFS OF FFL GUARD, LLC. AND GUN OWNERS OF CALIFORNIA, INC., AND LAW ENFORCEMENT ALLIANCE OF AMERICA, INC.** 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 November 13, 2012, at San Francisco, California.

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Declarant

Esther McDonald
Signature

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