IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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

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. F062490

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

APPELLANTS' OPENING BRIEF

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

Case Name: *SHERIFF CLAY PARKER, et al. v. STATE OF CALIFORNIA; et al.* Court of Appeal No.: F062490

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INTRODUCTION

In 2010, in an effort to protect public safety, the California Legislature passed an act regulating the commercial sale, display, and transfer of handgun ammunition. The primary impact of the law on individuals was that they would be required to show identification to purchase handgun ammunition. Ammunition sellers, backed by a county sheriff and an interest group, sued to block implementation of the law, claiming that they could not tell what calibers of ammunition were "principally for use" in a handgun. The trial court agreed, finding that, in the absence of a list of the cartridges involved, if two people could come to different conclusions about which ammunition was covered, the law was unconstitutionally vague on its face.

By applying such a stringent test for vagueness, which effectively relieved respondents of their burden to show that the challenged definition was invalid in all of its applications, and by disregarding the record which framed the question presented, the trial court erred. Long-established case law provides that only reasonable certainty, not mathematical precision or a list, is needed to satisfy constitutional principles for adequate notice of prohibited conduct and defeat a facial vagueness challenge.

Accordingly, the summary judgment entered in favor of plaintiffs below should be reversed.

STATEMENT OF CASE AND FACTS

On June 17, 2010, plaintiffs[1] filed a complaint in Fresno County Superior Court alleging that three statutes adopted as part of Assembly Bill

[1] Plaintiffs include Clay Parker, the former Sheriff of Tehama County, Herb Bauer Sporting Goods, Inc., California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Collectibles, LLC, and Steven Stonecipher (collectively, "respondents" or "plaintiffs").

962 (the "Anti-Gang Neighborhood Protection Act of 2009") were void for vagueness under the due process clause of the Fourteenth Amendment. (Joint Appendix, Volume I "JA I" 0014.)[2] Specifically, they contended that because many calibers of ammunition could be used in both handguns and rifles, sections 12060, 12061, and 12318[3] of the Penal Code are fatally vague, both facially and as applied, because their definition of "handgun ammunition" failed "to provide any standard whereby a person of ordinary intelligence can understand and determine whether a given caliber of ammunition is 'principally for use' in a handgun." (JA I 0014.) They also asserted that this alleged vagueness gave law enforcement officials "essentially unbridled discretion to interpret and apply the Challenged Provisions."[4] (JA I 0015.)

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[2] The relevant volume number of the Joint Appendix will be referenced by a roman numeral following "JA" in the citations.

[3] Senate Bill 1080, which became effective January 1, 2012, reorganized the deadly weapons sections of the Penal Code, changed the numbering of the statutes at issue here. Presently, former sections 12060 and 12061 are codified at section 30350, et seq., and sections 12318 and 12323 are codified at section 16650, et seq. For the Court's convenience, appellants will use the prior numbering scheme herein to correspond with the briefing and decision below.

[4] In their complaint, respondents admitted that subdivisions (3) through (7) of section 12061, and the entirety of section 12318, did not go into effect until February 1, 2011. (JA I 0022.) Accordingly, the only provisions in effect at the time the complaint was filed were subdivisions (a)(1) and (a)(2) of section 12061, which restricted individuals convicted of certain crimes from handling handgun ammunition in the course of their employment, and prohibited display of handgun ammunition in a manner accessible to a purchaser. (JA I 0022.) Respondents did not allege that these provisions had been enforced against them (or would be) and introduced no such evidence below.

On these facts, respondents alleged three causes of action for (1) Due Process Vagueness – Facial, (2) Due Process Vagueness – As Applied, and (3) a Petition for Writ of Mandate. (JA I 0031-34.) Defendants State of California, the California Department of Justice, and the Attorney General (collectively, the "State" or "appellants") answered plaintiffs' complaint and verified petition on August 4, 2010. (JA I 0052-74.) Thereafter, respondents filed a voluminous motion for preliminary injunction, but withdrew the motion prior to a ruling on it. (JA I-II0076-523, JA III 0592-707.) Respondents then filed a motion for summary judgment and/or summary adjudication. (JA III 0815.) On January 18, 2011, following briefing and argument, respondents dismissed their second and third causes of action, and submitted the balance of their motion to the Court. (JA XIV 4031.)

On January 31, 2011, the Court issued a minute order denying respondents' motion for summary judgment and granting in part and denying in part respondents' motion for summary adjudication, and enjoined enforcement of the challenged statutes. (JA XIV 4032.) In its written order, the Court found that the statutes were unconstitutionally vague on their face. (JA XIV 4033-4055.) On February 22, 2011, judgment was entered in favor of respondents. (JA XIV 4056-60.) On April 28, 2011, a timely notice of appeal was filed. (JA XV 4271.)

Following entry of judgment, on March 14, 2011, respondents filed a memorandum of costs in the amount of $11,365.63. On April 1, 2011, appellants filed a timely motion to tax costs. (JA XIV 4151-75.) On May 18, 2011, appellants' motion to tax costs was granted in part, and costs were taxed by $2,571.18. (JA XV 4277-79.) The trial court declined to tax costs for the filing fee for respondents' withdrawn motion for preliminary

injunction. (JA XV 4278.) On June 10, a timely notice of appeal was filed challenging the partial denial of the motion to tax costs.[5] (JA XV 4281-86.)

STANDARD OF REVIEW

Appellants present two issues in this appeal, and each has its own standard of review. The first issue, the constitutionality of the Penal Code sections challenged by respondents, is considered de novo by this Court: "'The interpretation of a statute and the determination of its constitutionality are questions of law. In such cases, appellate courts apply a de novo standard of review.'" (*Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 90, quoting *Samples v. Brown* (2007) 146 Cal.App.4th 787, 799 [citations omitted].)

The second issue raised by appellants, the trial court's partial denial of their motion to tax costs, is reviewed for abuse of discretion: "Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion." (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.)

ARGUMENT

I. THE TRIAL COURT ERRED BY FINDING THE CHALLENGED STATUTES UNCONSTITUTIONALLY VAGUE

The trial court failed to apply the appropriate principles which guide determination of a facial challenge for vagueness. If the correct analysis is used it is clear that the statutes at issue meet the requirements of reasonable certainty, and should not have been invalidated as unconstitutionally vague.

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[5] The appeal regarding the motion to tax costs was initially given case number F062709. Following a stipulation between the parties, on November 15, 2011 this Court ordered appeal number 62709 consolidated with the present appeal (F062490), and permitted the filing of a single brief addressing both appeals in appeal number F062490.

A. Applicable Principles

The starting point for evaluating a constitutional challenge is the presumption that legislative enactments "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*People v. Ervin* (1997) 53 Cal.App.4th 1327, 1328; see also *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1403 [the constitutionality of a statute designed to protect the public from dangerous weapons must be sustained if possible].) A statute will not be held void for vagueness if any reasonable and practical construction can be given its language, or if its terms may be made reasonably certain by reference to other definable sources. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117; *People v. Townsend* (1998) 62 Cal.App.4th 1390, 1401.)

Just because a statute contains "one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face." (*In re Jorge M.* (2000) 23 Cal.4th 866, 886; *People v. Hazelton* (1996) 14 Cal.4th 101, 109.) "Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear." (*People v. Townsend, supra*, 62 Cal.App.4th at pp. 1401-1402 [internal quotations and citation omitted].) Reasonable specificity is all that is required. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890; *People ex rel. Gallo v. Acuna, supra*, 14 Cal.4th at p. 1117.)

As the United States Supreme Court has explained, facial challenges are disfavored, and litigants who bring them face a high burden:

> Facial challenges are disfavored for several reasons. 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." *Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (internal quotation marks and brackets omitted). 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.'" *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)). Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion)).

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

In evaluating a facial challenge, a court considers "only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) The Supreme Court of California has not articulated a single test for determining the propriety of a facial challenge, but instead has presented the governing doctrine in two ways. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Under the stricter test, the statute must be upheld unless the complaining party establishes the statute is invalid in all of its applications and "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." (*Ibid.*) Under the more lenient standard, a party must still establish that the statute conflicts with constitutional principles "'in the generality or great majority of cases.'" (*Ibid.*, italics omitted; see also *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 250 (conc. & dis. opn. of Cantil-Sakauye, C.J.) [recognizing multiple standards of review for facial

challenges].)[6] But under either test, the plaintiff "has a heavy burden to show the statute is unconstitutional in all or most cases, and he 'cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute.'" (*Coffman Specialties, Inc. v. Department of Transp.* (2009) 176 Cal.App.4th 1135, 1144-1145, quoting *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39 [internal quotation marks omitted].)

B. The Facial Vagueness Challenge Fails as a Matter of Law Because Respondents Admitted that the Challenged Definition Has Several Valid Applications

The sole cause of action not abandoned by respondents sought a declaration that sections 12060, 12061, and 12318 of the Penal Code were facially void for vagueness "because they fail to provide notice to persons of ordinary intelligence regarding which calibers of ammunition are 'handgun ammunition' and thus subject to" the challenged statutes. (JA I 0091.) At bottom, respondents' challenge is to the definition of "handgun ammunition," which is imported into sections 12060, 12061 and 12318 from subdivision (a) of Penal Code section 12323. Section 12323 subdivision (a) provides that handgun ammunition is "ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, as defined in subdivision (a) of Section 12001,

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[6] To date, the more lenient test has been limited to cases involving the First Amendment or abortion rights. (See *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679 [outside First Amendment and abortion cases, "the challenger must establish that no set of circumstances exists under which the Act would be valid"].) Accordingly appellants submit that the more lenient "great majority" standard should not be applied here.

notwithstanding that the ammunition may also be used in some rifles."[7] Blanks, as well as ammunition designed and intended to be used in "antique firearms" are excluded from this definition under the challenged statutes. (Pen. Code, § 12060, subd. (b).) (Hereinafter, the "Challenged Definition.")

As noted above, facial challenges to a statute's constitutionality require a demonstration that the provisions of the statute, despite careful interpretation, fatally collide with the Constitution. As numerous state and federal courts have observed, facial challenges are extremely difficult to prove. "Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." (*National Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 580 [quotation marks omitted].) The Supreme Court of California has similarly opined that:

> A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation.] '"To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. . . . Rather, petitioners must demonstrate that the act's provisions *inevitably pose a present total and fatal conflict* with applicable constitutional prohibitions."'

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[7] Section 12001 subdivision (a)(1) provides: "As used in this title, the terms 'pistol,' 'revolver,' and 'firearm capable of being concealed upon the person' shall apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length."

(*Arcadia Unified Sch. Dist. v. State Dep't of Educ.* (1992) 2 Cal.4th 251, 267, quoting *Pacific Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180-181.) The principles set forth in *Pacific Legal Foundation* are "formidable rules insulating a statute from facial attack." (*In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 48-49.) Hence, if an appellate court can conceive of a situation in which a statute could be applied constitutionally, the statute will be upheld. Unless the statute reveals a "*present* total conflict with constitutional provisions," any overbreadth is cured through "case-by-case analysis of the fact situations to which the statute is applied." (*Ibid.* [original emphasis].)

Respondents maintained that the Challenged Definition failed to give adequate notice of which ammunition it covered and which it did not. But in deposition, plaintiffs Clay Parker, Steve Stonecipher, and Herb Bauer Sporting Goods identified fifteen different cartridges of ammunition between them as cartridges that were used more often in handguns than in rifles. (JA VII 2175-77.) And respondents' own ammunition expert conceded that there are at least seven cartridges of ammunition that are unquestionably handgun ammunition within the meaning of the Challenged Definition. (JA VII 2175-76 [identifying .25 ACP, .45 GAP, 9mm Federal, 10mm Auto, .357 SIG, .44 Auto Mag, and .38 S&W as handgun ammunition].) Moreover, these concessions by respondents must be considered in the context of expert testimony from the state that sixteen different ammunition cartridges were chambered (i.e. loaded) more frequently in handguns than in rifles. (JA VII 2257.) Finally, respondents expressly conceded below that one ammunition cartridge, the .25 automatic, is used *exclusively in pistols*, and neither respondents nor appellants are aware of any rifle chambering this type of cartridge. (JA XI 2893.) The court below disregarded the record before it and did that which the law forbids in assessing facial challenges—it identified future

hypothetical situations in which constitutional problems *may* possibly arise as to a particular application of the statute.[8] (See *United States v. Powell* (1975) 423 U.S. 87, 93 [statute prohibiting the mailing of firearms "capable of being concealed on the person" was not unconstitutionally vague simply because potential uncertainty existed regarding the precise reach of the statute in marginal fact situations not currently before the court].)

Under the stricter standard articulated above in *Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1126, if the Challenged Definition can lawfully be applied to *any* ammunition, then it does not present a total and fatal conflict, and sections 12060, 12061, and 12318 cannot be struck down as facially vague. Applying this standard, respondents' concession that the Challenged Definition has valid applications should, therefore, have been dispositive of their facial vagueness challenge. (See *Pacific Legal Found.*, *supra*, 29 Cal.3d at pp. 180-181 [holding that the plaintiff must establish that the challenged statute is invalid in all applications].) The court below erred in concluding otherwise.

Even if the less strict "great majority" standard were applied, respondents' facial challenge still fails. The burden of demonstrating that the statutes at issue are unconstitutionally vague "in the generality or great majority of cases" still presents a "heavy burden" for respondents. (*Coffman Specialties, Inc. v. Department of Transp.*, *supra*, 176 Cal.App.4th at p. 1145.) The notion that a reasonable person cannot understand what is meant by ammunition "principally for use" in handguns flies in the face of the record.

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[8] For example, the trial court spent three pages of its order speculating about hypothetical conduct by local law enforcement that might give rise to constitutional problems. (JA XIV 4045-47.)

In proceedings below, respondents conceded that many ammunition vendors market or brand "some ammunition as 'handgun ammunition.'" (JA XI 2897.) Significantly, the evidence presented by appellants demonstrated that ammunition vendors divide their stock offered for sale between "handgun" ammunition and "rifle" ammunition. (See JA IX 2306-2369.) And simple Internet research showed that most commercial ammunition vendors, including those that submitted declarations in support of respondents' vagueness challenge, listed "handgun ammunition" as a discrete category along with a catalog of calibers and cartridges available. (See JA IX 2367-68, 2370-71, and 2373.) A California Department of Justice expert opined that based on his training and experience, and after examining, among other things, readily-available reference works, websites, and catalogs, he concluded that eleven calibers were "chambered, or loaded, more frequently in handguns than rifles:" .45, 9mm, 10mm, .357, .38, .44, .380, .454, .25, and .32. (JA VIII 2257.) This unrebutted testimony effectively demonstrates that there are many types of ammunition cartridges that fit within the Challenged Definition, and it would be impossible to conclude on this record that the statutes were unconstitutional in the great majority of cases as would be required even under the more generous facial vagueness standard.

The mere possibility that the Challenged Definition might be misapplied to cartridges of ammunition that are not "principally for use" in a handgun is an insufficient platform upon which to base a facial vagueness challenge. Any purported uncertainty about the challenged law must be "'cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 578 [citations omitted].)

C. The Trial Court Erred in Finding the Challenged Definition Unconstitutionally Vague

Relying primarily on *Kolender v. Lawson* (1983) 461 U.S. 352, the trial court found that the challenged statutes failed "to provide adequate notice of the conduct proscribed to the people or handgun ammunition vendors of ordinary intelligence to whom the statutory scheme applies." (JA 4039.) The trial court objected to the absence of a list of ammunition covered by the statutes, and found that "the statutory language of the 'handgun ammunition' definition encourages individual people and handgun ammunition vendors to consider their own experience, conduct, and/or actions in using or selling ammunition calibers and cartridges in handguns or rifles to determine if a particular ammunition caliber or cartridge is 'handgun ammunition.'" (JA XIV 4042.) In the trial court's view, because the statutes required ammunition vendors to make a determination based on their experience, rather than simply reference a list, this meant that the statutes were not "definite enough so that ordinary people can understand what conduct is prohibited." (JA XIV 4043.)

The trial court's reasoning is inconsistent with established jurisprudence on the level of specificity required in penal laws. Dozens of penal statutes that require reference to life experience have been upheld against vagueness challenges. The statutes challenged in this case likewise provide sufficient notice of the conduct proscribed, and must be upheld.

1. Mathematical Specificity Is Not Required

In order to pass muster against a vagueness challenge, a penal statute 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." (*People v. Maciel* (2003) 113 Cal.App.4th 679, 683 [citation omitted].) However, courts have held that a mathematical level of precision is not necessary to

meet the required standards. "The fact that a term is somewhat imprecise does not itself offend due process. Rather, so long as the language sufficiently warns of the proscribed conduct when measured by common understanding and experience, the statute is not unconstitutionally vague." (*People v. Ellison* (1998) 68 Cal.App.4th 203, 207-208.) Because words in the English language "inevitably contain germs of uncertainty, mathematical precision in the language of a penal statute is not a sine qua non of constitutionality." (*In re M.S.* (1995) 10 Cal.4th 698, 718 [citations and internal quotations omitted].) "Only a reasonable degree of certainty is required and there is a strong presumption in favor of the constitutionality of statutes; thus a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language." (*People v. Misa* (2006) 140 Cal.App.4th 837, 844.)

Significantly, the challenged statutes apply chiefly to ammunition vendors, who generally have superior knowledge as to which calibers and cartridges of ammunition are used more often in handguns than in rifles. The California Supreme Court has held that "where the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided 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, 765, citing *Perea v. Fales* (1974) 39 Cal.App.3d 939, 942 [standard of "conduct unbecoming an officer" was not specified in statute, but sufficient certainty was provided by the common knowledge of police officers].) As discussed in section I.B above, it is clear from the record that ammunition vendors know what cartridges are used more often in handguns than in rifles.

2. The Statutes At Issue Are Not Standardless

The trial court concluded that because the statutes at issue did not contain or refer to a "guide" or "list" of ammunition, the statutes lacked "objective standards" for enforcement. (JA XIV 4042-43.) The law is otherwise. Fundamentally, due process does not require that a statute contain a list of all if its applications.

> Although a particular statute is somewhat vague or general in its language because of difficulty in defining the subject matter with precision, it will be upheld if its meaning is reasonably ascertainable. Courts must view the statute from the standpoint of the reasonable person who might be subject to its terms. *Thus, it is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited.* The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.

(*People v. Deskin* (1992) 10 Cal.App.4th 1397, 1400 [internal quotation marks omitted; emphasis supplied]; see also *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1394 [detailed specifications not necessary to defeat vagueness challenge]; *People v. Ervin*, *supra*, 53 Cal.App.4th at p. 1328 [requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage, and understanding]; *People v. Heilman* (1994) 25 Cal.App.4th 391, 400 [same].) And the "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." (*People v. Barajas* (2011) 198 Cal.App.4th 748, 762, quoting *Rose v. Locke* (1975) 423 U.S. 48, 49-50.)

The trial court complained that because those subject to the statutes at issue would "be forced to consider and rely upon their own subjective experiences in order to determine what ammunition is 'handgun ammunition,'" and since each person's definition could be "different from

any other person's," the Challenged Definition was unconstitutionally vague. (JA XIV 4043.) This reasoning is unsound.[9] The terms of a statute, "although nonmathematical, are not impermissibly vague if their meaning can be objectively ascertained by reference to common experiences of mankind." (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1133.) It is no secret that certain ammunition cartridges are more often used in handguns than in rifles. The evidence submitted by appellants clearly established this point. Opening a book, looking at a catalog, examining a website, asking fellow ammunition vendors—all of these options inform a vendor about the meaning of the statute. In the same way that penal statutes which use terms like "reasonable" (*Barclays Bank v. Franchise Tax Board* (1993) 10 Cal.App.4th 1742, 1763) or "great bodily injury" (*People v. Poulin* (1972) 27 Cal.App.3d 54, 59-60), both of which could result in a difference of opinion about their meaning, have been upheld against vagueness challenges, so too should the Challenged Definition be upheld.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING COSTS FOR RESPONDENTS' WITHDRAWN MOTION FOR PRELIMINARY INJUNCTION

As noted above, respondents filed a motion for preliminary injunction, then withdrew their motion when the trial court announced that it was defective and would be denied in its current state. (JA XIV 4163.) Respondents then changed tactics and brought a summary judgment

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[9] Likewise the contention that the challenged statutes will permit arbitrary or discriminatory enforcement cannot withstand scrutiny. Just as for any arrest, before enforcing the statutes law enforcement will need probable cause to show that the ammunition at issue is used principally in pistols or revolvers consistent with the terms of the Challenged Definition. (See, e.g., *People v. Celis* (2004) 33 Cal.4th 667, 673.) The challenged laws themselves thus provide the enforcement standard and a "check" on law enforcement every time they wish to apply the challenged statutes.

motion. (JA XIV 4164.) Although the trial court granted appellants' motion to tax costs in part, its failure to tax costs related to the withdrawn motion for preliminary injunction was an abuse of discretion which should be reversed by this Court.[10]

A. Applicable Principles

The right to recover litigation costs is determined entirely by statute. (*Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946, 948.) "[I]n the absence of an authorizing statute, no costs can be recovered by either party." (*Davis v. KGO–TV, Inc.* (1998) 17 Cal.4th 436, 439.) Under Code of Civil Procedure section 1033.5,[11] recoverable costs must be reasonable in amount and reasonably necessary to the conduct of the litigation, rather than merely beneficial to its preparation. (§ 1033.5, subds. (c)(2), (c)(3).) Costs fall into two categories: those recoverable as a matter of right, and those recoverable at the discretion of the court. (*Perkos Enters. Inc. v. RRNS Enters.* (1992) 4 Cal.App.4th 238, 242.)

Where, as here, a plaintiff obtains non-monetary relief, i.e., declaratory or injunctive relief, an award of costs is discretionary. (§ 1032,

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[10] The State recognizes that the rather nominal sum involved here might make this appeal seem trivial. However, this is an issue of first impression, and even modest costs, when multiplied over the many lawsuits to which the State is a party, can add up to a substantial sum. Moreover, this issue takes on added importance in cases, like this one, where there is a chance of an attorneys' fee recovery. From the State's perspective, the key principle at play here is that litigants who file and withdraw a motion have not advanced the litigation in any form or fashion, since as a legal matter a motion withdrawn is the same thing as a motion that was never filed at all. The party that filed and then withdrew should bear the cost of its misadventure, not its opponent. Of course, should the Court accept the State's argument on the merits, and enter judgment in its favor, the issue of costs to respondents would become moot.

[11] All statutory references in this argument are to the Code of Civil Procedure.

subd. (a)(4) ["When any party recovers other than monetary relief . . . the court, in its discretion, may allow costs or not"]; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1141-1142; *United States Golf Ass'n v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 625 [court properly exercised discretion in denying costs to either party].) Although the burden is on the objecting party to show that claimed costs are unreasonable or unnecessary, items that are properly objected to are put in issue, and the burden of proof then shifts to the party claiming them as costs to show that necessity or reasonableness of the disputed items. (*Ladas v. California State Auto. Ass'n.*, *supra*, 19 Cal.App.4th at p. 774.)

B. The Trial Court Abused its Discretion by Allowing Plaintiffs to Recover the Cost of Filing the Preliminary Injunction Motion

Although recovery of filing fees is permitted under section 1033.5 subdivision (a)(1), section 1033.5 subdivision (c)(2) authorizes courts to disallow recovery of a motion fee if it determines that it was not reasonably necessary to the litigation. (*Perkos Enterps.*, *supra*, 4 Cal.App.4th at p. 245 ["the intent and effect of section 1033.5, subdivision (c)(2) is to authorize a trial court to disallow recovery of costs, including filing fees, when it determines the costs were incurred unnecessarily"].) After obtaining a judgment in their favor, respondents sought and were awarded costs for filing a preliminary injunction motion near the outset of the case. But they voluntarily *withdrew* that motion (which the Court deemed defective and unsupported) on November 17, 2010 rather than allow it to be denied. (JA XIV 4163.) The effect of withdrawing a motion is to place the record where it stood prior to the filing of the motion; in other words, as though it had not been made. (*Hammons v. Table Mountain Ranches Owners Ass'n, Inc.* (Wyo. 2003) 72 P.3d 1153, 1157 ["A motion withdrawn leaves the

record as it stood prior to the filing of the motion, i.e., as though it had not been made"]; *Altsman v. Kelly* (Pa. 1939) 9 A.2d 423, 488 [same].)

Citing *Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at p. 774, the trial court found that the State had not met its "initial burden of proof of demonstrating that the motion fee for Plaintiffs' motion for preliminary injunction was unnecessary or unreasonable." (JA XV 4277.) But the State should not be made to bear the cost for the filing of a preliminary injunction motion that was withdrawn before it was decided—by definition such a cost was not reasonably necessary to the litigation. In the eyes of the law—albeit law not yet expressly confirmed in California precedent—once withdrawn, it was as if the motion "had not been made." The motion was unnecessary in the first instance because the challenged statutes had not even taken effect yet, and it was so defective that respondents were admonished by the Court to withdraw it lest it be denied. On this record, the State respectfully requests that this Court include in its decision a finding of an abuse of discretion in this regard, and remand with instructions to tax the filing fee for the withdrawn motion.

CONCLUSION

For the reasons stated above, appellants respectfully ask that the judgment entered below be reversed, and that judgment in favor of appellants be entered. (See Code Civ. Proc., § 43; *Conley v. Matthes* (1997) 56 Cal.App.4th 1453, 1459 fn. 7 [where it appears from record as matter of law that there is only one proper judgment on undisputed facts, an appellate court may direct entry of judgment for nonmovants on appeal of summary judgment].)

Dated: February 22, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANTS' OPENING BRIEF uses a 13 point Times New Roman font and contains 5,459 words.

Dated: February 22, 2012

KAMALA D. HARRIS
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DECLARATION OF SERVICE

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

No.: **F062490**

I declare:

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

On February 22, 2012, I served the attached **APPELLANT'S OPENING BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of 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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On February 21, 2012, I caused four (4) copies of the **APPELLANT'S OPENING BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102 by Personal Delivery.

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 February 22, 2012, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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