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

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The State's Petition for Review focuses heavily on substantive errors that, in its view, the Fifth District made in deciding this case. But it fails to sufficiently establish why this case requires review for any of the reasons laid out in the California Rules of Court, e.g., "when necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Ct., Rule 8.500, subd. (b).)

The State's foundational claim is that the appellate court applied the wrong standard in determining the validity of laws regulating the display, sale, and transfer of so-called "handgun ammunition" against a facial vagueness challenge. The State claims that, had the court applied California's strictest test for facial claims rather than its "generality of cases" standard, the court would have reversed the trial court decision and upheld the regulations. Further, the State argues that the court used the wrong standard because of long-standing confusion over which test applies in California.

The State's argument falls short on several points, but necessarily fails on at least one. The court found that the challenged laws were unconstitutional under *either* standard. Slip Op. pp. 37-38. So even if there were some confusion about which standard controls in *some* cases, that

confusion did not affect the outcome in *this* case, nor is this case the right vehicle for resolving any such confusion. Rather, this case involves an impossibly vague regulatory scheme that is necessarily void on its face regardless of the standard of review. It was rightly decided, both at trial and on appeal. Review should be denied.

STATEMENT OF THE CASE

Passed in 2009, Assembly Bill 962 (AB 962) added former sections 12060, 12061, and 12318 to the California Penal Code.[1] The key provision in this case is now section 16650, which combines the language of former sections 12060, subdivision (b), and 12323, subdivision (a), to provide the definition of "handgun ammunition." (See Stats. 2009, ch. 628, § 2; Stats. 1995, ch. 263, § 3.) As used in the statutory scheme, "handgun ammunition" is defined 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), emphasis added.) Section 16650's definition is essential to the proscriptive language of section 30312 (former section 12318) and sections 30345 through 30365 (former section 12061), all of

[1] The Penal Code sections regulating firearms were renumbered during the litigation of this case. Here, Respondents generally refer to the current versions of relevant statutes, but refer to renumbered provisions as "former sections."

which impose restrictions on transactions in "handgun ammunition."[2]

Section 30312 requires that "the delivery or transfer of ownership of handgun ammunition may only occur 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).) This effectively prohibits all internet and mail order sales.

Sections 30345 through 30365 require "handgun ammunition" vendors to: (1) preclude prohibited employees from accessing "handgun ammunition"; (2) store "handgun ammunition" out of the reach of customers; and (3) record specific information about every transfer of "handgun ammunition" made by the vendor and obtain a thumb print from the customer. Vendors must make these records available for inspection by law enforcement in accordance with the provisions of sections 30355, 30357, 30360, and 30362.

A violation of section 30312 imposes misdemeanor criminal liability punishable by imprisonment not exceeding six months, or by fine not exceeding $1000, or both, as does a violation of section 30352, 30355,

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[2] Although former section 12323, subdivision (a) was enacted in 1982 and is referred to by former section 12316, subdivision (a)(1)(B) and others, the enactment of AB 962 marks the first time the "principally for use" in handguns standard was employed as the sole mechanism by which to determine what ammunition is regulated by California firearms statutes.

30360, or 30362. (Pen. Code, § 30365, subd. (a).)

In June 2010, Respondents filed a complaint challenging former Penal Code sections 12060, 12061, and 12318 on the grounds that they were void for vagueness. (J.A. I 0014.) Appellants the State of California, Attorney General Kamala Harris, and the California Department of Justice (collectively "the State") answered the complaint. (J.A. I 0052-0074.)

Respondents filed a motion for summary judgment and, alternatively, for summary adjudication on the grounds that the Challenged Provisions were unconstitutionally vague for failure to define "handgun ammunition" with sufficient clarity. (J.A. III 0825.) Specifically, the trial court was asked to consider whether the State's "principally for use" in handguns definition was unconstitutionally vague. (J.A. III 0830.)

The trial court granted Respondents' motion for summary adjudication on their facial vagueness claim. (J.A. XIV 4032.) Judgment was entered in Respondents' favor, and a permanent injunction barring the enforcement of the stricken laws was issued. (J.A. XIV 4271.) The State's timely appeal followed. (J.A. XIV 4271.)

A panel of the Fifth District Court of Appeal issued its published opinion on November 6, 2013, upholding the trial court's judgment.

The appellate court conducted an in-depth examination of both

federal and state law regarding applicable standards of review for facial vagueness challenges and, specifically, the State's argument that under the *Salerno* standard the Challenged Provisions satisfy due process if they can be validly applied in *even one* circumstance. (Slip Op. pp. 13-33.) In rejecting the State's position, the Court concluded:

> [W]e reject appellants' argument that the challenged statutes are valid so long as we can conceive of at least one scenario in which the "principally for use" language would not be vague. Under this interpretation of the *Salerno* standard, the existence of a single cartridge (out of hundreds or thousands) that is used more often in handguns than in rifles would allow these criminal statutes to pass constitutional muster even if vagueness "permeates the text" of their provisions and leaves citizens of ordinary intelligence without fair notice of the conduct proscribed. *If the Salerno standard actually compels such a result, it surely conflicts with the basic requirements of due process in this instance*. Therefore, we apply the principles outlined by the United States Supreme Court in opinions such as *Kolender* and *Morales*, discussed *infra*, and apply California's more lenient standard to determine whether the statutes are vague "in the generality or great majority of cases."

(Slip Op. pp. 13-14, emphasis added.)

In equally thorough fashion, the court applied that standard to the facts in evidence, and held that the trial court correctly found the definition of "handgun ammunition" unconstitutionally vague. (Slip. Op. pp. 7-11.) It also found "no basis from the text of the challenged statutes, their legislative history, the record on appeal, or elsewhere upon which to conclude there is a common understanding or objective meaning of the term

'handgun ammunition.' " (Slip Op. p. 37.)

Ultimately, it did not matter which standard of review applied, for the Court found that "the inherent vagueness of the statutory scheme presents a total and fatal conflict with the due process clauses of the United States and California Constitutions, even if one could conceive of a scenario in which application of the law to a particular set of facts would not involve ambiguity." (Slip Op. pp. 37-38.)

The dissent disagreed with the standard applied by the majority, arguing that the facial challenge warranted lesser scrutiny because it was brought pre-enforcement and did not actually implicate constitutional (Second Amendment) rights. (Dis. Op. p. 5.) The dissent would have upheld the statutes by construing them to include a scienter element and limiting their application to the relatively few cartridges the dissent believed are generally recognized as "principally for use" in handguns. (Dis. Op. p. 1.)

The majority opinion rejected that approach, noting that: "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully [prosecuted].' " (Slip Op. p. 36, citing *City of Chicago v. Morales* (1999) 527 U.S. 41, 60 (*Morales*).)

ARGUMENT

I. THE COURT OF APPEAL'S OPINION BRINGS CLARITY, NOT CONFUSION, TO THE ANALYTICAL FRAMEWORK FOR FACIAL VAGUENESS CHALLENGES

In its opinion, the Court of Appeal laid out, in great detail, the current state of the law governing this case. (Slip. Op. pp. 17-27.) After doing so, it settled on a standard for judicial review of facial vagueness challenges in the specific context of a criminal law that implicates constitutional conduct and lacks a scienter requirement. (Slip. Op. pp. 27-28.) While the court recognized the standard for facial constitutional challenges to be "the subject of some uncertainty," Slip. Op. at p. 27, quoting *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218, the opinion brings great clarity to this area of law. And, in selecting the appropriate test for the case at bar, it faithfully adheres to the applicable legal principles it describes. Rather than sowing a "lack of clarity in the appropriate standard for facial challenges," Pet. for Rev. p. 7, the decision is remarkably clear.

The opinion describes the two tests applicable to facial challenges raised in California state courts; one strict, one less so. (Slip Op. pp. 13, 25.) Reciting California's strictest standard, the court recognized that "a statute will not be considered facially invalid unless its provisions present 'a

total and fatal conflict with applicable constitutional prohibitions in all of its applications.' " (Slip Op. p. 25, quoting *East Bay Asian Local Devel. Corp. v. State of California* (2000) 24 Cal.4th 693, 709.) Alternatively, under the less-strict standard, a party need only establish that the challenged law is unconstitutional "in the generality" of cases. (Slip Op. pp. 13, 25, quoting *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673, and *In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.)

To determine when it is appropriate to deviate from the stricter, "total and fatal conflict" test, the court examined the analyses of significant state and federal facial challenges to extract from those cases the analytical framework driving that determination. (Slip Op. pp. 17-28, 31-33.)[3] The opinion also discusses both the circumstances that have or may have warranted heightened judicial scrutiny of legislative enactments (and thus a more lenient facial standard) in other cases and the important policy

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[3] Discussing *Morales*, *supra*, 527 U.S. 41; *United States v. Salerno* (1987) 481 U.S. 739 (*Salerno*); *Kolender v. Lawson* (1983) 461 U.S. 352 (*Kolender*); *Hoffman Estates v. The Flipside, Hoffman Estates* (*Hoffman Estates*) 455 U.S. 489; *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643; *People v. Super. Ct.* (*Caswell*) (1988) 46 Cal.3d 381; *Franklin Life Ins. Co. v. State Bd. of Equalization* (1965) 63 Cal.2d 222; *Cnty. of Sonoma v. Super. Ct.* (2009) 173 Cal.App.4th 322; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660; *In re Marriage of Siller* (1986) 187 Cal.App.3d 36.

considerations demanding the application of such review in this case. (Slip. Op. pp. 29-33.) From there, the decision to apply the "generality of cases" standard was not only simple, it was supported by overwhelming legal precedent.

That the court applied the "generality of cases" test here, where others have opted not to, creates no confusion or discord among the courts. A conflict does not arise simply because courts have applied two different tests to facial challenges. Some cases warrant the stricter "present total and fatal conflict" test, and others are deserving of a more lenient standard. That much is clear from the binding authority of the highest courts of the United States and California. (Slip. Op. p. 13.) The Court of Appeal, undertaking an exhaustive analysis of that authority, Slip Op. pp. 13-33, aptly applied the controlling legal principles and settled on the standard appropriate under the circumstances of *this* case.

Despite the Court of Appeal's clear and reasoned analysis, the State argues the opinion "exacerbated" the lack of clarity regarding the proper standards governing this case. (Pet. for Rev. p. 8.) To make its case, the State selects a single, passing remark from some twenty pages of sound legal reasoning – and drastically misconstrues it. (Pet. for Rev. p. 8.) Twisting the court's reflection that it did not "believe the California

Supreme Court has ever endorsed the *Salerno* standard,"[4] Slip. Op. p. 13, the State suggests the court incorrectly claimed "that this Court 'has never endorsed' the stricter standard that the challenged law be shown 'unconstitutional in all circumstances.' " (Pet. for Rev. p. 8.)

But the opinion does not suggest this Court has never applied California's stricter facial test. Certainly the court could not claim such a thing, having identified the two standards California courts regularly apply to facial challenges. (Slip Op. pp. 13, 25.) Instead, as is evident throughout the opinion, the Court of Appeal sought to dispel the State's notion that the federal *Salerno* test must apply in California courts. (Slip Op. pp. 13, 25, 27-28.) It simply made clear that California's "total and fatal conflict" test is "technically distinct" from the *Salerno* "no set of circumstances" formulation applied in federal courts. (Slip Op. p. 25.) That is no major revelation. For if they were indeed one and the same, surely the State could point to just one case of this Court that cites *Salerno* for this premise or

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[4] In *Salerno*, the United States Supreme Court put forth the very stringent rule that, to succeed, a facial challenger must establish that "no set of circumstances exists under which the [statute] would be valid." 481 U.S. at p. 745. This test has long been the subject of controversy in the federal courts. In the State's view, it would save the Challenged Provisions if *just one* cartridge (out of hundreds or thousands) could be said to be used more often in handguns than rifles. (Slip Op. pp. 14-15.) But even *Salerno* did not apply such a strict test. (Resps.' Br. 27, fn.6, quoting *Washington v. Glucksberg* (1997) 521 U.S. 702, 739-740 [conc. opn. of Stevens, J].)

otherwise adopts its rigid "no set of circumstances" language.

The Court of Appeal's decision is a sound one. It thoroughly examines the two tests California state courts have used for years when considering facial challenges, and it selects the standard applicable to the pressing constitutional questions at hand. The court's analysis is in line with legal precedent that looks to the underlying basis for a facial challenge and the policy considerations that attach to each unique case. Far from muddling the issue, the Court of Appeal's opinion clarifies the "uncertainty" that has characterized the standard for facial constitutional challenges. (See Slip Op. p. 27.) To review the decision for the purpose of addressing the facial vagueness standard is unnecessary given the fundamentally sound reasoning already espoused by the Court of Appeal.

II. THE COURT OF APPEAL PROPERLY APPLIED THE "GENERALITY OF CASES" STANDARD FOR REVIEWING FACIAL CHALLENGES; EVEN IF IT HAD NOT, THE COURT HELD THAT THE CHALLENGED PROVISIONS PRESENT A "TOTAL AND FATAL CONFLICT"

The court initially settled on a vagueness test it took from *Hoffman Estates*, *supra*, 455 U.S. 489, a case cited by this Court in explaining that a law must be "impermissibly vague in all of its applications" to be deemed facially invalid, but which was based on the assumption that "the enactment implicates *no* constitutionally protected conduct, . . .' " (Slip Op. p. 28, citing *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116 (*Acuna*)

and *Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495, 498-499, emphasis added.) Under that test, a law that implicates constitutional conduct, imposes criminal penalties, and lacks a scienter requirement will warrant heightened vagueness review. (Slip Op. p. 28, citing *Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495, 498-499; *Kolender*, *supra*, 461 U.S. at p. 358 and fn.8; *Morales*, *supra*, 527 U.S. at pp. 53, 55.)[5] Applying that test to the Challenged Provisions, the Court of Appeal properly applied the "generality of cases" standard to this case. (Slip Op. pp. 28-31.) Alternatively, the court held that the Challenged Provisions could not survive even the strict "present total and fatal conflict" test. (Slip Op. pp. 37-38.)

A. The Court of Appeal Properly Found That the Challenged Provisions Lack a Scienter Requirement

Nothing in the law requires one to know that he or she is transacting in "handgun ammunition" to be guilty of a violation. And nothing permits

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[5] The State exaggerates the opinion's citation to *Hoffman Estates*. (Pet. for Rev. pp. 8-10.) The opinion does not conclude that this Court's citation to *Hoffman Estates* "created an implication that the strict standard used by this Court *must necessarily* 'mirror' the standards" set forth there. (See Pet. for Rev. p. 9.) It instead considers which test would apply *if* it does. (Slip Op. p. 28 ["*If* California's strictest standard of review mirrors *Hoffman Estates* standard, it is flexible and yielding to vagueness concerns . . when three elements are present."], emphasis added.) *If*, on the other hand, it does not, the court recognizes it "must still decide whether [*Salerno*] is appropriate in this particular case." (Slip Op. Pp. 31-32.)

one to rely on his or her subjective understanding or personal experience regarding what constitutes "handgun ammunition" in his or her defense. Indeed, a vendor who inadvertently sells and fails to register the sale of even one round of ammunition that a law enforcement officer deems "handgun ammunition" faces misdemeanor charges. (See Pen. Code, §§ 19, 30365.)

The State provides little more than the bare assertion that the Challenged Provisions are not strict liability statutes. (Pet. for Rev. pp. 10-11.) While the existence of mens rea is certainly the "rule" of American criminal jurisprudence, Pet. for Rev. pp. 10-11, the failure to register ammunition fits neatly within the "public welfare" offense exception. (*People v. Calban* (1976) 65 Cal.App.3d 578, 584 ["The only exception to this general rule are so-called 'public welfare' or 'malum prohibitum' crimes. . . ."]; see also *In re Jorge M.* (2000) 23 Cal.4th 866, 872.) Statutes, like the Challenged Provisions, that are enacted for the protection of public health and safety regularly dispense with the element of wrongful intent in order to further the legislature's goal of addressing some identified public safety concern. (*People v. Vogel* (1956) 46 Cal.2d 798, 801 fn.2.)

Any attempt to infer a scienter requirement cannot save the Challenged Provisions from either vagueness or application of the

"generality of cases" standard. In the dissent's view, it would be proper to judicially re-define "handgun ammunition" to that which "generally is recognized as used more often in handguns than in other types of firearms." (Dis. Op. p. 10.) To the extent that knowledge of what is "generally [] recognized" is an acceptable substitute for that which is "commonly understood,"[6] there is no such list of ammunition. (Slip Op. p. 36.) The wildly varying responses provided by the deponents in this case, including two experts, illustrates just that. (J.A. IX 3089, XII 3719-3722.)

The references the dissent points to as proof "that certain ammunition is recognized as handgun ammunition" do not bring the clarity it seeks. (See Dis. Op. p. 15.) *Cartridges of the World*, thought by the dissent to be easily determinative of any given ammunition's principal use, Dis. Op. pp. 12, 15, describes some of the handguns and rifles in which given ammunition has been used throughout history. But it makes *no* representation as to any cartridge's principal use, in any given jurisdiction, at any given time, by any class of users. And the fact that some ammunition vendors' websites categorize their stock as "handgun ammunition," Dis.

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[6] As discussed below, courts regularly look to the "common understanding and practices" or the "common experiences of mankind" to bring clarity to vague language. (See, e.g., *People v. Barksdale* (1972) 8 Cal.3d 320, 327; *People v. Morgan* (2007) 42 Cal.4th 593, 606.) The dissent does not provide authority for a "generally [] recognized" standard.

Op. pp. 12, 15, says *nothing* about whether that ammunition is "generally [] recognized" as being used more often in handguns. Certainly, the record does not indicate what those vendors meant when listing ammunition as such. (J.A. XI 3364-3365; XII 3454-3459.) The State did not attempt to determine whether such designation was merely puffery designed to encourage buyers to purchase certain stock, whether it reflected a vendor's understanding of the ammunition uses popular with its particular customer base, whether it reflected ammunition usage in handguns versus rifles, or whether it was simply *suitable* for use in handguns. In any event, the Challenged Provisions must also be understood by general sporting goods retailers and shipping companies and their employees, all of whom have little or no special familiarity with firearms and ammunition, and by laypersons who make ammunition purchases over the Internet or through mail-order catalogues. In short, even if a cartridge's principal usage could somehow be determined, such is not ascertainable from the *common* experiences of mankind.

Ultimately, to infer a scienter requirement would do nothing but inject a requirement that one knows something they cannot know, creating a law that cannot be enforced as no one could ever harbor the requisite intent. Where inferring a scienter requirement would create absurd results or

otherwise defeat the Legislature's intent that the criminal laws it passes should be enforced, it is improper to do so. (*Barnes v. Chamberlain* (1983) 147 Cal.App.3d 762, 766 ["a construction that would create a wholly unreasonable effect or an absurd result should not be given"], citing *Dempsey v. Market Street Ry. Co.* (1943) 23 Cal.2d 110, 113.)

B. The Court of Appeal Properly Held That Laws Impacting Second Amendment Conduct Require Heightened Vagueness Review

The dissenting opinion and the State's petition improperly frame the Second Amendment harm as the "minor inconvenience to the buyer" of registering one's ammunition purchases. (Dis. Op. p. 7; Pet. for Rev. pp. 13-14.) Even if it could be said that government-mandated registration of constitutionally protected purchases was a "minor inconvenience," this argument misses the point. The law's impact on the Second Amendment is the "chilling effect" that reduces access and inhibits the purchase of constitutionally protected items (i.e., ammunition). (Slip Op. p. 31.)

Vague laws urge citizens to "steer far wider" of the conduct which a statute vaguely defines because they are unsure which actions are illegal. (*Grayned v. City of Rockford* (1972) 408 U.S. 104; see also *Reno v. ACLU* (1997) 521 U.S. 844.) Courts are especially vigilant about declaring a statute "void for vagueness" when a statute might chill the exercise of First

Amendment rights. They should be equally concerned with the Second Amendment. The State contends that "the Second Amendment is not directly analogous to the First." (Pet. for Rev. p. 13.) And, to an extent, that is true. Indeed, the First Amendment's concerns about the chilling effect of vague laws are *even stronger* in the Second Amendment context.

Firearms and ammunition dealers operate their businesses in a highly regulated field. They can lose their state and/or local licenses – and their very livelihood – for simple regulatory infractions. The same cannot be said of purveyors of items protected by the First Amendment. Bookstore owners, for example, are not required to maintain comparable licenses just to offer books to the public. There is no regulatory agency with the ability to revoke a bookstore's license for failing to register the sale of a single books.

As to the impact on consumers, the concern of vague laws limiting their access to firearms and ammunition is similarly more pressing than First Amendment concerns. If the chilling effect of a vague law prevents a person from obtaining and reading a particular book, his or her *intellectual growth* may be stunted. But if the chilling effect of a vague law prevents a person from obtaining and using a firearm or ammunition in self-defense, his or her *physical health* may suffer, resulting in great personal injury.

The record is replete with evidence that the Challenged Provisions

had chilled and would continue to chill Second Amendment conduct. In addition to regulating ammunition purchases by requiring registration of all "handgun ammunition" sales, the Challenged Provisions effectively banned all internet and mail-order sales of "handgun ammunition." The blanket prohibition on those purchases effectively eliminates access to protected ammunition in remote areas and to rare ammunition generally sold only via internet or mail-order catalogue. (Slip Op. p. 31.) While one could technically purchase ammunition that is not "handgun ammunition," the laws' unclear language induces both vendors and consumers to "steer far wider" by foregoing transactions in ammunition that might not *actually* be restricted. Indeed, the record demonstrates that out-of-state vendors had ceased or planned to cease selling *all* ammunition in California because they could not determine which ammunition was prohibited. (J.A. VIII 2040-2041, 2044-2045, 2048-2049.) In light of all this, the court correctly found that the Challenged Provisions "reach a substantial amount of constitutionally protected conduct." (Slip Op. pp. 29-31.)

Because it is clear that the Challenged Provisions threaten to inhibit Second Amendment freedoms (if they do not, in fact, violate them), the State ultimately rests its argument on a conclusory statement that "surely something more than a mere showing that a constitutional right is

'involved' is needed, . . ." (Pet. for Rev. pp. 14-15.) The State's argument is unpersuasive. Significantly, it relies on dicta from *Heller* that laws "imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful." (Pet. for Rev. p. 13, quoting *Dist. of Columbia v. Heller* (2008) 554 U.S. 570, 626-627 and fn.26 (*Heller*).) But such language speaks to legal challenges to the direct violation of Second Amendment rights – not to vagueness concerns. The lack of clarity in the Challenged Provisions leads to a *substantial reduction in access to items protected by the Second Amendment*, and it threatens *millions* of ammunition transactions annually. This is a far cry from simply "involving" some Second Amendment conduct – a reality the opinion recognizes. (Slip Op. p. 31 ["[I]t is difficult to argue that the challenged statutes do not reach a substantial amount of constitutionally protected conduct."].)

Regardless of whether the Challenged Provisions might stand up to a Second Amendment challenge, the severe harm threatened by vague laws that "reach a substantial amount of" or "threaten to inhibit the exercise of" constitutionally protected conduct demands that courts remain particularly vigilant. (See Slip Op. p. 29, quoting *Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495, 499, *Kolender*, *supra*, 461 U.S. at p. 358 and fn.8, and *Morales*, *supra*, 527 U.S. at p. 55.) The courts should not limit the

application of this standard to fundamental rights protected by the First Amendment. Indeed, they *have not*. (See, e.g., *Kolender*, *supra*, 461 U.S. at p. 358 [implicating "right to freedom of movement"]; *People v. Barksdale* (1972) 8 Cal.3d 320, 326-327 [recognizing importance of heightened vagueness review of laws involving abortion rights].) And the United States Supreme Court has instructed that the Second Amendment is deserving of protections similar to the First. (*Heller*, *supra*, 554 U.S. at pp. 592-595; *McDonald v. City of Chicago* (2010) __ U.S. __, 130 S. Ct. 3020, 3042.)

C. The Court of Appeal Alternatively Held That the Challenged Provisions Fail Under Either Test

In any event, the court held that the Challenged Provisions are facially vague under either standard applied in state courts. (Slip Op. pp. 37-38.)

> *We believe the inherent vagueness of the statutory scheme* ***presents a total and fatal conflict*** *with the due process clauses of the United States and California*, even if one could conceive of a scenario in which application of the law to a particular set of facts would not involve ambiguity. *At a minimum, the challenged statutes present a general conflict with the protections of due process and are unconstitutionally vague* ***in the great majority of cases*** for failure to provide adequate notice of the conduct proscribed and a reasonably certain standard for enforcement of the law.

(Slip Op. pp. 37-38, double emphasis added.) Any concerns the State has regarding the propriety of applying the "generality of cases" standard in this

case are thus inconsequential, for the result is the same regardless of the test applied.

III. THE COURT OF APPEAL'S OPINION FITS COMFORTABLY WITH CONTROLLING CASE LAW

A. The Court of Appeal Correctly Held That the Challenged Provisions Are Facially Vague

The Challenged Provisions expose individuals, ammunition retailers, and ammunition shippers to criminal liability for *every* transfer of "handgun ammunition." But those bound to follow the law and those bound to enforce it can *never* know which transfers rightly give rise to that liability. The best anyone can do is venture a guess based on his or her subjective understanding of the statutory language and his or her subjective knowledge of ammunition usage in any given jurisdiction, at any given time.

The court rightly recognized that individuals, ammunition vendors, and law enforcement are all unable to determine what constitutes "handgun ammunition" under the Challenged Provisions, and held that "*no* guidance or objective standard" exists to determine what ammunition is "principally for use in a handgun." (Slip Op. p. 37, emphasis added.) Contrary to the State's suggestion, the opinion does not require it to "furnish detailed plans and specifications" regarding what constitutes "handgun ammunition" under its legislatively created definition. (See Pet. for Rev. p. 16, quoting

People v. Deskin (1992) 10 Cal.App.4th 1397, 1400.) It asks only for some minimal guidelines – *anything* that could guide those bound to comply with the law and those tasked with enforcing it. (Slip Op. p. 37.) The court, based on the weight of the evidence, found the Challenged Provisions failed to meet that minimum requirement for due process. (Slip Op. p. 37 ["Mathematical precision is not required, but an average person of ordinary intelligence must be able to identify the applicable 'standard for inclusion' and exclusion. (*Smith v. Goguen* (1974) 415 U.S. 566, 578.) In this case the standard is elusive at best."].)

The court thus properly declared the laws unconstitutionally vague on their face because "[t]he level of certainty necessary to provide fair notice of the proscribed conduct and adequate standards for compliance with the law is missing." (Slip Op. p. 37.) It further found that the Challenged Provisions pose a "significant risk of arbitrary and discriminatory enforcement," effectively conferring "discretion upon individual police officers to interpret the law themselves, thus allowing it to be enforced selectively or haphazardly." (Slip Op. p. 37.) This holding correctly summarizes the prevailing test for the void-for-vagueness doctrine, *Kolender*, *supra*, 461 U.S. at p. 357, and it was supported by the weight of the evidence in the record.

Taking the court's finding that the marketing techniques of some ammunition vendors "does not establish a technical meaning or universally accepted standard *among vendors*," well out of context, the State suggests the court held it to an improper test for vagueness. (Pet. for Rev. p. 15 ["[T]he Court of Appeal complained that the statutes did not 'establish a technical meaning or universally accepted standard' for what ammunition was 'primarily for use' in a handgun. [Citation] That is not the test for vagueness."], quoting Slip Op. p. 36.) Contrary to the State's insinuation, the court did not rest its vagueness analysis on this finding – it was but one reason of many the court held that the Challenged Provisions are impermissibly vague. (Slip Op. pp. 34-38.)

Indeed, the court was merely responding to the State's argument that, because some ammunition vendors advertise their inventory as "handgun ammunition," they should be held to share a "common knowledge and understanding" of the term. (Slip Op. p. 36; A.O.B. p. 13.) The court recognized that uncertainty may be cured by reference to "common understanding and practices" or "from any demonstrably established technical or common law meaning." (Slip Op. p. 36, quoting *People v. Barksdale*, *supra*, 8 Cal.3d at p. 327.) But, weighing the State's evidence, it properly found that the marketing designations of a few ammunition

vendors was insufficient to establish a common industry practice – let alone a "technical meaning or universally accepted standard." (Slip Op. p. 36.) The court further recognized that section 30312 applied not only to vendors, but to *all* citizens, Slip Op. p. 36, most of whom harbor no special knowledge about ammunition at all. Various other portions of the opinion establish there is no *common* understanding of what ammunition is "principally for use" in handguns. (Slip Op. pp. 35-37.) In short, the techniques that courts regularly use to bring clarity to otherwise vague statutory language could not save the statutes challenged here.

The opinion correctly concludes, based on sound legal reasoning and the weight of the evidence, that the Challenged Provisions are unconstitutionally vague. The State's complaint that the court's vagueness analysis bucks established precedent is simply unfounded.

B. The Court of Appeal's Finding of Vagueness Here Does Not Demand a Finding of Vagueness in Other Cases

Citing a number of state laws using similar language, the State claims that striking the "principally for use" non-standard for lacking "a common understanding or objective meaning" in this case jeopardizes "scores of legislative acts." (Pet. for Rev. p. 16.) Not so. The phrase is not vague per se, nor do Respondents make that claim.

The Court of Appeal's reasoning questions the validity of only those

laws that rely on terms like "principally" or "primarily" *and* whose meaning cannot otherwise be "objectively ascertained." (Slip. Op. pp. 34-38; see also *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1133 (*Suter*).) It does not conflict with case law upholding laws using various "non-mathematical" terms that can be "objectively ascertained by reference to common experiences of mankind." (See, e.g., *People v. Morgan*, *supra*, 42 Cal.4th at p. 606; *People v. Daniels* (1969) 71 Cal.2d 1119, 1129.)

Both the Court of Appeal and the trial court correctly held there to be no such "common understanding or objective meaning" as to what constitutes "handgun ammunition" under the State's "principally for use" test. (Slip Op. p. 37.) Indeed,"[s]everal firearms users and vendors with different backgrounds were deposed in this case, including two highly credentialed experts, yet none shared the same understanding of what is meant by the notion of ammunition 'principally for use' in handguns," Slip Op. p. 37, let alone what ammunition might fall within that classification.

Not one of the laws the State cites is comparable to the Challenged Provisions, which rely on imprecise language *and* lack any objectively ascertainable meaning. Instead, they direct individuals and law enforcement officers to an identifiable source giving an unclear term a more definite meaning. For instance, Insurance Code section 11580.06, subdivision (a)

defines "motor vehicle" as "any vehicle *designed for use* principally upon streets and highways . . . ." (Cited by Pet. for Rev. p. 16, citing Dis. Op. p. 11, emphasis added.) The "designed for use" qualifier indicates that it is the intention of the vehicle's manufacturer that controls its principal use – not the intent of its users. (See *People v. Nelson* (1985) 171 Cal.App.3d Supp. 1, 10-11 ["designed or marketed for use" not vague because such language "is construed solely from the viewpoint of the person in control of the item, i.e., the manufacturer or seller, without reference to a third person's state of mind"].)[7] Such intentions can be ascertained simply. This is unlike the "principally for use" language of the Challenged Provisions which relies on usage by unidentified third-party consumers in some unspecified geographic location during some undefined period of time. (Slip Op. p. 34.)

The other statutes cited ask readers to interpret the law by reference to the conduct or intentions of an identifiable person or persons (often themselves):

- An attorney is asked to determine whether she is "actively and principally engaged in the business of negotiating loans secured by real property." (Bus. & Prof. Code, § 10133.1, cited by Pet. for Rev. p. 16, citing Dis. Op. p. 11.)

- An employee can ask whether the licenced contractor he

[7] Penal Code sections 189 and 498(c)(1), also cited by the State, rely on similar "designed for use" language for clarity. (See Pet. for Rev. p. 16, citing Dis. Op. p. 11.)

works for is "engaged in installing or maintaining transmission or distribution systems" more often than not. (Lab. Code, § 108.2, cited by Pet. for Rev. p. 16, citing Dis. Op. p. 11.)

- A non-resident of the state is asked whether she stores her car outside of California more than fifty percent of the time. (Veh. Code, § 435.5, cited by Pet. for Rev. p. 16, citing Dis. Op. p. 11.)

- A person is asked if the majority of his purchases are "for the purpose of resale." (Civ. Code, § 1802.4, cited by Pet. for Rev. p. 16, citing Dis. Op. p. 11.)

- The recipient of a personal gift from her spouse is asked whether she uses that gift more often than her spouse does. (Fam. Code, § 852, cited by Pet. for Rev. p. 16, citing Dis. Op. p. 11.)

- A couple is asked whether their relationship is chiefly driven by emotional or sexual intimacy free of financial considerations. (Pen. Code, § 243, subd. (f)(10) [mis-cited by Pet. for Rev. P. 16 and Dis. Op. p. 11 as Pen. Code, § 243, subd. (f)(19)].)

- A business owner is asked to determine whether he is "primarily" engaged in firearms sales before allowing unaccompanied minors to enter. (*See Suter*, *supra*, 57 Cal.App.4th at 1133, cited by Pet. for Rev. p. 16 and Dis. Op. p. 11.)

It is clear that each of these statutes use imprecise language, insofar as they are terms that might have multiple meanings. Yet each of the State's cited statutes contain an unambiguous meaning in the context of that which they seek to describe, usually by referencing the conduct or intentions of an easily identified person or persons. This is not the same as the Challenged

Provisions, which along with being imprecise, require determinations that cannot be "objectively ascertained."

In short, the Court of Appeal's decision creates no conflict with existing case law. Its finding of vagueness is firmly in line with precedent.

CONCLUSION

The Court of Appeal's opinion is both legally and logically sound, and it fits harmoniously with controlling precedent regarding facial vagueness challenges in state court. It seems then that the State's real concern is the way in which both lower courts applied the relevant legal analyses to the evidence presented – evidence which overwhelmingly supports the courts' findings that the Challenged Provisions' definition of "handgun ammunition" was not sufficiently definite to meet minimum requirements for due process. Such is *not* grounds for review by this Court. (Cal. Rules of Ct., Rule 8.500, subd. (b).)

For these reasons, Respondents respectfully request the Court deny the State's Petition for Review.

Dated: January 10, 2014 **MICHEL & ASSOCIATES, P.C.**

By: _____
C. D. Michel
Attorney for Plaintiffs/Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.504, subdivision (d)(1), of the California Rules of Court, I hereby certify that the attached Answer to Petition for Review double-spaced, typed in Times New Roman proportionally spaced 13-point font, and the brief contains 6417 words of text, including footnotes, as counted by the WordPerfect word-processing program used to prepare the brief.

Dated: January 10, 2014

MICHEL & ASSOCIATES, P.C.

By: 

C. D. Michel
Attorney for Plaintiffs/Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200 Long Beach, CA 90802.

On January 10, 2014, I served the foregoing document(s) described as:

ANSWER TO PETITION FOR REVIEW

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

SEE ATTACHED "SERVICE LIST"

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit. Executed on January 10, 2014, at Long Beach, California.

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 January 10, 2014, at Long Beach, California.

CLAUDIA AYALA

SERVICE LIST

SHERIFF CLAY PARKER, ET AL. v. STATE OF CALIFORNIA, ET AL.
CASE NO. S215265

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