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January 16, 2014

Chief Justice Tani Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797
VIA HAND DELIVERY

Re: Response to Request for Depublication (Cal. Rules of Court, Rule 8.1125)
Parker v. State of California, Supreme Court Case No. S215265
Court of Appeal Case Nos. F062490, F062709

To the Honorable Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.1125(b), Sheriff Clay Parker, Herb Bauer Sporting Goods, California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven Stonecipher, plaintiffs in the above-titled case, submit this letter in response to the State of California's request for depublication.

In *Parker*, the Court of Appeal upheld the trial court's ruling that three criminal statutes regulating transactions in "handgun ammunition" were unconstitutionally vague in violation of due process. The court's comprehensive and legally sound opinion should remain published because it meets several of the standards for publication and because it was correctly decided.

I. THE *PARKER* OPINION MEETS SEVERAL STANDARDS FOR PUBLICATION

The Court of Appeal's opinion meets no less than five of the standards for publication described by Rule 8.1105, subdivision ©, of the California Rules of Court. Specifically:

1. It thoroughly explains an existing rule of law;
2. It applies that rule of law to a set of facts different from other published opinions;
3. It involves a legal issue of continuing public interest;
4. It makes a significant contribution to the body of legal literature; and

5. It includes a dissenting opinion that contributes to the development of the law.

Parker provides an exhaustive analysis of the controlling legal principles, providing a clear and concise summary of existing case law regarding the proper analytical framework for facial vagueness challenges. (Slip Op. pp. 17-27.) And it applies those principles in the specific context of a vagueness challenge to criminal laws that threaten to inhibit Second Amendment conduct and lack a scienter requirement – a set of facts different from those of other published opinions. (Slip Op. pp. 27-28.) As the State acknowledges, this is the first case to recognize that rights protected by the Second Amendment rights are analogous to those protected by the First, and to consequently extend the "generality of cases" standard to facial vagueness challenges implicating the Second Amendment. (Req. for Depub. 3.)

Addressing the appropriate test for facial challenges, a "recurring issue that has evaded resolution" for some time, Slip Op. p. 27, and the applicability of First Amendment doctrines to Second Amendment questions, an issue that has evolved rapidly since *Heller* was decided,[1] this case involves two legal issues of continued and substantial public interest. The opinion makes a significant contribution to the body of legal literature on those issues, and the dissenting opinion strengthens that contribution. Both the majority and dissenting opinions add significantly to the development of jurisprudence regarding the interplay of facial challenges, the void-for-vagueness doctrine, and the Second Amendment.

Further, to the extent the State is correct that *Parker* deviates from some established state law restriction of the "generality of cases" standard to First Amendment and abortion cases, the opinion creates a new rule of law properly bestowing on the Second Amendment the same protections afforded to speech and abortion. At least, it would create a conflict in the law. And both are reasons *favoring* publication. (Cal. Rules of Ct., rule 8.1105, subds. (c)(1), (5).)

II. *PARKER* WAS CORRECTLY DECIDED

A. The Court Applied the Correct Standard of Review

Central to the State's depublication request is its claim that the court improperly applied the "generality of cases" standard in determining the facial validity of laws implicating Second Amendment rights. While this standard typically has been applied in cases involving the First Amendment and abortion rights, Req. for Depub. 3, the opinion's selection of the "generality of

[1] See, e.g., *United States v. Marzzarella* (3d Cir. 2010) 614 F.3d 85, 89 fn.4 (looking to the First Amendment in interpreting the Second and observing that *Heller* "repeatedly invokes the First Amendment in establishing principles governing the Second Amendment"); see also, *Natl. Rifle Assn. v. BATFE* (5th Cir. 2012) 700 F.3d 185, 197-198; *Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 697-699; *United States v. Chester* (4th Cir. 2010) 628 F.3d 673, 682.

cases" standard in *Parker* was sound.

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. The court was right to be equally concerned with the Second Amendment. The record is replete with evidence that the challenged laws had chilled Second Amendment conduct, leading to a substantial reduction in access to constitutionally protected items and posing a threat to millions of ammunition transactions annually.

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.) The courts should not limit application of this standard to those 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.)

The Court of Appeal's application of the "generality of cases" standard in the Second Amendment context was not in error, and it serves as no basis for depublication. Indeed, to the extent *Parker* marks a departure from previous cases reserving that standard to the First Amendment or abortion rights, publication is proper because it creates a new rule and/or a conflict in case law. (See Cal. Rules of Ct., rule 8.1105, subds. (c)(1), (5).)

B. The Court Properly Found That the Laws Lack a Scienter Requirement

The State provides little more than the bare assertion that the Challenged Provisions are not strict liability statutes. (Req. for Depub. p. 3.) While it is true that a scienter requirement "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence," *People v. Valenzuela* (2001) 92 Cal.App.4th 768, 775, the State ignores that, like every rule, there are exceptions. And the failure to register ammunition transactions fits neatly within the exception for "public welfare" offenses. Indeed, statutes liked the challenged laws purportedly 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.)

It is true the opinion did not go into depth on the scienter issue – but it did not need to. Such an analysis would have been redundant given the court's repeated concerns with the

inherent vagueness of the challenged laws. In the court's view, the statutes' language is so uncertain that no average reader can objectively ascertain what the statutes seek to proscribe. (Slip Op. pp. 34-38.) Ultimately, to infer a scienter requirement would simply inject a requirement that one knows something that cannot be known, creating a law that cannot be enforced as no one could ever harbor the requisite intent. In this case, inferring a scienter requirement solely because a mens rea requirement "is the rule" would give short shrift to another tenant of our jurisprudence: "[A] construction [by the courts] that would create a wholly unreasonable effect or an absurd result should not be given." (*Dempsey v. Market Street Ry. Co.* (1943) 23 Cal.2d 110, 113.)

Reading the statute as containing no scienter requirement was thus proper and in line with the opinion's thorough vagueness analysis. While the court's treatment of the issue was brief, it does not conclude that a lack of scienter can be assumed just because a mens rea requirement is not explicitly stated. (See Req. for Depub. p. 4.) Depublication is not necessary to prevent citation to *Parker* for that position.

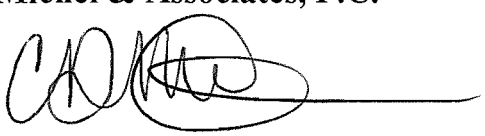
C. The Court Properly Applied the Void-for-Vagueness Doctrine

The Court of Appeal found the challenged laws to be unconstitutionally vague, in part, because they "provide no guidance or objective criteria" to determine whether ammunition is "principally for use" in a handgun." (Slip. Op. p. 36). Citing *People v. Morgan* (2007) 42 Cal.4th 593, 606, for the premise that people must often govern their conduct by such "nonmathematical" standards, the State argues that *Parker* will create confusion regarding the level of certainty required of criminal statutes. (Req. for Depub. 4.) But far from standing in conflict with *Morgan*, the opinion fits comfortably beside it. *Morgan* and similar cases do not uphold laws using nonmathematical standards like "reasonable" or "substantial," unless the meaning of those terms can be "objectively ascertained by reference to common experiences of mankind." (*Morgan*, *supra*, 42 Cal.4th at p. 606.) *Parker* requires nothing more than that. The Court of Appeal appropriately searched the challenged laws for any "objectively ascertainable" meaning and was unable to find one. Even under *Morgan*, such a law would be stricken.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge the Court to reject the State's request for depublication of the *Parker* opinion.

Respectfully submitted,
Michel & Associates, P.C.



C. D. Michel

CDM/amb

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 16, 2014, I served the foregoing document(s) described as
Response to Request for Depublication (Cal. Rules of Court, Rule 8.1125)
***Parker v. State of California*, Supreme Court Case No. S215265**
Court of Appeal Case Nos. F062490, F062709

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:

Kamala D. Harris, Attorney General of California Ross C. Moody, Deputy Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004	Attorneys for Defendants/Appellants
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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 16, 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.

CLAUDIA AYALA