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' REPLY BRIEF

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INTRODUCTION

Respondents disregard most of the case law cited in appellants' opening brief addressing the level of specificity needed to survive a facial challenge for vagueness. They instead urge the Court to apply a heightened standard of review, ask rhetorical questions, and posit hypothetical situations about how the statutes at issue might be implemented. However, a statute may not be facially invalidated for vagueness simply because there may be difficulty in determining whether some marginal or hypothetical act is covered by its language.

In the end, respondents cannot reconcile their position with long-established precedent which holds that mathematical certainty is not required to satisfy a vagueness challenge. Considered under the proper legal standard, the challenged statutes provide sufficient detail on what conduct is prohibited. Respondents' facial challenge was improperly sustained below, and must be reversed on appeal.

I. THE PROPER STANDARD OF REVIEW FOR THE FACIAL VAGUENESS CHALLENGE IS THE STRICT "VOID IN ALL APPLICATIONS" TEST.

In their opening brief, appellants urged that the instant facial challenge be examined under the strict "void in all applications" test articulated in *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126: a statute is not invalid unless it "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." (Appellants' Opening Brief ["AOB"] at p. 6.) Appellants acknowledged that a more lenient test of whether a statute conflicts with constitutional principles in "the generality or great majority of cases" also exists, but noted this Court's restriction of that more lenient test to First Amendment and abortion cases. (*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"].) (AOB at pp. 6-7.)

Respondents disagree with the application of the strict "void in all applications" test, and urge the Court to employ the more lenient "generality of cases" standard. (Respondents' Brief ["RB"] at p. 26.) In respondents' view, because the instant statutes purportedly "impinge upon conduct protected by the Second Amendment and levy criminal sanctions for their violation, the challenged provisions should be confirmed invalid if they are vague in even the 'generality of cases.'"[1] (RB at p. 25.)

Respondents urge this Court to apply an incorrect standard of review. Penal statutes in general are not subject to the more lenient standard, and the fact that the Second Amendment is supposedly "implicated" is irrelevant. Indeed, as demonstrated below, the more rigorous standard is routinely applied to facial challenges involving firearms rights, a fact ignored by respondents. Respondents must meet the rigorous "void in all applications" test to successfully invalidate the statutes.

A. The "Void in All Applications" Test Is Appropriate for Use in Firearms Cases

Respondents acknowledge that in *United States v. Salerno* (1987) 481 U.S. 739, 745 the United States Supreme Court held that a "facial challenge to a legislative act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under

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[1] By suggesting that this Court "confirm" that the challenged statutes are invalid, respondents fail to accurately state the Court's role in this appeal. Because the interpretation of a statute and the determination of its constitutionality are questions of law, this Court applies a de novo standard of review, and it not merely "confirming" the ruling of the trial court. (*Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 90.) Furthermore, as the plaintiffs and parties seeking summary adjudication, respondents continue to bear the burdens of persuasion and production.

which the act would be valid." (RB at p. 27.) But respondents maintain that the test articulated in *Salerno* "is simply not the appropriate test for *vagueness* challenges to laws that impinge upon constitutionally protected conduct." (*Ibid.*) To respondents, "laws that abut upon any constitutionally protected freedom" should be treated under the more lenient "generality of cases" standard articulated in *Kolender v. Lawson* (1983) 461 U.S. 352. (RB at pp. 20, 25.) And respondents believe that following *Heller*[2] and *McDonald*,[3] "the Second Amendment is deserving of protections similar to the First Amendment." (RB at p. 20.) The positions staked out by respondents are legally unsupportable.

B. *Heller* and *McDonald* Did Not Foreclose State Regulation of Firearms

It is true that a sea change in Second Amendment jurisprudence occurred in 2008 with the *Heller* decision. In *Heller*, the Supreme Court recognized that the Second Amendment[4] conferred an individual, as opposed to a collective, right. At issue in *Heller* were District of Columbia laws making it a crime to carry an unregistered firearm and prohibiting the registration of handguns. Considering the right of self-defense to be an inherent and central component of the Second Amendment, the Supreme Court rejected the argument that the Second Amendment's right to keep and bear arms was simply a means of preserving the militia. Instead, the Court concluded that the Second Amendment confers an individual right to keep and bear arms. The Court then held that the "District's ban on

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[2] *District of Columbia v. Heller* (2008) 554 U.S. 570.

[3] *McDonald v. City of Chicago* (2010) ___U.S. ___, 130 S. Ct. 3020.

[4] The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." (U.S. Const., amend. II.)

handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." (*Heller*, *supra*, 554 U.S. at p. 635.)

But the Court in *Heller* took pains to note that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." (*Heller*, *supra*, 554 U.S. at p. 626.) Although a complete ban on the possession and use of handguns for self-defense in the home was not reconcilable with the Second Amendment, the same could not be said for other restrictions, including "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, *or laws imposing conditions and qualifications on the commercial sale of arms.*" (*Id.* at pp. 626-27, emphasis supplied.) The high court reiterated the permissibility of reasonable restrictions on firearm possession in *McDonald*, stating that incorporation of the Second Amendment into the Fourteenth Amendment "does not imperil every law regulating firearms." (*McDonald*, *supra*, 130 S. Ct. at p. 3047.) Rather, the Supreme Court indicated that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." (*Id.* at p. 3046.)

The statutes at issue clearly fall within the "reasonable firearms regulations" permitted under *Heller* and *McDonald*. Requiring an ammunition seller to require identification from the buyer at the time of the sale of ammunition principally for use in a handgun is a common-sense, reasonable regulation on ammunition sales. Law abiding citizens should not object to providing identification, and the criminal element who resists this request has no business being armed. (See Historical and Statutory Notes, 51D Pt. 1 West's Ann. Pen. Code (2012 ed.) foll. § 12060, pp. 262-263, signing message of Governor [challenged statute "reasonably regulates

access to ammunition and improves public safety without placing undue burdens on consumers"].) Far from an outright ban on a firearm or other restriction on the rights of gun-owners, the statutes at issue impose a minimal burden tailored to increase public safety.

Moreover, although respondents characterize the statutes at issue as "abutting upon Second Amendment conduct" (RB at p. 28), their challenge below was not based upon a Second Amendment violation. Rather, it was based upon alleged vagueness under the due process clause. The relevance of the Second Amendment to this case as pled is marginal, at best.

C. The "Void in All Applications" Test Has Been Repeatedly Applied to Second Amendment Cases

Respondents concede that this Court has adopted the "void in all applications" standard articulated in *Salerno* in reviewing a facial vagueness challenge. (RB at pp. 26-27, citing *Sanchez v. City of Modesto*, *supra*, 145 Cal.App.4th at p. 679.) Respondents maintain, however, that the *Salerno* standard should not be used when interpreting a firearms-related statute due to the protections afforded under the Second Amendment. (RB at p. 27.) But respondents cite no cases holding that *Salerno* should not be used in a firearms-related case. And other courts have soundly rejected respondents' contention, and have routinely applied the *Salerno* "void in all applications" test in cases involving statutes related to guns. In fact, five federal circuits have applied the *Salerno* formulation in cases raising facial challenges under the Second Amendment since *Heller* and *McDonald* were decided. (See *GeorgiaCarry.Org, Inc. v. Georgia* (11th Cir. 2012) 687 F.3d 1244, 1260-61 [plaintiffs "must show that the Carry Law is unconstitutional in all applications to prevail in their facial challenge"]; *United States v. Decastro* (2d Cir. 2012) 682 F.3d 160, 163 [a facial challenge requires plaintiff "to establish that no set of circumstances exists under which the statute would be valid"]; *United*

States v. Tooley (4th Cir. 2012) (per curiam) 468 Fed.Appx. 357, 359 [claimant "must establish that no set of circumstances exists under which the Act would be valid"]; *United States v. Bena* (8th Cir. 2011) 664 F.3d 1180, 1182 [claimant "must establish that no set of circumstances exists under which [the act] would be valid"]; *United States v. Barton* (3d Cir. 2011) 633 F.3d 168, 172 [a facial challenges requires showing "that the law is unconstitutional in all of its applications"]; cf. *Hightower v. City of Boston* (1st Cir. 2012) __ F.3d __, 2012 WL 3734352, p. *11, fn. 13 [applying "refinement" of the *Salerno* formulation which asks if the statute has a "plainly legitimate sweep"].)

The repeated use of the "void in all applications" standard by federal courts in facial challenges involving the Second Amendment indicates that it is the appropriate standard to be applied here.[5]

D. The Statutes Survive Facial Challenge Under Either Standard

As explained above, this Court should apply the "void in all applications" standard in considering the facial challenge presented in this case. As noted in appellants' opening brief, in the superior court respondents expressly conceded that one ammunition cartridge, the .25 automatic, is used *exclusively in pistols*, and neither respondents nor appellants are aware of any rifle which uses this type of cartridge. (AOB at

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[5] Respondents suggest that the challenged statutes have no mens rea requirement, and suggest that this fact makes it appropriate for the lesser standard to apply. (RB at p. 19.) Not so. The statutes at issue are not strict liability statutes. Although they do not explicitly state a required mental state, and merely indicate that their violation is a misdemeanor, it is clear that a mental state is required. (See Penal Code, § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"]; see also *People v. Valenzuela* (2001) 92 Cal.App.4th 768, 775 [mens rea requirement "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence"].)

p. 9, citing JA XI 2893.) The existence of even one concededly valid application of the statutes at issue is fatal to respondents' case, as it demonstrates at least one application where the statutes are not void. (See *Pacific Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180-181 [holding that the plaintiff must establish that the challenged statute is invalid in all applications].)

Of course, the record below contains much more than one example of where the challenged definition could be validly applied. The ammunition expert retained by respondents conceded below 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, in deposition testimony offered below, fifteen different cartridges of ammunition were identified by plaintiffs as cartridges that were used more often in handguns than in rifles. (JA VII 2175-77.) In addition to these concessions by respondents, the record contains unrebutted 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.) Thus, there are ample examples in the record to rebut respondents' claims under the governing "void in all applications" test.

But the statutes challenged here survive even under the more lenient "generality of cases" standard suggested by respondents. (RB at p. 25.) The burden of demonstrating that statutes are unconstitutionally vague "in the generality or great majority of cases" has been described as a "heavy burden" for a litigant to meet. (*Coffman Specialties, Inc. v. Department of Transp.* (2009) 176 Cal.App.4th 1135, 1145.) The contention that a reasonable person cannot understand what is meant by ammunition "principally for use" in handguns is contrary to both the record and to

common sense. In addition to the examples cited above, the record in this case indicates that ammunition sellers split their stock into two main categories: "handgun" ammunition and "rifle" ammunition. (See JA IX 2306-2369.) And most commercial ammunition vendors list "handgun ammunition" as a discrete category of ammunition available.[6] (See JA IX 2367-68, 2370-71, and 2373.) In fact, in the superior court, respondents expressly conceded that many ammunition vendors market or brand "some ammunition as 'handgun ammunition.'" (JA XI 2897.) Thus, it seems clear that there is a large category of ammunition for which there is little, if any, dispute about whether it is "principally for use in handguns."

II. THE CHALLENGED STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE

Respondents' chief complaint appears to be that there is "no official list" in the statutes describing what ammunition is subject to the restrictions at issue. (RB at p. 56.) To respondents, this omission constitutes a "glaring failure to provide notice to persons of ordinary intelligence as to what conduct is regulated by the law." (RB at pp. 56-57, emphasis deleted.)

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[6] Respondents' suggestion that appellants want to proceed on a "'cartridge-by-cartridge' basis" through "piecemeal adjudication" is incorrect. (RB at p. 30.) As indicated, the vast majority of ammunition is commonly divided into categories of "rifle" and "handgun." If a challenge is brought regarding a specific application of the statutes to a certain type of ammunition, that would simply be a classic as-applied challenge, not improper "piecemeal" litigation. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069,1084 [an as-applied challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied"]; *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 48-49 ["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 presents 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"].)

Consequently, respondents assert that the law is unconstitutionally vague because "it provides neither individuals nor law enforcement personnel with the vital information they need to determine what ammunition might be covered by [the statutes] and to conform their behavior to the law." (RB at p. 38.)

But respondents only reach this conclusion by ignoring the cases cited in appellants' opening brief which establish that "mathematical precision in the language of a penal statute is not a sine qua non of constitutionality." (AOB at p. 13, citing *In re M.S.* (1995) 10 Cal.4th 698, 718 [citations and internal quotations omitted].) It is clear that the statutes at issue provide sufficient detail to pass constitutional muster.

A. Neither a List Nor Mathematical Certainty Is Required

The suggestion that an "official list" is needed for the statutes to be constitutional is plainly wrong. The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of "life, liberty, or property without due process of law," as assured by both the federal Constitution (U.S. Const., amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7). In general, "the void-for-vagueness doctrine requires that a penal statute 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.) "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." (*Jordan v. DeGeorge* (1951) 341 U.S. 223, 231-32.) The California Supreme Court has opined that under both the state and federal Constitutions, due process of law in a penal context requires two elements: a criminal statute must "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for

police enforcement and for ascertainment of guilt." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567 [citations and internal quotations omitted].)

The fact that 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.) As the United States Supreme Court has emphasized,

> few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

(*Boyce Motor Lines v. United States* (1952) 342 U.S. 337, 340.)

"[I]t is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited." (*People v. Deskin* (1992) 10 Cal.App.4th 1397, 1400.) Put another way, "a criminal statute does not need to provide an express or explicit list of prohibited conduct with scientific precision, however much we might think it helpful." (*Lock v. State* (Ind. 2012) 971 N.E.2d 71, 75.) Accordingly, a statute "cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." (*People v. Morgan* (2007) 42 Cal.4th 593, 606, citing *Walker v. Superior Court* (1988) 47 Cal.3d 112, 143.)

B. "Principally for Use in a Handgun" Is a Sufficiently Definite Standard

Respondents do not claim the individual words of the challenged definition are beyond comprehension; they argue instead that because each person must "consider and rely on their subjective experiences" to determine if ammunition is "principally for use" in handguns, it is too

vague to be enforced. (RB at p. 33.) To respondents, because "each person" may have a "different understanding of a law's meaning" it is impossible for "persons of ordinary intelligence to comply with the law" and law enforcement is left with "virtually complete discretion" in enforcing it. (*Ibid.*) This facile analysis must be rejected.

Fundamentally, as explained above, due process does not require that a statute contain a list of all if its applications. A substantial number of penal statutes use non-mathematical descriptions for prohibited conduct.[7] Statutes like these have been found to be sufficiently descriptive to satisfy the standards applied in a vagueness challenge. For example, when the California Supreme Court found that the requirement in the definition of kidnapping that the victim be carried a "substantial distance" was not unconstitutionally vague, it rejected an argument very similar to that advanced by respondents here:

> "The law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,' 'substantial,' and the like. Indeed, a wide spectrum of human activities is regulated by such terms: thus one man may be given a speeding ticket if he overestimates the 'reasonable or prudent' speed to drive his car in the circumstances (Veh. Code, § 22350), while another may be incarcerated in state prison on a conviction of willful homicide if he misjudges the 'reasonable' amount of force he may use in repelling an assault. As the Supreme Court

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[7] Notably, numerous provisions in the California Penal Code, along with hundreds of other California statutes, use words like "principally," "chiefly," and "primarily" to define prohibited conduct, all without giving rise to vagueness concerns of the sort alleged by respondents. (See, e.g., Pen. Code, § 453, subd. (b)(2) ["no device commercially manufactured primarily for the purpose of illumination shall be deemed to be an incendiary device"]; Pen. Code, § 635 [criminalizing manufacture of "any device which is primarily or exclusively designed or intended for eavesdropping"]; Pen. Code, § 12022.2 [criminalizing possession of ammunition "designed primarily to penetrate metal or armor"].)

> stated in *Go–Bart Importing Co. v. United States* (1931) 282 U.S. 344, 357, 'There is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissively vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1128-1129.)

(*People v. Morgan*, *supra*, 42 Cal.4th at p. 606.) Indeed, language substantially similar to the "principally for use" definition at issue here has been upheld in cases construing drug paraphernalia and firearms statutes. (See, e.g., *Posters 'N' Things, Ltd. v. United States* (1994) 511 U.S. 513, 520-521 ["primarily intended . . . for use" drug paraphernalia law not unconstitutionally vague where language is "to be understood objectively and refers generally to an item's likely use"]; *Richmond Boro Gun Club, Inc. v. City of New York* (2d Cir. 1996) 97 F.3d 681, 684-686 ["designed for" assault weapon law not facially vague where "persons have plain notice of the applicability of the law to [a] core group of weapons"].) The common thread in these cases is that, where the statutes had at least some valid applications, courts have refused to invalidate them on their face. (See, e.g., *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 495, fn. 7, 502 [language of the challenged ordinance was "sufficiently clear to cover at least some of the items that [Plaintiff] sold," [a plaintiff] "must prove that . . . no standard of conduct is specified at all"].)

Jurisprudence from the Supreme Court of the United States likewise provides many examples of penal statutes that are not lists or mathematical equations, and also require application of some subjective judgment to interpret, but pass constitutional muster for vagueness. In *Holder v. Humanitarian Law Project* (2010) __ U.S. __, 130 S. Ct. 2705, for instance, the Supreme Court analyzed a statute which made it a crime to offer material support to terrorist groups. (*Id.* at p. 2720.) The statute at

issue used such generic terms as "training" or "personnel" in its description of prohibited conduct, but nonetheless was found to not be unconstitutionally vague:

> As a general matter, the statutory terms at issue here are quite different from the sorts of terms that we have previously declared to be vague. We have in the past "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." [*United States v. Williams*, 553 U.S. 285, 306, 128 S.Ct. 1830 (2008)]; see also *Papachristou v. Jacksonville*, 405 U.S. 156, n. 1, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (holding vague an ordinance that punished "vagrants," defined to include "rogues and vagabonds," "persons who use juggling," and "common night walkers" (internal quotation marks omitted)). Applying the statutory terms in this action—"training," "expert advice or assistance," "service," and "personnel"—does not require similarly untethered, subjective judgments.

(*Ibid.*) The Court concluded that "perfect clarity and precise guidance have never been required" of a penal statute. (*Ibid.*)

Under the governing law, respondents' observation that each person must bring their own understanding of the meaning of the terms of the statute does not establish that a statute is unconstitutionally vague. Myriad statutes require "interpretation" based upon "common usage and understanding" yet have been upheld against vagueness challenges. (*People v. Deskin*, *supra*, 10 Cal.App.4th at p. 1400.) Based upon the law, as well as the record presented to the court below, it is beyond reasonable dispute that the definition challenged in this case provides a standard of conduct and the fact that borderline cases might arise if the statute is ever improperly applied does not render it unconstitutionally vague on its face.[8]

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[8] The Court should not credit respondents' assertion that law enforcement officials will have "unbridled discretion" to interpret and enforce the challenged statutes. Respondents provided no admissible

(continued...)

C. Respondents' Hypothetical Examples and Rhetorical Questions Do Not Establish That the Terms Are Unconstitutionally Vague

After conceding that "the individual words of the statute do not necessarily create confusion" (RB at p. 35, emphasis deleted) respondents resort to offering many hypothetical examples and rhetorical questions about the meaning of "principally for use" in handguns. (RB at pp. 35-37.) But this flurry of speculation fails to obscure the point that "a statute is not void simply because there may be difficulty in determining whether some marginal or hypothetical act is covered by its language." (*People v. Morgan*, *supra*, 42 Cal.4th at p. 606, citing *People v. Ervin* (1997) 53 Cal.App.4th 1323, 1329.) And "the mere fact that close cases can be envisioned" does not "render[ ] a statute vague." (*United States v. Williams*, *supra*, 553 U.S. at pp. 305-306.) Moreover, on a facial challenge for vagueness, "a court will not consider every conceivable situation which might arise under the language of the statute *and will not consider the question of constitutionality with reference to hypothetical situations*." (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1095, citing *In re Cregler* (1961) 56 Cal.2d 308, 313, italics supplied.)

(...continued)
evidence of this assertion in the court below, but instead offered the conclusory assertions of two law enforcement officers, one of whom admitted that he made no attempt to research or otherwise determine what ammunition might be covered by the challenged definition, and that he leaves enforcement of firearms laws at gun dealers and ammunition vendors to the California Department of Justice. (See JA Vol. VIII 2206-2207, 2239 [State Supp. UMF No. 6-7 & 13-14]; see also JA Vol. IX 2380-2381, 2396-2397 [State's Objections to Evidence Nos. 1-8, 80-86].)

D. Respondents' Reference to Failed Legislation Is Irrelevant

In their brief, respondents point to two abortive pieces of legislation related to handgun ammunition and contend that these failed legislative efforts are indicia that the statutes at issue here are unconstitutionally vague. (RB at pp. 44-46.) Neither example is relevant to the issues before the Court.

First, respondents contend that a "previous legislative" attempt from 1994 to use the "principally for use" in handguns terminology "exposed the vagueness problem" present in the statutes at issue here. (RB at p. 44.) Respondents cite a committee report prepared in connection with Senate Bill 1276 in 1994 in which the committee commented that "it may be very difficult for dealers" to determine what handgun ammunition is, without more legislative revisions. (RB at p. 44, citing JA IV 0945.) Putting aside the general rule that unpassed bills have little value as evidence of legislative intent (*Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n* (1987) 43 Cal.3d 1379, 1396), a report on legislation considered (but not passed) *eighteen years ago* is simply not relevant to the interpretation of the statutes at issue here or the legal questions before the Court. Unless the report was considered by the legislators when voting on the statutes challenged here, it is not a proper indicator of legislative intent. (See *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1340-1341 [refusing to grant judicial notice of letter written by consultant to State Bar taxation section which sponsored the bill, in the absence of a showing that the "views expressed therein were presented to the legislators who voted on the bill"].) Indeed, the question of whether a piece of legislation "is so vague and ambiguous that it offends due process" and how its terms "should be interpreted, are legal questions for the court to decide," and the opinions of legislators or staff on these

matters are "of little to no relevance." (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1179.) This Court need not, and should not, consider the allegedly "compelling" legislative history of this failed bill from 1994 in rendering its decision here.

In a similar vein, respondents contend that "the Legislature recognized the vagueness of the Challenged Provisions" as evidenced by the attempt to "fix" them through subsequent legislation. (RB at p. 45.) To respondents, the fact that the author of AB 962 (the act challenged here) submitted legislation thereafter "to bring clarity to the definition" of handgun ammunition by proposing a list of cartridges covered "represents an acknowledgment by the Legislature" that the challenged statutes failed to identify the ammunition they regulate. (RB at pp. 45-46.)

Respondents' reliance on an individual legislator's unsuccessful attempt to enact a change in the statutes is unavailing. First, the significance of legislation that has not passed is of dubious value for any purpose. (See *California Highway Patrol v. Superior Court* (2006) 135 Cal.App.4th 488, 506, fn. 13 ["[c]omments made by an individual legislator . . . about unpassed legislation have little value as evidence of legislative intent behind the statute the legislation sought to amend"].) Second, the fact that the Legislature might have chosen another method to describe the prohibited conduct at issue is legally, and logically, irrelevant to the issue of the constitutionality of what the Legislature actually did do. As the United States Supreme Court has noted, legislation is not rendered unconstitutionally vague simply because "Congress might, without difficulty, have chosen 'clearer and more precise language' equally capable of achieving the end which it sought . . . ." (*United States v. Powell* (1975) 423 U.S. 87, 94, quoting *United States v. Petrillo* (1947) 332 U.S. 1, 7.) Finally, and most significantly, the legal issue of whether the statutes are vague in a *constitutional* sense is a legal question for the Court to decide.

(See *County of Yolo v. Los Rios Community Coll. Dist.* (1992) 5 Cal.App.4th 1242, 1257 [statutory interpretation is the court's responsibility].)

This case cannot be decided based on examining old, never-passed bills, or by parsing legislative attempts to improve upon the current statutory scheme. These arguments are merely a distraction from the actual issue presented here, namely, whether the challenged statutes are void in all applications. As demonstrated above, the statutes are not unconstitutionally vague, and the judgment below should be reversed.

III. THE TRIAL COURT'S FAILURE TO TAX COSTS RELATED TO THE WITHDRAWN MOTION FOR PRELIMINARY INJUNCTION WAS AN ABUSE OF DISCRETION WHICH SHOULD BE REVERSED BY THIS COURT

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 the motion was withdrawn, it was as if it "had not been made." The motion was unnecessary in the first instance because the challenged statutes had not yet even taken effect at the time of filing. And contrary to respondents' revisionist suggestion that the filing of the motion was a "catalyst" for resolution of the case (RB at p. 59), the motion was so defective that respondents were admonished by the lower court to withdraw it lest it be denied due to its many flaws. (JA XIV 4163.) On this record, the State respectfully requests, in the event that the judgment is affirmed on the merits, 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.

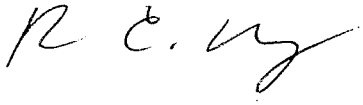
CONCLUSION

For the reasons stated above, appellants respectfully ask that the judgment entered below be reversed, and that judgment in favor of appellants be entered.

Dated: September 26, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
PETER A. KRAUSE
Supervising Deputy Attorney General



ROSS C. MOODY
Deputy Attorney General
Attorneys for Appellants State of California, Kamala D. Harris, and the California Department of Justice

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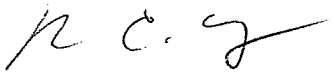
CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANTS' REPLY BRIEF uses a 13 point Times New Roman font and contains 5,375 words.

Dated: September 26, 2012

KAMALA D. HARRIS
Attorney General of California



ROSS C. MOODY
Deputy Attorney General
Attorneys for Appellants

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 September 26, 2012, I served the attached **APPELLANTS' REPLY 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 September 26, 2012, I served one (1) copy of the **APPELLANTS' REPLY BRIEF** on the California Supreme Court **electronically** by sending the copy to the Supreme Court's electronic notification address.

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 September 26, 2012, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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