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

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INTRODUCTION

This case presents a facial vagueness challenge to three criminal statutes that regulate the display, sale, and transfer of "handgun ammunition," defined as that which is "principally for use" in handguns ("the Challenged Provisions"). Respondents' claims are based on the failure of these laws to sufficiently define "handgun ammunition" such that ordinary persons cannot determine what conduct is prohibited, making "arbitrary and discriminatory" enforcement of the law inevitable.

The State's foundational claim is that the appellate court applied the wrong standard in determining the validity of the Challenged Provisions against a facial vagueness challenge. Had the court applied California's strictest test for facial claims rather than its more lenient "generality of cases" standard, the State argues, the court would have reversed the trial court decision and upheld the regulations. This argument must fail.

As an initial matter, the Court of Appeal correctly selected the "generality of cases" standard because the Challenged Provisions impinge upon Second Amendment conduct, impose criminal sanctions, and are devoid of any limiting scienter requirement. But the application of that more lenient test is inconsequential. The Challenged Provisions are unconstitutionally vague under *any* test because it is impossible to know in

every circumstance whether any given ammunition constitutes "handgun ammunition" under the law.

Although the Challenged Provisions purport to regulate only ammunition that is "principally for use" in handguns, ammunition is not limited to use in either handguns or rifles. So while "handgun ammunition" under the Challenged Provisions might be understood as ammunition that is used, or for use, more often in handguns, whether certain ammunition is used more often in handguns than in rifles is not constant, and it depends on a variety of considerations.

For instance, ammunition usage is subject to widely varying trends over time, in different jurisdictions, and depending upon the availability and popularity of different firearms. If an individual, ammunition vendor, or law enforcement officer is forced to consider and rely upon his or her own subjective interpretation of the Challenged Provisions, each is likely to conceive of a definition of "handgun ammunition" that is in part, or to a great extent, different from any other person's. In failing to set forth any criteria by which to interpret the "principally for use" standard, the Challenged Provisions provide neither individuals nor law enforcement with the vital information they need to determine what ammunition might be covered and to conform their conduct to the law.

Even if the meaning of the "principally for use" standard could be known, the Challenged Provisions task individuals and law enforcement with determining whether any given ammunition has been used, or will be used, "principally" in handguns. The record is clear that such is an impossible feat, for that information simply does not exist.

Ultimately, both lower courts properly held that, because it is impossible to reasonably determine which ammunition is regulated, the Challenged Provisions are unconstitutionally vague on their face. The Court should uphold the judgment entered below.

STATEMENT OF THE ISSUES PRESENTED

1. In California, laws are sometimes reviewed for facial vagueness under a test that asks whether the law poses a total and fatal conflict with due process principles. Others are reviewed under a more lenient standard that invalidates laws that are vague in the generality of cases. The United States Supreme Court has instructed that laws are subject to heightened vagueness review, i.e., a more lenient facial test, if the laws threaten constitutional freedoms, impose criminal penalties, or lack a scienter requirement. The courts have applied such review in cases involving First Amendment liberties, the right to travel, various reproductive freedoms, and the right to equal protection under the law. The Supreme Court has recently

held that the Second Amendment secures fundamental, individual rights that cannot be treated as inferior to other rights. The Challenged Provisions threaten to inhibit millions of lawful ammunition transactions annually, they levy criminal sanctions, and they are devoid of a scienter requirement. Did the Court of Appeal properly apply the less strict facial test?

2. The due process clauses of the California and U.S. Constitutions instruct that laws are void for vagueness if they either: (1) fail to provide sufficient notice to ordinary persons of the proscribed conduct; or (2) fail to provide guidelines to prevent arbitrary and discriminatory enforcement. The Challenged Provisions impose restrictions on transfers of ammunition "principally for use" in handguns. There are thousands of varieties of ammunition, virtually all of which are used in both rifles and handguns. The Challenged Provisions provide no guidance to determine whether any given ammunition is "principally for use" in handguns. Nor do they reference any source that details the principal use of any ammunition cartridge, and the record reflects that the parties are unaware of any source that contains such information. Do the Challenged Provisions provide sufficient clarity to support reversal of the lower courts' conclusions that the Challenged Provisions are unconstitutionally vague?

STATEMENT OF THE CASE

I. THE CHALLENGED STATUTES

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

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

[2] Although section 16650 was enacted in 1982 as section 12323, subdivision (a), and has long been referred to by statutes not challenged here, the enactment of AB 962 marks the first time the "principally for use" standard was employed as the sole mechanism by which to determine what ammunition is regulated by California law. For instance, former section 12316, subdivision (a)(1)(B), defined "ammunition" as:

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.

> [H]andgun ammunition as defined in [former] subdivision (a) of Section 12323. Where ammunition or reloaded ammunition may be used in both a rifle and a handgun, it may be sold to a person who is at least 18 years of age, but less than 21 years of age, *if the vendor reasonably believes that the ammunition is being acquired for use in a rifle and not a handgun*. (italics addded.)

By authorizing the retailer to determine whether ammunition is "handgun ammunition" based on a subjective understanding of the *individual purchaser's intended use*, the law brought some clarity to its scope beyond that provided for by section 16650 alone.

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

II. BACKGROUND REGARDING AMMUNITION AND "CARTRIDGE INTERCHANGEABILITY"

Due to the technical subject matter of this litigation, Respondents here provide a brief overview of ammunition and its usage in modern firearms for the Court's convenience and information.

Modern rifles and pistols fire "self-contained metallic ammunition." (Joint Appendix, volume VIII ("J.A. VIII") 2022.) All such ammunition consists of essentially the same components: A metal casing that holds a bullet, a charge of powder, and a primer to ignite the powder. (J.A. IV 0982, VIII 2022, 2179-2180.) Three terms, in order of increasing specificity, are used to describe self-contained metallic ammunition: "ammunition," "caliber," and the given "cartridge" name. (J.A. VIII 2033, 2180.) Reference to only the caliber is not an accurate method of identifying a particular type of ammunition.[3] Instead, ammunition is typically and

[3] Indeed, "caliber" may be defined simply as "the size of a bullet or shell as measured by its diameter" (Webster's New World Dict. (3d college ed. 1991), p. 198) or as "a numerical term, without the decimal point, included in a cartridge name to indicate a rough approximation of the bullet

accurately referred to by its cartridge name because the caliber often does not reflect the cartridge's actual bullet diameter and other characteristics specific to that ammunition. (J.A. VIII 2032-2033, 2180-2181.) Within any given caliber, there is generally a number of cartridges of varying lengths, bullet weights, velocities, and true bullet diameters, some of which may be used more often in handguns, and some of which may be used more often in rifles. (J.A. VIII 2033, 2181.)

Virtually all modern self-contained metallic ammunition, of which there are literally thousands of varieties, can be used safely in both handguns and rifles. (J.A. VIII 2035, 2181.) This is generally referred to as "cartridge interchangeability." (J.A. VIII 2022.) Thus, a single box of cartridges may be consumed by use in a rifle, a pistol, or both. (J.A. VIII 2022.) Ultimately, whether a cartridge is used more often in handguns than rifles changes over time, depending on the introduction of new models of handguns and rifles and the changing popularity of different firearms that utilize that cartridge. (J.A. VIII 2036.) The use of different ammunition in handguns and rifles also varies widely by geographic region depending on the types of firearms that are lawfully possessed and the types of shooting applications popular in the region at the time. Further, military and law

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diameter." (J.A. V 1317.)

enforcement use of various firearms can impact whether different varieties of ammunition are used more frequently in handguns or in rifles. (J.A. VIII 2036-2037.)

The takeaway is that whether a particular cartridge is used in a handgun or a rifle, and whether it is used *more often* in handguns or rifles, is ultimately determined by the changing needs and desires of the end user and the marketplace. (J.A. VIII 2022.) Respondents (and their expert) do not know of any source from which it can be determined which ammunition is used, or will be used, more often in handguns. (J.A. VIII 2037.)

III. PROCEDURAL HISTORY

In light of the realities of ammunition and the ammunition market described above, widespread confusion regarding which ammunition transfers would be regulated emerged soon after the passage of AB 962. That confusion was shared by individuals and ammunition vendors, who contacted Respondents' attorneys seeking advice on how to comply with the Challenged Provisions. (J.A. VIII 2008.)

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, the Attorney General of California, and the California Department of

Justice (collectively, "the State") answered the complaint. (J.A. I 0052-0074.)

In December 2010, 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 whether the State's "principally for use" in handguns language was unconstitutionally vague. (J.A. III 0830.)

The trial court granted Respondents' motion for summary adjudication on their facial vagueness claim in January 2011. (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. XV 4271.) The State's timely appeal followed. (J.A. XV 4271.)

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

The appellate court conducted an in-depth examination of both federal and state case law regarding the applicable standards for reviewing facial vagueness challenges and, specifically, the State's argument that under the *Salerno* test the Challenged Provisions satisfy due process if they can be validly applied to even one cartridge. (Slip opn. pp. 13-33, citing

United States v. Salerno (1987) 481 U.S. 739 (*Salerno*).) 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 opn. pp. 13-14, italics 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. opn. pp. 7-11, 38.) 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 opn. p. 37.)

Ultimately, however, the Court found that—even under California's

strictest standard for reviewing facial challenges—"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 opn. pp. 37-38, italics added.)

The dissent disagreed with the standard applied by the majority, arguing that Respondents' facial challenge warranted lesser scrutiny because it was brought pre-enforcement and did not actually implicate constitutional rights. (Dis. opn. 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 used more often in handguns than in other types of firearms." (Dis. opn. p. 10.)

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 opn. p. 36, citing *City of Chicago v. Morales* (1999) 527 U.S. 41, 60 (*Morales*).)

ARGUMENT

I. A FACIAL, PRE-ENFORCEMENT CHALLENGE IS APPROPRIATE IN THIS CASE

In support of its argument that the Court should apply the strictest test for facial challenges, the State reminds this Court that facial challenges are generally disfavored. (A.O.B. pp. 8-9.) To be sure, the United States Supreme Court has identified a number of policy considerations driving the courts' measured treatment of such cases:

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." [Citation.] Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither " 'anticipate a question of constitutional law in advance of the necessity of deciding it' " nor " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " [Citation.]

(*Wash. State Grange v.Wash. State Republican Party* (2008) 552 U.S. 442, 450-451 (*Wash. State Grange*).)

But these principles apply to facial challenges generally. "[C]ompeting policy concerns must be taken into account when an attack is made under the void-for-vagueness doctrine. If a statute is objectively vague such that it cannot be understood by ordinary citizens for whom it poses a threat of criminal liability, questions of constitutional due process

are neither speculative nor premature."[4] (Slip. opn. p. 15.)

As the Court of Appeal recognized, this is simply not the sort of case that raises the concerns identified above. It does not rely on a "factually barebones record," nor does it ask the Court to "anticipate a question of constitutional law in advance of the necessity of deciding it." (Slip. opn. p. 32, citing *Wash. State Grange*, *supra*, 553 U.S. at pp. 450-451.) The Challenged Provisions are inherently vague, for they rely on a definition of "handgun ammunition" that fails to provide notice of what information the test for inclusion requires, and because such information cannot be known. As such, "[i]f the inflexible *Salerno* standard is used, *the due process rights of countless citizens will be violated* when they are forced to guess at the meaning of the term 'handgun ammunition[,]" justified solely by the fact that the State *might* be able to point to one cartridge (out of thousands) that has no common rifle applications. (Slip. opn. p. 32, italics added.) Of course, whether such a relatively uncommon cartridge was historically or is currently used in rifles is not information that is known by ordinary citizens. To save a law with thousands of improper applications on this basis offends fundamental notions of due process.

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[4] Surely, this explains why facial challenges are not summarily turned away and why courts have resolved such challenges for nearly a century. (See, e.g., *Lanzetta v. New Jersey* (1939) 306 U.S. 451.)

II. THE COURT OF APPEAL CORRECTLY SELECTED THE "GENERALITY OF CASES" STANDARD

In its opinion, the Court of Appeal laid out, in great detail, the current state of the law governing this case. (Slip. opn. pp. 17-27.) And it settled on a test for reviewing facial vagueness challenges in the specific context of a criminal law that implicates constitutional conduct and lacks a scienter requirement. (Slip. opn. p. 28.) While the court recognized the standard for facial constitutional challenges to be " 'the subject of some uncertainty' " (Slip. opn. at p. 27, quoting *Today's Fresh Start, Inc. v. L.A. Cnty. Office of Educ.* (2013) 57 Cal.4th 197, 218), the opinion goes to great lengths to bring some clarity to this area of law.

The opinion describes the two tests applicable to facial challenges raised in California state courts: one strict, one less so. (Slip opn. 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 opn. 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 opn. pp. 13, 25, quoting *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27

Cal.4th 643, 673 (*San Remo Hotel*) and *In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.)

To determine when it is appropriate to deviate from the "total and fatal conflict" test, the court tirelessly examined significant state and federal facial challenges to ascertain the analytical framework driving that determination. (Slip opn. pp. 17-28, 31-33.)[5] And it discussed both the circumstances warranting heightened judicial scrutiny (and a more lenient facial standard) in other cases and the important considerations demanding such review in this case. (Slip. opn. pp. 29-33.) From its exhaustive analysis, the Court of Appeal gleaned a three-part test triggering the "generality of cases" standard whenever a facial vagueness challenge involves a law that touches upon a significant amount of constitutional conduct, imposes criminal sanctions, and includes no scienter requirement. (Slip. opn. p. 28.) Aside from requiring *all three* conditions to be met to trigger the more lenient standard, rather than treating each as factors to be

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[5] Discussing *Morales*, *supra*, 527 U.S. 41; *Salerno*, *supra*, 481 U.S. 739; *Kolender v. Lawson* (1983) 461 U.S. 352 (*Kolender*); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489 (*Hoffman Estates*); *San Remo Hotel*, *supra*, 27 Cal.4th 643; *People v. Superior Court* (*Caswell*) (1988) 46 Cal.3d 381; *Franklin Life Ins. Co. v. State Bd. of Equalization* (1965) 63 Cal.2d 222; *County of Sonoma v. Superior Court* (*Sonoma Cnty. Law Enforcement Assn.*) (2009) 173 Cal.App.4th 322; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660 (*Sanchez*); *In re Marriage of Siller* (1986) 187 Cal.App.3d 36.

weighed, the court's reasoning was sound.[6]

Courts have long recognized that the rigor with which the two prongs of the void-for-vagueness doctrine, i.e., sufficient notice to persons of ordinary intelligence and the potential for "arbitrary and discriminatory enforcement," are applied increases if the law threatens to "inhibit the exercise of constitutionally protected rights," imposes criminal penalties, *or* lacks a scienter requirement. (*Hoffman Estates*, *supra*, 455 U.S. at pp. 498-499.) Because such laws demand the utmost clarity (*Bagget v. Bullitt* (1964) 377 U.S. 360, 371-372), the vagueness challenger generally need not establish that the law is "vague in all of its applications" to prevail (see *Kolender*, *supra*, 461 U.S. at pp. 357-358; *Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495, 498-499). In California, this amounts to application of the more lenient "generality of cases" standard.[7]

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[6] The State argues that no authority from this Court establishes such a test, claiming that "the penal statutes examined by this Court on facial challenges for vagueness have applied the strict standard." (A.O.B. p. 15, citing *People v. Morgan* (2007) 42 Cal.4th 593, 605-606 (*Morgan*); *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116 (*Acuna*); *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*).) But neither Respondents nor the Court of Appeal suggest that *all* facial vagueness challenges to criminal laws demand application of the more lenient test.

[7] Courts also regularly dispense with such tests altogether, opting instead to focus entirely on the two prongs of the vagueness doctrine. (See, e.g., *Kolender*, *supra*, 461 U.S. at p. 355-356 [facial vagueness challenge to law requiring the production of "credible and reliable" identification on demand]; *People v. Heitzman* (1994) 9 Cal.4th 189, 199 (*Heitzman*)

Here, the Challenged Provisions impact Second Amendment conduct, impose criminal penalties, and are devoid of any limiting scienter requirement. It is therefore proper to consider Respondents' vagueness challenge under the less stringent "generality of the cases" standard adopted by the court below.[8]

A. The Court of Appeal Properly Rejected the Stricter Standard Because the Challenged Provisions Impact Constitutional Conduct and Impose Criminal Sanctions

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, 109; see also *Reno v.*

[challenge to criminal law against "wilfully . . . permit[ting]" an elder or dependant adult to suffer pain]; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th at p. 774 (*Gatto*) [challenge to county fair dress code].)

[8] Because of the pre-enforcement nature of this challenge, the dissent would have "require[d] respondents to establish that the statutes have no constitutional application to prevail . . .." (Dis. opn. p. 6.) Respondents are aware of no case, and the dissent cited to none, in which the fact that a challenge was brought pre-enforcement compelled the reviewing court to apply only the strictest facial test.

The dissent also would have invoked the stricter standard because Respondents' case was "composed largely of declarations and deposition testimony from parties opposed to any sort of gun control . . . ." (Dis. opn. p. 6.) This is an unjustified characterization of Respondents and their witnesses that finds no support in the record. Respondents' ideological leanings, whatever they may be, have no bearing on the level of protection their rights deserve or the scrutiny that should be applied to their claims. In any event, the inherent vagueness of the Challenged Provisions is amply demonstrated by statements made by the State's own expert witness, who himself had great difficulty settling on an understanding of the laws.

ACLU (1997) 521 U.S. 844.) Courts are thus especially vigilant about declaring a statute "void for vagueness" when the law might chill the exercise of First Amendment rights, but they have not limited that concern to the rights of speech, religion, and association. Indeed, they have extended it to multiple cases involving the rights to life, to choose whether to bear children, to travel, and to equal protection under the law. (See, e.g., *Kolender*, *supra*, 461 U.S. at p. 358 ["freedom of movement"]; *Colautti v. Franklin* (1979) 439 U.S. 379 [abortion]; *Roe v. Wade* (1973) 410 U.S. 113 [abortion]; *People v. Barksdale* (1972) 8 Cal.3d 320, 326-327 (*Barksdale*) [rights to life and to choose whether to bear children]; *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 543-545 [equal protection].) The State provides no compelling reason the courts should not be equally concerned about the fundamental rights explicitly protected by the Second Amendment.

As the United States Supreme Court signaled in *Kolender*, where the Court applied heightened vagueness review to a law impacting the fundamental right to "freedom of movement," and potentially raising First Amendment concerns, laws that abut upon constitutionally protected freedoms—not simply free speech—demand the greatest clarity. (*Kolender*, *supra*, 461 U.S. at pp. 358-362; see also *Hoffman Estates*, *supra*, 455 U.S. at pp. 498-499.) But even if a heightened standard of vagueness review (and

thus a less stringent facial test) were appropriately limited to certain fundamental rights, the right to arms should not be among those excluded. For the United States Supreme Court has affirmatively held that the Second Amendment is deserving of protections similar to those afforded to the First. (*McDonald v. City of Chicago* (2010) __ U.S. __, 130 S. Ct. 3020, 3043 (*McDonald*).) Countless courts have thus directly borrowed First Amendment analyses in formulating their tests for Second Amendment claims. (See, e.g., *United States v. Chester* (4th Cir. 2010) 628 F.3d 673, 682; *United States v. Marzzarella* (3d Cir. 2010) 614 F.3d 85, 89 & fn.4; *Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 703, 707; *United States v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1138.)

Regardless, the State asks the Court to reject that well-worn path, contending that "the Second Amendment is not analogous to the First." (A.O.B. p. 18.) In some contexts, that may be true. But not here and not for the reasons the State puts forth.

The right to free speech is not, as the State contends, "largely unfettered." (See A.O.B. p. 19.) Like the Second Amendment, it is not without its limitations. (*District of Columbia v. Heller* (2008) 554 U.S. 570, 595 (*Heller*) ["Of course the right [to bear arms] was not unlimited, just as the First Amendment's right of free speech was not."].) For instance, some

speech is not protected at all, and flat bans on such speech are regularly upheld. (See, e.g., *Roth v. United States* (1957) 354 U.S. 476, 485 [obscenity].) Commercial speech is afforded less protection than other forms, and it is often strictly regulated. (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64-65.) Even core, political speech is subject to restrictions on its time, place, and manner. (See *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.) In spite of all that permissible regulation, laws implicating First Amendment conduct are regularly subject to the more lenient, "generality of the cases" standard. The commonsense observation that the Second Amendment is not unlimited offers little justification to treat it as an inferior right.

Though free speech has "been characterized as 'the Constitution's most majestic guarantee' " (A.O.B. p. 19, citing Tribe, American Constitutional Law (2d ed. 1988) § 12–1, at pp. 785-786), the right to arms "has justly been considered, as the *palladium* of the liberties of a republic," a safeguard for *all* other freedoms, for it provides a "moral check" against tyranny (3 Story, Commentaries on the Constitution of the United States (1833) § 1890, italics added). While the State recognizes that the more lenient standard is often justified because of "the fundamental nature of the rights at issue" (A.O.B. at p. 10), it seems to have forgotten that the United

States Supreme Court has confirmed that Second Amendment rights are indeed "*fundamental* to our system of ordered liberty." (*McDonald*, *supra*, 130 S.Ct. at p. 3042, italics added.) No constitutional right is "less 'fundamental' than" others (*Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.* (1982) 454 U.S. 464, 484), and the Supreme Court has emphatically rejected attempts to deprive the Second Amendment of the dignity afforded other fundamental rights (*Heller*, *supra*, 554 U.S. at pp. 634-635). The Second Amendment is not to be treated as a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." (*McDonald*, *supra*, 130 S. Ct. at p. 3044; see also *Peruta v. County of San Diego* (9th Cir. 2014) 742 F.3d 1144, 1179.) The Court should reject the State's invitation to do so here.

It is no answer to say that the more lenient test has been heretofore limited to cases challenging laws involving First Amendment freedoms or reproductive rights. (See A.O.B. at pp. 10-11.) Significantly, this argument relies on *Sanchez*, *supra*, 145 Cal.App.4th at p. 679, a pre-*Heller* decision from the Court of Appeal. When *Sanchez* was decided, fundamental rights were not yet guaranteed by the Second Amendment. So it is hardly surprising that examples of successful facial challenges implicating Second Amendment rights and triggering a heightened standard were hard to find. It

makes little sense to limit heightened vagueness review to the rights of speech and reproductive choice in light of the groundbreaking pronouncements of *Heller* and *McDonald*.

Because the Challenged Provisions reach a "substantial amount of" activity protected by the Second Amendment and impose criminal sanctions for each violation of the law, at least two factors weigh strongly in favor of applying the "generality of cases" standard to Respondents' claims.

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 ban all internet and mail-order sales of "handgun ammunition." The blanket prohibition on those purchases effectively eliminates access to ammunition in remote areas and to countless varieties of ammunition generally sold only via internet or mail-order catalogue. (Slip opn. 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 are not *actually* 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 of Appeal correctly found that the Challenged Provisions "reach a substantial amount of constitutionally protected conduct." (Slip opn. pp. 29-31.)

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. opn. p. 7; A.O.B. p. 20.) The State goes so far as to liken the Challenged Provisions to identification requirements to purchase alcohol and certain cold medicines. But there is hardly a comparison to be drawn. Such purchases do not require mandatory thumb printing and disclosure of personal information that must be regularly turned over to law enforcement. And of course, individuals do not enjoy a *constitutional right* to purchase a bottle of Captain Morgan or a box of Sudafed. Even if it could be said that government-mandated registration of constitutionally protected purchases was a "minor inconvenience," this argument largely misses the point. The law's greater impact on the Second Amendment is the chilling effect that significantly reduces access to and inhibits the purchase of constitutionally protected items, i.e., ammunition. (Slip opn. p. 31.)

Because it is clear that the Challenged Provisions threaten to inhibit Second Amendment freedoms, 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, . . ." (A.O.B. p. 21.) The State's argument is unpersuasive. The Court of Appeal did, in fact, find "something more." It found that the laws "reach a *substantial amount* of constitutionally protected conduct." (Slip opn. p. 31, italics added.) For the imprecision of the Challenged Provisions leads to a *significant 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.

What's more, the State relies on dicta from *Heller* that laws " 'imposing conditions and qualifications on the commercial sale of arms' " are "presumptively lawful." (A.O.B. p. 19, quoting *Heller*, *supra*, 554 U.S. at pp. 626-627 & fn.26.) But such language speaks to legal challenges to the direct violation of Second Amendment rights—not to vagueness concerns. Regardless of whether the Challenged Provisions might stand up to a direct 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 opn. p. 29, quoting *Hoffman Estates*, *supra*, 455 U.S. at pp. 494-495, 499, *Kolender*, *supra*, 461 U.S. at p. 358 & fn.8, and *Morales*, *supra*, 527 U.S. at p. 55.)

B. The Court of Appeal Properly Rejected the Stricter Standard Because the Challenged Provisions Lack a Scienter Requirement and No Such Requirement Can Be Inferred

Nothing in the law requires one to know that the ammunition he or she is transacting in is actually "principally for use" in handguns to be guilty of a violation. And nothing permits 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. (A.O.B. p. 16.) While the existence of mens rea is certainly the "rule" of American criminal jurisprudence (A.O.B. p. 16, quoting *People v. Valenzuela* (2001) Cal.App.4th 768, 775), 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 Jennings* (2004) 34 Cal.4th 254, 267 (*Jennings*).) 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. (*Jennings*, *supra*, 34 Cal.4th a p. 274, citing *People v. Vogel* (1956) 46 Cal.2d 798, 801 fn.2.)

Without discussion, the State claims that "[t]here is abundant case law from this Court that a scienter element *must be* read into a criminal statute such as this one." (A.O.B. p. 16, italics added, citing *In re Jorge M.* (2000) 23 Cal.4th 866, 887 (*Jorge*) and *Jennings*, *supra*, 34 Cal.4th at p. 267.) But the two cases the State cites do not stand for such a broad premise. In fact, *Jorge* and *Jennings* come to opposite conclusions as to whether the laws challenged therein implied a knowledge requirement. (*Jorge*, *supra*, 23 Cal.4th at pp. 887-888; *Jennings*, *supra*, 34 Cal.4th at p. 246.) Far from demanding that scienter "must be" read into criminal laws that are silent on the issue, these cases merely affirm that courts are to analyze a mix of factors when considering *if* it should be.

Those factors may include: the legislative history and context; any general provision on mens rea; the severity of the punishment; the

seriousness of harm to the public that may be expected to follow from the forbidden conduct; the defendant's opportunity to ascertain the true facts; the difficulty prosecutors would have in proving a mental state for the crime; and the number of prosecutions to be expected under the law. (*Jorge*, *supra*, 23 Cal.4th at p. 873.) In this case, most of these factors weigh heavily against reading a scienter requirement into the Challenged Provisions.

The legislative history of AB 962 indicates it was enacted in an attempt to promote public safety and to address California's ongoing gang violence epidemic. (J.A. IV 906-908; see also Sen. Com. on Pub. Safety, analysis of Assem. Bill No. 962 (2009-2010 Reg. Session).) Its origins as a legislative response to a serious public safety concern, as reflected in its legislative history and in statutory findings, place the Challenged Provisions squarely in the category of public welfare offenses, of which the primary goal is regulation for public safety rather than punishment of offenders. (*Jorge*, *supra*, 23 Cal.4th at p. 874.)

What's more, the Challenged Provisions impose misdemeanor liability punishable by imprisonment not exceeding six months and/or by fine not exceeding $1000. While certainly not insignificant, the penalty is not comparable to the penalties imposed in those cases where the court

found it fitting to infer a knowledge requirement. (See, e.g., *Staples v. United States* (1994) 511 U.S. 600, 616-618 [mens rea required, in part, because the law's harsh penalties included felony charges carrying "up to 10 years' imprisonment"]; *Jennings*, *supra*, 34 Cal.4th at pp. 273-274 [suggesting that a misdemeanor requiring a prison sentence of *at least* six months, exceeding the "normal" penalty for a misdemeanor, tips in favor of inferring scienter]; *Jorge*, *supra*, 23 Cal.4th at pp. 879-880 [scienter required because felony/misdemeanor "wobbler" was punishable by imprisonment for up to 25 years].)

Further, 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" as that which "generally is recognized as used more often in handguns than in other types of firearms." (Dis. opn. p. 10.) To the extent that knowledge of what is "generally [] recognized" is an acceptable substitute for the "common experiences of mankind,"[9] there is no such group of ammunition. (Slip opn. pp. 35-37.)

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[9] As discussed below (*infra* Part IV), courts regularly look to the "common experiences of mankind" to bring clarity to vague language. (See, e.g., *Barksdale*, *supra*, 8 Cal.3d at p. 341; *Morgan*, *supra*, 42 Cal.4th at p. 606.) The dissent does not provide authority for a "generally [] recognized" standard.

The wildly varying responses provided by the deponents in this case (including two experts) and the State's extensive, multi-step research process illustrate just that. (J.A. XI 3089, XII 3719-3722.)

To infer a scienter requirement would thus 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.)

Finally, because the number of prosecutions to be expected under the Challenged Provisions is significant, it is unlikely "the legislature meant to require prosecuting officials to go into the issue of fault." (*Jorge*, *supra*, 23 Cal.4th at p. 873.) With millions of ammunition transactions annually, it is reasonable to assume the Legislature, responding to a public safety concern of increasing gravity, "anticipated a significant number of prosecutions would ensue under the law." (*Id.* at p. 887.) And, as explained above, the difficulty in proving a mental state would unduly hinder the ability to

prosecute a substantial number of violators. Where imposing a scienter requirement would have that result, the Court should avoid such a construction. (*Ibid*.)

While the Court of Appeal wasted little time in determining that no scienter requirement existed or could be inferred from the Challenged Provisions, its ultimate finding was correct. The Court should affirm that holding and apply the "generality of cases" standard.

Should the Court read a knowledge requirement into the Challenged Provisions, it should nevertheless apply the more lenient test because the laws levy criminal sanctions and reach a substantial amount of constitutional conduct. Again, the three factors are not to be mechanically construed. Casting aside the "generality of the cases" standard in this case solely on the basis that a scienter requirement could be inferred would effectively allow courts to avoid the more lenient standard in virtually every case. Regardless of a significant chilling effect on constitutionally liberties, regardless of whether the law carries criminal penalties including incarceration, and regardless of whether the text is devoid of any scienter requirement, courts could routinely select the stricter test by inferring a scienter requirement. Following the State's argument to its logical conclusion, the "generality of cases" standard would have virtually no

conceivable application.

III. THE COURT OF APPEAL CORRECTLY HELD THAT THE CHALLENGED PROVISIONS ARE UNCONSTITUTIONALLY VAGUE UNDER EITHER TEST

In any event, the court held that the Challenged Provisions are facially vague under either standard applied in state courts. They " 'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions,' " for it is impossible to know how the law applies to *all* persons and to *all* ammunition, and not merely in some "marginal" or even "hypothetical" situation. (See *Arcadia Unified Sch. Dist. v. Dept. of Educ.* (1992) 2 Cal.4th 251, 267, quoting *Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180-181.) As the Court of Appeal recognized:

> 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 opn. pp. 37-38.) 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.

Recall, "[a] regulation is constitutionally void on its face when, as a

matter of due process, it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.' " (*Gatto*, *supra*, 98 Cal.App.4th at pp. 773-774, quoting *Connally v. Gen. Const. Co.* (1926) 269 U.S. 386, 391 (*Connally*).) To pass constitutional muster under the void-for-vagueness doctrine, a law must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited *and* in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender*, *supra*, 461 U.S. at p. 357, italics added.) Both lower courts properly found that the Challenged Provisions fail on *both* counts, rendering them facially and fatally vague. (J.A. XIV 4073, 4078-4079, 4084.)

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 criteria" exists to determine what ammunition is "principally for use in a handgun." (Slip opn. p. 37.) 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 A.O.B. p. 23, 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 opn. 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 opn. 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. [Citation.] In this case the standard is elusive at best."].)

Recognizing the lack of clarity in the Challenged Provisions as drafted, the dissent offered an interpretation of "principally for use" in handguns that would narrow the laws' application to those instances in which the one "knows or should know that the ammunition" being displayed or sold "generally is recognized as used more often in handguns than in other types of firearms." (Dis. opn. p. 10.) While the Court should

give a challenged law "any reasonable and practical construction" (A.O.B. p. 8, citing *Acuna*, *supra*, 14 Cal.4th at p. 1117 and *People v. Townsend* (1998) 62 Cal.App.4th 1390, 1401), it may not redraft the law, replacing the Legislature's intent with its own, simply to save it from unconstitutionality. (*United States v. Albertini* (1985) 472 U.S. 675, 680 ["Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature."].) The dissent's attempt to fix the Challenged Provisions goes far astray of the plain language of the laws, inserting a specific knowledge requirement that finds no support in legislative history and entirely replacing the legislative definition of "handgun ammunition." The sort of rewrite the dissent suggests is wholly improper.

The majority properly declared the laws unconstitutionally vague 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 opn. 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 opn. p. 37.) The court's 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, as described below.

A. It Is Impossible To Know What Conduct Is Regulated by the Challenged Provisions

The Challenged Provisions pose two distinct vagueness problems. First, they provide no way of knowing what the "principally for use" test actually requires, leaving those bound to follow the law and those bound to enforce it with only their own subjective understanding of what standard applies. Second, there is no reasonable means for determining which ammunition actually meets that standard. It is thus impossible for anyone to know what conduct is regulated by the law.

To determine whether a statute is clear enough to provide adequate notice, courts generally look to the language of the statute, its legislative history, and court decisions construing the statutory language to interpret its meaning. (*Heitzman*, *supra*, 9 Cal.4th at p. 200.) Here, however, the lower courts found that none of these tools of statutory interpretation provide sufficient clarity as to what the "principally for use" standard requires or what ammunition is regulated by the Challenged Provisions.

As both lower courts recognized, there is no case law interpreting the definition of "handgun ammunition" as established in former Penal Code

sections 12060, subdivision (b), and 12318, subdivision (b)(2). (See J.A. XIV 4039; Slip opn. pp. 34-35.) And the laws' legislative history is of similarly little guidance. (J.A. XIV 4039-4040; Slip opn. p. 35.)

Further, the text of the Challenged Provisions fails to provide reasonable people with a standard by which to determine whether any given ammunition is "principally for use" in handguns. (J.A. XIV 4040-4042.) While the phrase can reasonably be interpreted to mean ammunition that is used or for use more than 50 percent of the time in handguns,[10] it remains entirely unclear what esoteric information one must consider to determine that any given ammunition is "principally for use" in handguns. The court below recognized that a host of variables "shape the concept of ammunition 'principally for use' in handguns," reciting a number of questions left unanswered by the Challenged Provisions:

> Is the standard determined by the behavior of all users of firearms or only certain groups such as civilian gun owners in a geographic region, e.g., nationally, in California, or by county, city, or otherwise? Is ammunition usage by military and law enforcement personnel included in the equation? Are changes in the availability or popularity of certain firearms

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[10] The term "principally" is defined as "chiefly, mainly, [or] primarily." (Webster's Revised Unabridged Dictionary (G. & C. Merriam Co. 1913) p. 1138.) And the terms "mainly" and "primarily," have been found to mean quantifiably more than 50 percent. (See, e.g., *In re Kelly* (9th Cir. 1988) 841 F.2d 908, 913; *State ex rel. Martin v. Kansas City* (1957) 181 Kan. 870, 876 [317 P.2d 806, 811].)

> and cartridges taken into consideration? Is the definition based on sales statistics, crime statistics, or other data gathered over a certain period of time?

(Slip. opn. p. 34.) Respondents below identified countless other variables that might drive the determination of what constitutes ammunition used more often in handguns—each of which the Challenged Provisions ignore. (Resp. Br. pp. 36-37.) As the court astutely recognized, "[i]n the absence of baseline standards, the classification of interchangeable calibers and cartridges as 'handgun ammunition' may be a fluid concept or a moving target, so to speak. (Slip. opn. p. 34; see also *supra* Part II, pp. 7-9 [discussing cartridge interchangeability].)

Ultimately, Respondents do not and cannot know what ultimate criteria will cause a particular type of ammunition to be deemed "handgun ammunition" under the Challenged Provisions. They are not alone. The State itself displayed great difficulty in applying a uniform understanding of the "principally for use" standard. On some occasions, it indicated the Challenged Provisions apply to ammunition that is "used principally" in handguns, seemingly taking into account the *actual* usage of the particular ammunition in handguns versus rifles. (J.A. V 1200, VIII 2198.) But at other times, it suggests that the determination turns on the number of handguns in circulation chambered in a particular caliber versus the number

of rifles chambered in that same caliber. (J.A. V 1385-1386,VIII 2198-2199.) And yet, at other times, the State's expert suggests the determination is guided by a mix of factors. (J.A. V 1417, VIII 2199, XI 3031.)

Even if one could determine the criteria that the "principally for use" standard is measured by, there is no way to determine whether any given ammunition is used, or will be used, more than 50 percent of the time in handguns in any given jurisdiction, at any given time. Virtually all ammunition can be, and is in fact, used safely in both handguns and rifles. (J.A. VIII 2035, 2181.) There is no generally accepted delineation of different types of ammunition that clarifies which is "principally for use" in handguns. (J.A. VIII 2036, 2085.) The record establishes that Respondents and the parties' experts themselves could not agree that any ammunition about which they were questioned is used more than 50 percent of the time in handguns. (J.A. XI 3089, XII 3719-3722.) And there is nothing to consult that could reliably inform those to whom the law applies and those bound to enforce it as to what ammunition is used more often in handguns at any time and in any place.[11]

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[11] *Cartridges of the World*, an encyclopedia of ammunition that was relied on by both parties below, describes some of the handguns and rifles in which given ammunition has been used throughout history. It also describes the types of firearms for which certain cartridges were originally produced. It makes *no* representation as to any cartridge's "principal use."

The bottom line is this: The Challenged Provisions provide no way of knowing what the "principally for use" test actually requires. That deficiency alone makes the law unconstitutionally vague, for it provides neither individuals nor law enforcement personnel with the vital information they need to determine what ammunition might be covered by that standard and to conform their behavior accordingly. But even if such base standards were present, the vagueness problem is compounded by the fact that there is no way to determine whether any given ammunition is used more often in handguns.

B. Genuine and Well-documented Confusion Exists as to What Constitutes "Handgun Ammunition" Under the Challenged Provisions

The record amply demonstrates that there are vastly differing views as to what standards are set forth by the "principally for use" language and as to which ammunition is encompassed by that standard. (J.A. VIII 2040, 2044, 2048, 2052, 2055, 2058, 2063, 2067, 2071, XI 2915, 3089, 3097-3125, 3139-3171, 3185-3267, 3271-3307, XII 3719-3722.) The confusion is genuine and it is real. Neither individuals, nor vendors, nor experts in the field can agree on what ammunition is intended to be regulated as "handgun ammunition" by the Challenged Provisions. (J.A. VIII 2089-2043, XI 3079-3085, 3089, XII 3719-3722.)

Soon after the passage of AB 962, widespread and openly voiced confusion regarding the meaning of the newly passed laws surfaced. That confusion was shared by individuals and ammunition vendors, and it was recognized by the author of AB 962 himself.

For example, shortly after passage of the Challenged Provisions, Respondents' attorneys received countless inquiries from non-parties regarding what ammunition was covered by the law and seeking advice on how to comply with it. (J.A. VIII 2008.) Assemblyman Kevin de León, sponsor of AB 962, confirmed that the Legislature "had been listening to gun dealers, as well as vendors, regarding their concerns about AB 962," and he revealed that the *most common* complaint is that the "existing definition of 'handgun ammunition' is *too vague*." (J.A. III 0835-0836, quoting *Hearing Before the S. Pub. Safety Comm. on A.B. 2358*, 2010 Leg., 2009-2010 Reg. Sess. (Cal. 2010) [statement of Assem. Kevin de León, Sponsor], italics added.)[12] And ammunition shippers, unable to determine which ammunition was actually covered by the law, made plans to cease shipping *all* ammunition to California to avoid prosecution under the vague

[12] Acknowledging the vagueness of the Challenged Provisions, the Legislature attempted in 2010 to adopt legislation clarifying which ammunition the laws applied to. The bill failed. (J.A. III 0835-0836, IV 0918, 0934, VII 1924-1925.)

law. (J.A. VIII 2040-2041, 2044-2045, 2048-2049.)

The State itself was unable to articulate with any consistency what ammunition fell within the statutory definition of "handgun ammunition." When AB 962 was first enacted, and a member of the DOJ Bureau of Firearms was asked, she responded that she did not know and could not say whether a certain type of ammunition would constitute "handgun ammunition" under the law. (J.A. IV 0955-0959.) Later, the State's ammunition expert, when asked to identify all ammunition the Challenged Provisions applied to, responded that they apply to ammunition falling within an identified list of *eleven calibers*. (J.A. V 1198, 1222, XI 2931.) And later still, he declared that only *sixteen cartridges* were subject to the Challenged Provisions. (J.A. V 1263-1265, 1277-1279, VIII 2257-2258, XI 2961.) Just as the State and its *ammunition expert* were incapable of applying the statutory definition uniformly, ordinary individuals, ammunition vendors, and law enforcement cannot either.

The State misleadingly suggests that three of the Respondents who were deposed identified fifteen cartridges "among them" that are used more often in handguns than rifles. (A.O.B. p. 26, citing J.A. VIII 2207.) And they label that a "concession" that those 15 cartridges are covered by the Challenged Provisions. (A.O.B. p. 26.) In reality, the answers provided by

each deponent varied widely, and a comparative analysis of all deposition testimony reveals that only three cartridges were *estimated* by the deposed Respondents as perhaps chambered more often in a handgun *in their personal experience*. (J.A. XI 3045, 3047, 3049, 3079-3083, 3089, XII 3719-3722.) Interestingly, *two* of those cartridges were considered *not* likely used more often in handguns than in long guns by Respondents' expert.

The State next points to testimony by Respondents' expert, who estimated as to several cartridges' likely usage based on his expert knowledge and decades of personal experience with firearms and ammunition. (A.O.B. p. 26, citing J.A. VIII 2205, J.A. X 2717-2718.) Of course, whether an ammunition expert can provide an estimation for several cartridges based on his wealth of knowledge is not determinative of whether the provisions provide sufficient notice to ordinarily intelligent individuals, business owners, and law enforcement officers. What's more, Respondents' expert's list differed quite significantly from that of the State's expert (J.A. XI 3079, 3089), illustrating that even two highly credentialed experts cannot agree on which items the Challenged Provisions purport to regulate.

The State also claims that Respondents conceded that .25 automatic (i.e., .25 ACP) "is used *exclusively in pistols*," and they suggest that neither

party is "aware of any rifle chambering this type of cartridge." (A.O.B. p. 26.) This is a gross misrepresentation of the record. Respondents stated only that .25 ACP "was estimated by all deponents as likely being chambered more often in a handgun *based on their experience*." (J.A. XI 2893, italics added.) And, in fact, one deponent even testified that he had indeed seen it fired from *both* handguns and rifles. (J.A. XI 3089, 3291.)

In any event, this line of inquiry is irrelevant. Although the questions and the responses elicited indicate there is no common understanding as to what ammunition is "principally for use" in handguns even among the Respondents in this case, the limited, personal experience and knowledge of four people provides no meaningful insight into what ammunition is "principally for use" in handguns.[13] The State's attempt to point to a few cartridges that three or four people might have similar estimations on based on their subjective experience cannot save the Challenged Provisions under any test.

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[13] Respondents objected to the State's introduction of this testimony in the trial court as irrelevant, improper lay opinion, lacking foundation, speculative, and/or vague and ambiguous. (J.A. XII 3424-3450.) The trial court, however, summarily denied all evidentiary objections. (Rep.'s Tr. ["R.T."], Mot. Summ. J. Hrg. 35:18-22.) As the State again relies on this testimony to suggest "that there was a general understanding among witnesses about which cartridges were covered by the language of the statute" (A.O.B. p. 26), Respondents preserve their objections.

In sum, the record reflects that it is impossible to know whether various ammunition cartridges will be fired more often out of a handgun in any jurisdiction, by any group of users, over any given time period. There is no definable or referenced source that contains this information, as such information does not exist and cannot be known. The State's ammunition expert nonetheless argued that he believes there are 16 cartridges (out of thousands that are either used more often in a handgun or a rifle) that are regulated by the Challenged Provisions. When Respondents and their expert were themselves asked to speculate about these cartridges' principal usage according to their personal experience, their answers unsurprisingly varied widely across the board. In the face of this evidence, the State's unsupported conclusion of this evidence that there is a "large group of ammunition cartridges for which there is no dispute about whether it is principally for use in handguns" (A.O.B. p. 27) borders on the absurd.

C. The Extensive Process Undertaken by the State's Ammunition Expert to Determine What Ammunition Is Covered by the Challenged Provisions and His Arbitrary Conclusions Further Illustrate Vagueness

Respondents' concerns are further illustrated by an examination of the complex, multi-step research process the State's ammunition expert employed to determine which ammunition he believes falls within the definition of "handgun ammunition." (J.A. V 1374-1375, 1420, XI 2935.)

As a "starting point," the States's expert consulted the California Dealer Record of Sales (DROS) database—information not generally available to the public—to determine which "calibers of ammunition" should be further researched to determine whether they are "handgun ammunition" under the Challenged Provisions. (J.A. XI 2935, 2937, V 1200, 1289-1290, 1293-1294, 1302, 1340-1341.)[14]

The State's expert arbitrarily limited his review to California handgun sales records for the past five years—but admitted that if he had an opportunity to review the records for a larger period, his views as to what ammunition is covered by the Challenged Provisions might have changed. (J.A. V 1307-1308, 1378, 1408-1411, XI 2933, 2935, 2937.) He considered only "handgun sales" and did not conduct any comparative analysis with rifle sales for firearms chambered in that same caliber. (J.A. V 1295-1296, 1391, XI 2941.) In fact, he admitted that such records *do not even exist*. (J.A. V 1295-1296, XI 2941.) He arbitrarily limited his interpretation of the "principally for use" standard to civilian use of firearms in California. (J.A. V 1200, 1408-1410, XI 2935, 2937, 2957.) He admitted that he did not take into account the number of rifles chambered for ammunition he considers

[14] The DROS records contain California statistics about the number of "handguns" chambered in various calibers sold in a particular year. (J.A. V 1200, 1289-1290, 1302, XI 2935.)

"handgun ammunition" that are in use by the military. (J.A. V 1402-1404, XI 2957.) He admitted that he does not know what percentage of total guns in circulation are represented by the handgun sales data relied upon. (J.A. V 1410-1411, XI 2937-2938.) And finally, he admitted that he picked only the most popular selling calibers of handguns in California and, for whatever reason, those most often used in crime to determine which calibers should be researched further to determine whether they are subject to regulation under the Challenged Provisions. (J.A. V 1307-1311, 1340-1341, 1374-1375, XI 2937.)

Then, after consulting incomplete data that is not generally available to the public and selecting only the most popular calibers and those prevalently used in crime, the State's expert researched written materials, the websites of ammunition vendors (several of whom declared they did not know what ammunition is regulated by the Challenged Provisions), and online encyclopedias to determine what ammunition is "principally for use" in handguns. (J.A. V 1200, 1307-1311, VIII 2256-2257, XI 2931, 2935.)

Finally, the State's expert pulled from his subjective experiences to round out the list. (J.A. V 1244-1245, 1248, 1298, 1352, 1355, 1374-1375, 1377-1378, 1381, 1420, XI 2935, 2947, 2955-2957.)

After all that, the State's *ammunition expert* concluded that only

sixteen cartridges out of thousands—a fraction of a percent—were regulated by the laws as "principally for use" in handguns.[15]

But how did he divine such a process for determining which ammunition is regulated? The Challenged Provisions certainly do not prescribe it, nor do they signal the sorts of limitations the State placed on the "principally for use" standard. In fact, they are silent as to what considerations inform that standard. (See *supra* Part III.A, pp. 36-40.) Instead, citizens and law enforcement must rely on their own *subjective understanding* of the "principally for use" standard, and then on their own *subjective application* of that standard. This is incompatible with due process. If, as the State suggests, sixteen cartridges are regulated as "handgun ammunition," there must be guidelines to inform individuals, ammunition vendors, and law enforcement that those cartridges are regulated and how the countless other cartridges that are either used more often in handguns or in rifles were deemed not to be regulated.

Respondents do not disagree with the State's assertion that

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[15] It is also important to note that, in under a month of litigation, the State's expert significantly changed his opinion as to the laws' meaning no fewer than *three* times. (J.A. XII 3719-3722; see also J.A. V 1198 [identifying *eleven calibers*]; J.A. V 1256-1257 [identifying a slightly different list of *eleven calibers*]; J.A. VIII 2257 [identifying only *sixteen cartridges*].) That the State's own expert could not uniformly apply the "principally for use" standard in such a short period is revealing.

reasonable people might be expected to "do a little due diligence to find out what cartridges of ammunition or handgun ammunition are . . . within the meaning of the statute." (R.T., Mot. Summ. J. Hrg. 11:1-3.) But *no* amount of diligence could inform anyone as to what the "principally for use" standard requires or what ammunition meets it. The Challenged Provisions do not reference any definable sources, and no sources contain the requisite information. (J.A. IV 0906-0908, 0910-0911, 0955, 0957, 0959, 0961, 0965, 0968, XI 2919, 2923, XIV 4041-4042.)[16]

That the State's own *expert* struggled so mightily to interpret the Challenged Provisions and undertook such a painstaking research process to apply them demonstrates the laws' glaring failure to provide notice to persons of *ordinary* intelligence.

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[16] Any information in *Cartridges of the World*, a reference not identified by the Challenged Provisions, cannot save the challenged laws. In *Robertson v. City and County of Denver* (Colo. 1994) 874 P.2d 325 (en banc), the Colorado Supreme Court considered a vagueness challenge to a statute that regulated certain handguns depending on their original design history. The court struck the law even though the necessary historical information could be gleaned from a publication not identified by the challenged statute. (*Id.* at p. 334.) Here, the case is even worse. While *Cartridges of the World* describes some of the handguns and rifles that fire certain types of ammunition, it does not identify or make any representations as to a cartridge's principal use.

D. The Court of Appeal Correctly Held that the Challenged Provisions Cannot Be Saved by Any "Common Understanding" Alleged by the State

The required specificity of an otherwise vague statute can sometimes be satisfied by the "common knowledge and understanding *of members of the particular vocation or profession to which the statute applies*." (*Cranston v. City of Richmond* (1985) 40 Cal.3d, 755, 766, italics added.) But here, the Challenged Provisions are not limited to members of any particular vocation. (Slip. opn. p. 36.)

Rather, the definition of "handgun ammunition" must be deciphered by numerous businesses and individuals that harbor *no* specialized knowledge of ammunition usage, let alone the sort of information required to determine whether any cartridge is used more often in handguns. Employees of general stores, bait and tackle shops, sporting good stores, and department stores like Wal-Mart must speculate as to whether each cartridge of ammunition they sell will trigger criminal liability. And, as the Court of Appeal recognized, section 30312 applies to every single purchase of ammunition made by laypersons via common web-based businesses and mail order companies—accounting for potentially millions of transactions annually. (Slip opn. p. 36.) While firearms retailers are themselves unable to determine whether ammunition is used more often in handguns, any

heightened knowledge the State would assign to those vendors cannot save the laws from vagueness. The State cites to no authority, and Respondents are aware of none, that invokes a knowledge standard commensurate with members of a particular vocation when the statute applies so far beyond them.

In any event, there is simply no "common understanding," among either vendors or anyone else, of what ammunition is "principally for use" in handguns, a reality the Court of Appeal recognized in various portions of its opinion. (Slip opn. pp. 35-37.)

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. (A.O.B. p. 22 ["[T]he Court of Appeal found fault with the statutes in that they did not 'establish a technical meaning or universally accepted standard' for what ammunition was 'primarily for use' in a handgun. [Citation.] This is not the test for vagueness under any standard."], quoting Slip opn. p. 36.) Contrary to the State's insinuation, the court did not rest its holding on this finding nor did it suggest this was the "test for vagueness"—it was but one reason of many the court held that the Challenged Provisions are impermissibly vague. (Slip

opn. pp. 34-38.)

Indeed, the court was merely responding to the State's (now-abandoned) argument that, because some ammunition vendors choose to advertise their inventory as "handgun ammunition," they should be held to share a "common understanding" of the term. (Slip opn. p. 36; A.O.B. p. 22.) 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 of the language in question.' " (Slip opn. p. 36, quoting *Barksdale*, *supra*, 8 Cal.3d at p. 327.) But, weighing the State's evidence, it correctly found that anecdotal evidence of the marketing designations of a few ammunition vendors was insufficient to establish a common or widespread industry practice. (Slip opn. p. 36.)

The State never explained the relevance of such classifications to a determination of what ammunition is "principally for use" in handguns. Nor did it offer any foundation for assessing why, or on what basis, the vendors made such classifications. (J.A. XI 3364-3365; XII 3454-3459.) The State did not endeavor to determine whether such designation was merely puffery designed to encourage the sale of certain stock, whether it reflected the ammunition uses popular with a vendor's particular consumer base, whether

it reflected that such ammunition was sold for use in both handguns and rifles, or whether such ammunition was simply *suitable* for use in handguns. In short, that an ammunition vendor markets or brands some ammunition as "handgun ammunition" is not determinative of whether that ammunition is "principally for use" in handguns. Nor does it disprove that there is confusion among the various vendors (and everyone else the law applies to) as to what ammunition is regulated by the law.

The opinion correctly concludes, based on sound legal reasoning and the weight of the evidence, that the Challenged Provisions are unconstitutionally vague.

IV. 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." (A.O.B. p. 24.) Not so. The term "principally" 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. opn. pp. 34-38; see also *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1133 (*Suter*).) It

does not conflict with precedent upholding laws using various "non-mathematical" terms that can be "objectively ascertained by reference to *common experiences of mankind*." (See, e.g., *Morgan*, *supra*, 42 Cal.4th at p. 606; *People v. Daniels* (1969) 71 Cal.2d 1119, 1129, italics added.)

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 opn. 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 opn. 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, the cited laws 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 A.O.B. p. 24, citing Dis. opn. p. 11,

italics 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 end 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"]; see also *Posters 'N' Things, Ltd. v. United States* (1994) 511 U.S. 513, 518 (*Posters 'N' Things*), quoting *Hoffman Estates*, *supra*, 455 U.S. at p. 501 ["designed . . . for use" not vague because standard refers to " 'the design of the manufacturer, not the intent of the retailer or customer"]; *Richmond Boro Gun Club, Inc. v. City of New York* (2d Cir. 1996) 97 F.3d 681, 685-686 ["designed" standard not vague because it relies on the manufacturer's intent, as demonstrated by the item's "objective features"].)[17] Such intentions can be ascertained simply. The language employed by these laws 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

[17] Penal Code sections 189, 453, subdivision (b)(2), 635, 498, subdivision (c)(1), and 12022.2, also cited by the State, rely on similar "designed for use" language for clarity. (See A.O.B. pp. 24-25 & fn.5, citing Dis. opn. p. 11.)

during some undefined period of time. (Slip opn. 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 A.O.B. p. 24, citing Dis. opn. p. 11.)

- An employee can ask whether the licenced contractor he works for is "engaged in installing or maintaining transmission or distribution systems" more often than not. (Lab. Code, § 108.2, cited by A.O.B. p. 24, citing Dis. opn. 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 A.O.B. p. 24, citing Dis. opn. p. 11.)

- A person is asked if the majority of his purchases are "for the purpose of resale." (Civ. Code, § 1802.4, cited by A.O.B. p. 24, citing Dis. opn. 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 A.O.B. p. 24, citing Dis. opn. 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), cited by A.O.B. p. 24, citing Dis. opn. p. 11.)

- 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 A.O.B. p. 24 and Dis. opn. 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. This is not like the Challenged Provisions, which aside from being imprecise, require determinations that, as held by the court below, cannot be "objectively ascertained by reference to common experiences of mankind." (*Morgan*, *supra*, 42 Cal.4th at p. 606.)

The State's reliance on *Posters 'N' Things*, a case upholding arguably similar "primarily intended . . . for use" language in the context of a ban on sales of drug paraphernalia, is misplaced. (A.O.B. pp. 24-25.) There, the Court held that the language was not unconstitutionally vague because it could "be understood objectively and refers generally to an item's likely use." (*Posters 'N' Things*, *supra*, 511 U.S. at pp. 519-521.) Unlike the Challenged Provisions, the statute at issue in *Posters 'N' Things* included, inter alia, "a list of 15 items constituting *per se* drug paraphernalia" and a list of "eight objective factors" to determine whether an item constituted paraphernalia under the law. (*Id.* at p. 519.) These lists

provided "individuals and law enforcement officers with relatively clear guidelines as to prohibited conduct" and "minimize[d] the possibility of arbitrary enforcement and assist[ed] in defining the sphere of prohibited conduct under the statute." (*Id.* at pp. 525-526.)

Nothing in the Challenged Provisions provides this sort of guidance—there are no lists, factors, or even minimal guidelines. Worse yet, there is no resource one can consult to determine which items are "principally for use" in handguns. And since virtually *all* ammunition that can be fired from handguns is made to be and can be fired from rifles, nothing about the objective, observable characteristics of ammunition indicates that they are actually, or even "likely," used more often in handguns than other types of guns. In short, the language of the Challenged Provisions cannot be "understood objectively."

CONCLUSION

The root of the vagueness doctrine is a rough idea of fairness. (*Colton v. Kentucky* (1972) 407 U.S. 104, 110.) The Challenged Provisions fail to provide sufficient notice to inform an analysis of whether any given ammunition is subject to regulation. This failure is revealed by the struggles encountered by the State's own ammunition expert over the meaning of the "principally for use" standard and whether it is dependent on a number of

variables unspecified by statute. Even if the requirements of the "principally for use" test could be determined, the Challenged Provisions impermissibly task the public and law enforcement with determining whether any given cartridge of ammunition is used more often in handguns. Although the State's expert made a commendable attempt to interpret the laws, such information concerning ammunition usage simply does not exist. It is unfair to place such a heavy, and in fact impossible, burden on persons of ordinary intelligence and everyday law enforcement officers on the beat.

To be clear, Respondents are not asking for mathematical certainty, nor are they insistent upon a list of regulated items. What they do seek is some level of clarity as to what ammunition is covered by the Challenged Provisions—even minimal guidelines to govern their behavior and to comport with basic notions of due process.

Further, Respondents are not arguing whether the Challenged Provisions are good public policy. Affirming the appellate court's holding that these statutes are unworkable in their current form will not spell doom for future versions of these laws. Affirmance will simply ensure that such laws provide some level of notice beyond that which is unknowable, particularly as to laws that restrict enumerated, fundamental rights under threat of criminal prosecution.

Respondents thus respectfully request that the Court affirm that the Challenged Provisions are unconstitutionally vague on their face.

Dated: August 15, 2014 **MICHEL & ASSOCIATES, P.C.**

By: _____
C. D. MICHEL
Attorney for Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204, subdivision (c)(1), of the California Rules of Court, I hereby certify that the attached Respondents' Brief is double-spaced, typed in Times New Roman proportionally spaced 13-point font, and the brief contains 13328 words of text, including footnotes, as counted by the WordPerfect word-processing program used to prepare the brief.

Dated: August 15, 2014

MICHEL & ASSOCIATES, P.C.

By: 

C. D. MICHEL

Attorney for 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 August 15, 2014, I served the foregoing document(s) described as

RESPONDENTS' BRIEF

on the interested parties in this action by placing

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[X] a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

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Executed on August 15, 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 August 15, 2014, at Long Beach, California.

CLAUDIA AYALA

SERVICE LIST

SHERIFF CLAY PARKER, ET AL. v. STATE OF CALIFORNIA, ET AL.
CASE NO. F062490

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