In the Supreme Court of the State of California

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER,

Plaintiffs and Respondents,

v.

THE STATE OF CALIFORNIA; KAMALA D. HARRIS, in her official capacity as Attorney General for the State of California; AND THE CALIFORNIA DEPARTMENT OF JUSTICE,

Defendants and Appellants

Case No. S215265

Fifth Appellate District, Case Nos. F062490, F062709
Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeff Hamilton, Judge

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

The published decision of the Court of Appeal, Fifth Appellate District, declaring statutes that restrict the sale of ammunition "principally for use" in handguns unconstitutionally vague was the first case in California to extend the "generality of cases" standard for a facial constitutional challenge beyond the scope of First Amendment and abortion rights cases. Appellants filed a petition for review raising three primary arguments justifying a review grant: (1) the opinion creates a lack of clarity as to the appropriate standard for facial challenges; (2) the more lenient standard of review should not have been applied by the Court of Appeal here; and (3) the vagueness analysis employed by the Court of Appeal did not follow established law. (Petition, pp. 7, 8, 15.) In response, the answer filed by Respondents contends that (1) the opinion below brings "clarity" on the issue of which standard to apply; (2) the Court of Appeal selected and applied the appropriate standard; and (3) the opinion below "fits comfortably with existing case law." (Answer, pp. 7, 11, 21.)

At bottom, the answer suggests that the opinion of the Court of Appeal was an unremarkable application of existing case law which presents no basis for granting a petition for review. Not so. As indicated in the petition, the lack of clarity identified by the opinion (and evidenced by the strong dissent) demonstrates that the law on the appropriate standard of review in a facial vagueness challenge is unsettled, underscoring the need for review. The opinion is the first to suggest that Second Amendment cases should be treated in a manner similar to First Amendment cases and receive a more lenient standard of review in facial constitutional challenges. This novel conclusion cries out for review.

I. THE COURT OF APPEAL REACHED A NOVEL CONCLUSION, WARRANTING REVIEW

Respondents contend that the "opinion brings clarity, not confusion, to the analytical framework for facial vagueness challenges." (Answer, p. 7.) Respondents maintain that the opinion "is in line with legal precedent" and that it "clarifies the 'uncertainty' that has characterized the standard for facial constitutional challenges." (Answer, p. 10.) Respondents characterize the opinion's use of the "generality of cases" standard here as being "supported by overwhelming legal precedent." (Answer, p. 9.) Respondents' assertions cannot withstand scrutiny.

First, Respondents fail to fairly describe the ambitious scope of the opinion below. Far from being in step with prior precedent, the opinion is the first case to expand the use of the "generality of cases" standard beyond the First Amendment and abortion rights. Indeed, in order to make this expansion, the Court of Appeal had to diverge from its own precedent. (See Slip Op., pp. 25-26 [distinguishing *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679].) In addition, the opinion had to distinguish this Court's use of the "impermissibly vague in *all of its applications*" standard in *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116 in order to achieve the expansion. (See Slip Op., p. 28.) Thus, it is not accurate to portray the opinion as supported by precedent, or merely a modest extension of existing case law.

Second, the opinion itself appears to acknowledge that it is breaking new legal ground, or at least significantly advancing the law in this area. The opinion is peppered with references to the "lack of clarity," "inconsistency," and "controversy over the proper analytical framework for facial challenges" found in the existing case law. (Slip Op., pp. 13, 26-27.) The Court of Appeal declared that "waters have been muddied" in this area of the law, and indicated that this Court "recognized its own inconsistency

in using different levels of review for facial challenges." (Slip Op., p. 24, citing *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 278 and *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Against this backdrop, the opinion purports to "examine a number of pivotal United States Supreme Court opinions and attempts to harmonize the holdings of those cases with California law, despite a lack of clarity in both lines of authority." (Slip Op., p. 13.) Dismissing the Court of Appeal's action as "fit[ting] harmoniously with controlling precedent" (Answer, p. 28) fails to account for the context of the decision or the Court's own characterization of the status of this area of law.

II. THE COURT OF APPEAL ERRED BY NOT IMPLYING A SCIENTER REQUIREMENT

One fatal defect in the opinion justifying review is the Court's erroneous conclusion that the statutes at issue did not contain a scienter requirement. (Petition, pp. 10-11.) In the Court's reasoning, the strict standard of review "is flexible and yielding to vagueness concerns" if three elements can be shown: a substantial amount of constitutionally protected conduct is implicated, criminal penalties are imposed, and no scienter requirement exists. (Slip Op., p. 28, citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489.) Accordingly, the Court's finding that the statutes at issue "do not contain a scienter requirement" was central to its conclusion that a more lenient standard of review should apply. (Slip Op., p. 29.) In the answer, Respondents dismiss this argument, arguing that the Court "properly found that the challenged provisions lack a scienter requirement." (Answer, p. 12.)

It is common for a scienter requirement to be read into penal statutes such as the ones at issue. (*In re Jennings* (2004) 34 Cal.4th 254, 267.) Respondents cite *In re Jorge M.* (2000) 23 Cal.4th 866, 872 for the proposition that "the failure to register ammunition" falls within the "public

welfare" exception to the general rule requiring a mental state. (Answer, p. 13.) But *Jorge M.* does not support Respondents' argument, as that decision proceeded to find an implied scienter requirement for the Assault Weapons Control Act despite lack of specific mental state requirement in statute: "the People bear the burden of proving the defendant *knew or reasonably should have known* the firearm possessed the characteristics bringing it within the AWCA." (*In re Jorge M.*, 23 Cal.4th at p. 887, original emphasis.) As in *Jorge M.*, the Court of Appeal should have found an implied scienter requirement in the handgun ammunition statutes.[1]

If the Court had properly analyzed the scienter issue, it would not have applied the more lenient standard. Even applying the reasoning of the Court of Appeal derived from *Hoffman Estates*, the existence of a scienter requirement in the relevant statutes would have resulted in application of the stricter standard, not the more lenient one. (See Slip Op., p. 28 [statute "must lack a scienter requirement" to qualify for more lenient standard].)

III. THE COURT OF APPEAL ERRED BY FINDING SECOND AMENDMENT RIGHTS IMPLICATED BY THE STATUTES

Respondents maintain that "it is clear that the Challenged Provisions threaten to inhibit Second Amendment freedoms (if they do not, in fact, violate them)." (Answer, p. 18.) They concede that the United States Supreme Court has opined that "imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful regulatory measures." (Answer, p. 19, quoting *District of Columbia v. Heller* (2008) 554 U.S. 570, 626-627 and fn. 26.) They contend, however, that the

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[1] Indeed, appellants expressly conceded the existence of the scienter requirement. (See Dissenting Op., p. 9, fn. 2 [acknowledging concession at oral argument]; see also Appellant's Reply Brief, p. 6, fn. 5 [conceding existence of mens rea requirement].)

Supreme Court's analysis is relevant only to a direct Second Amendment challenge, and "not to vagueness concerns." (Answer, p. 19.)

But the core of the reasoning expressed by Respondents and adopted by the Court below was that the challenged statutes "implicate" Second Amendment rights. (Slip Op., p. 29.) The Court of Appeal expressly acknowledged that if "a substantial amount of constitutionally protected conduct" is not reached by the statutes (Slip Op., p. 31), then there is no basis for the more lenient standard of review.[2] The fact that Second Amendment concerns are expressed in the context of a vagueness challenge does not eliminate the requirement that Respondents demonstrate some significant impact on Second Amendment rights in order for their argument to stand.

Significantly, Respondents ignore a key point raised in the petition: the restrictions on handgun ammunition purchases at issue here are no more onerous than the restrictions on the sale of handguns themselves. (See Petition for Review, pp. 13-14, citing Penal Code, § 26845, subd. (a) ["No handgun may be delivered unless the purchaser, transferee, or person being loaned the firearm presents documentation indicating that the person is a California resident"].) As noted by the dissenting justice, "requiring the ammunition seller or transferor to record the buyer's identification information" is a "minor inconvenience to the buyer" and not a "threat to inhibit his or her right to possess an operable handgun for self-defense." (Dis. Op., p. 7.) The suggestion that Second Amendment rights are

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[2] Respondents assert that the Court of Appeal "alternatively held that the Challenged Provisions fail under either test." (Answer, p. 20.) This is a distortion of the Court's holding. As the dissent pointed out: "Most of the respondents who oppose enforcement of the challenged provisions concede the statutes have some valid applications. Thus, if the court applies the void in all applications test, their challenge fails. If the court applies the void in the generality of cases test, they may prevail." (Dis. Op., p. 5.)

damaged by modest identification and face-to-face purchase requirements for handgun ammunition when such restrictions are already in place for the handguns themselves must be rejected.

CONCLUSION

The decision of the Court of Appeal is deeply flawed. If left uncorrected, it will sow confusion into California case law. Far from being a simple application of existing precedent, it dramatically expands the category of more lenient facial challenge review beyond First Amendment issues. This Court should grant review.

Dated: January 21, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY IN SUPPORT OF PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 1,626 words.

Dated: January 21, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Sheriff Clay Parker, et al. v. State of California***

No.: **S215265**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 21, 2014, I served the attached **REPLY IN SUPPORT OF PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 21, 2014, at San Francisco, California.

J. Wong
Declarant

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Signature

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