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August 16, 2016

Mr. Frank A. McGuire
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***Sheriff Clay Parker, et al. v. State of California, et al.*, Case No. S215265**
Response to Defendants-Appellants' Supplemental Letter Brief

Dear Mr. McGuire:

Per this Court's July 20, 2016 order, Plaintiffs-Respondents Sheriff Clay Parker, et al. ("Parker") hereby respond to the supplemental letter brief filed by Defendants-Appellants State of California, et al. (the "State") "addressing whether the passage of Senate Bill No. 1235 (2015-2016 Reg. Sess.) has rendered moot the claims raised by the plaintiffs in this matter."

The parties are unified in their understanding that this case may soon become moot. Parker responds to the State's mootness analysis only to clarify one minor point concerning the scope of his claims. Although it is too soon to decide the disposition of a case that is not yet moot, Parker nonetheless responds to the State's arguments requesting a limited reversal. If Parker's claims are indeed mooted, dismissal would be appropriate and consistent with this Court's treatment of cases that have already been ruled upon by an appellate court.

I. PARKER'S CHALLENGES TO FORMER PENAL CODE SECTIONS 12060, 12061, AND 12318 ARE ALL ON TRACK TO BECOME MOOT

As explained in the parties' supplemental letter briefs, this case will soon be moot unless the proposed veto referendum for Senate Bill 1235 qualifies for the ballot and Proposition 63 is rejected by the voters. Although the parties agree on this issue, Parker responds to clarify one point concerning the State's description of his claims.

Recall that Parker challenged former Penal Code sections 12060, 12061, and 12318.[1] (Joint Appendix ("J.A."), vol. I 0001; Resp. Br. at p. 5.) The State's supplemental brief describes Parker's

[1] All further section citations are to the Penal Code unless otherwise noted.

claims using the renumbered[2] sections—indicating that Parker challenged sections 16650, 30312, and 30345 through 30365. (State's Suppl. Letter Br. at p. 2.) As the State suggests, renumbered sections 30312 and 30345 through 30365 simply continue former sections 12061 and 12318, sections that were indeed challenged in this case. Renumbered section 16650, however, continues portions of both former section 12060 (which Parker did challenge) and former section 12323 (which he did not). (Resp. Br. at p. 5.) Accordingly, Parker's claims are more accurately described as a challenge to section 16650 *only* to the extent that this section recodifies former section 12060. To the extent that section 16650 also recodifies former section 12323, subdivision (a), Parker's claims did not challenge that provision.[3] (J.A., XV 4271.) Former section 12323(a) was not enjoined by the trial court, and that renumbered provision remains enforceable, regardless of the outcome of this lawsuit.

In any event, Parker's claims concerning each of the challenged provisions are on track to become moot, barring intervention by the voters.

II. DISMISSAL IS APPROPRIATE IF THE CASE IS MOOTED

Should Parker's claims indeed become moot, a simple dismissal would be the proper mechanism for disposing of this case. Although such a determination is premature, the state nonetheless urges the Court to "dismiss this appeal and reverse the judgment as moot, with instructions to the superior court to dismiss the underlying action." (State's Suppl. Letter Br. at pp. 6-7.) But, for the reasons described below, reversal of the appellate court's decision would be inappropriate in this case.

If an event renders a controversy moot pending review by an appellate court, the appeal is ordinarily dismissed. (*Eye Dog Found v. State Bd. of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541; *Consol. Vultee A. Corp. v. United Auto. etc., Workers* (1946) 27 Cal.2d 859.) And when a case is pending review before this Court, specifically, it will be dismissed "when a supervening event renders the case moot for any reason, e.g., . . . when the court orders review to construe a statute that is then repealed before the court can act." (Advisory Com. com., Cal. Rules of Court, rule 8.528, subd. (b).) While courts of appeal sometimes order a limited reversal of a trial court's judgment where a case has been dismissed as moot, that is not the normal practice of this Court. Nothing in the California Rules of Court governing the proper disposal of cases awaiting Supreme Court review contemplates the reversal of an appellate decision if the case becomes moot. (See *ibid.*; see also Cal. Rules of Court, rule 8.528.)

Indeed, this Court normally dismisses—but does not reverse—cases that become moot pending review. (See, e.g., *People v. Saleem* (2010) 115 Cal.Rptr.3d 535 [dismissing review of Court of Appeal decision finding that a criminal law regarding body armor was unconstitutionally vague because, after review was granted, amendments to the law mooted the lawsuit]; *Pack v. Super. Ct.* (*City of Long Beach*) (2012) 146 Cal.Rptr.3d 271 [dismissing review on mootness grounds after the challenged

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[2] Effective January 1, 2012, California's dangerous weapons statutes were non-substantively reorganized and renumbered by Senate Bill No. 1080 (2009-2010 Reg. Sess.).

[3] As explained in greater detail in Parker's merits briefing, the statutes that Parker challenged reference the underlying definition of "handgun ammunition" contained in former section 12323, subdivision (a), which was enacted in 1982. But the enactment of former sections 12060, 12061, and 12318 marked the first time that the "principally for use" in handguns standard found in section 12323, subdivision (a), was employed as the *sole* mechanism for determining whether any given ammunition is restricted by California law. Accordingly, Parker focused his challenge on sections 12060, 12061, and 12318. (Resp. Br. at pp. 5-6, fn. 3; Resp. Br. at pp. 31-32, fn. 7, *Parker v. State of California* (Aug. 17, 2012) (No. F062490) 221 Cal.App.4th 340.)

ordinance was repealed]; *Kandy Kiss of Cal. v. Tex-Ellent* (2014) 175 Cal.Rptr.3d 251 [dismissing review on mootness grounds]; *Concerned Cits. for Resp. Govt. v. West Point Fire Prot. Dist.* (2012) 149 Cal.Rptr.3d 640 [same]; *People v. Price* (2010) 108 Cal.Rptr.3d 555 [same].) It is no surprise then that the cases the State cites in support of its request involved disputes that were mooted while the case was pending initial review by the Court of Appeal—not by the California Supreme Court. (State's Suppl. Letter Br. at p. 6, citing *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129; *Coal. for a Sust. Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939; *City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952.)

But even if this Court did regularly reverse appellate court judgments in mooted cases, such extraordinary relief is not warranted here. For limited reversal is generally granted to address one or more concerns not raised in this case. Specifically, such relief might be appropriate when:

> (1) The issues on appeal are rendered moot *before being fully and finally litigated by any appellate court*, (*Coal. for a Sust. Future, supra*, 198 Cal.App.4th at pp. 944-948, [reversing because the trial court judgment effectively "escaped appellate review"]; *Paul, supra*, 62 Cal.2d at pp. 131-134, [reversing where the basis for a trial court's judgment that was never fully litigated on appeal had disappeared and thus become moot]; *City of Los Angeles, supra*, 147 Cal.App.3d at p. 960 [reversing trial court judgment]);
>
> (2) It is necessary to guard against any implicit approval of a "questionable *trial court* judgment" (*Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1088, fn. 7, italics added); and/or
>
> (3) It would prevent ambiguity or confusion regarding the outcome of the case (see *Paul, supra*, 62 Cal.2d at pp. 134-135; *In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 258 ["To avoid creating confusion by simply dismissing the appeal and thereby allowing (the trial court's) order to stand, we reverse 'solely for the purpose of restoring the matter to the jurisdiction of the superior court, with directions to the court to dismiss the proceeding.' "]).

Here, the Court of Appeal fully considered and decided Parker's claims, reaching the same conclusion that the trial court reached. (*Parker v. State of California* (2013) 221 Cal.App.4th 340.) There is neither any questionable ruling nor one that evaded appellate review. And the judgment and injunction issued by the trial court, and affirmed by the Court of Appeal, make clear that only the "versions" of the statutes as challenged in this litigation are affected. (J.A., XV 4271.) If and when Parker's claims become moot, the Court of Appeal's decision will not create any ambiguity or confusion as to the outcome of the case because the judgment and injunction that it affirmed do not call into question the new versions of these statutes under either Senate Bill 1235 or Proposition 63. In fact, reversal in this context could itself cause confusion. If the otherwise valid judgment were reversed for mootness, there would be no legal impediment to prevent the State from re-enacting and enforcing the challenged provisions in their original form, despite identical statutes having been declared invalid by both the trial court and the Court of Appeal. For this reason alone, the Court of Appeal's judgment should not be reversed.[4]

[4] Further, while some courts of appeal may order a limited reversal of a trial court's judgment when a case becomes moot, it is not mandatory when the passage of legislation moots a dispute, as was the case here. (See, e.g., *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 310-311 [dismissing CEQA challenge on appeal in light of legislation exempting defendant from CEQA provisions]; *Hake v. City of Bakersfield* (1942) 49 Cal.App.2d 174, 175 [dismissing challenge to municipal parking meter ordinance where the ordinance was repealed while appeal was pending].)

Further, reversal is severe and connotes the affirmative rejection of a judgment and turns the result around. (*Norman I. Krug Real Estate Invs., Inc. v. Praszker* (1994) 22 Cal.App.4th 1814, 1823.) "To reverse a judgment, according to Webster's dictionary, means to overthrow it by a contrary decision, to make it void, to undo or annul it *for error*." (*Ibid.*, italics added, citing *Atl. Coast Line R.R. Co. v. St. Joe Paper Co.* (5th Cir. 1954) 216 F.2d 832, 833.) The drastic effect of reversal is not lessened by any provision that such reversal "does not imply approval of a contrary judgment." (See *id.* at p. 1823 [finding that the danger of reversal cannot be obviated by a provision stating that "reversal 'is pursuant to settlement and does not constitute either approval or rejection of the trial court's judgment.' "].) As a result, if a case is reversed after dismissal on mootness grounds, the winning litigant—whose arguments on the merits prevailed—now loses, and the losing litigant—whose arguments were rejected—suddenly wins. (*Ibid.*)

Reversal of the appellate decision would be particularly contrary to the public interest and undermine the legitimacy of the judicial system. (See *State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 60, 62 [denying on public interest grounds the parties' joint motion to dismiss upon the stipulation that the opinion of the court of appeal remain unpublished which then would have "effectively eliminate(d) a precedent-setting appellate decision"].) Not only would reversal expunge an opinion of the Court of Appeal, it would create an end-run for the State to reverse an adverse appellate opinion through its own actions—a result that the United States Supreme Court would not countenance. (*U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership* (1994) 513 U.S. 18, 24 ["From the beginning we have disposed of moot cases in the manner *most consonant to justice* . . . in view of the nature and character of the conditions which have caused the case to become moot."] quotations omitted, italics added.)

The Court should reject the State's invitation to reverse the decisions of both the trial court and the Court of Appeal as a result of mootness stemming solely from legislation that the State enacted to circumvent those decisions.

III. CONCLUSION

The parties are in agreement that this case will soon be moot unless a veto referendum for Senate Bill 1235 qualifies for the ballot and the voters reject Proposition 63. But it is too soon to decide the proper disposition of this case. Should Parker's claims become moot, pursuant to California Rules of Court, rule 8.528, this Court should dismiss review, allowing the Court of Appeal opinion to remain unpublished unless this Court orders otherwise. (See Cal. Rules of Court, rule 8.528, subd. (b)(3).)

Sincerely,
Michel & Associates, P.C.

Clinton B. Monfort

DECLARATION OF SERVICE

I, Laura L. Quesada, 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, California 90802.

On August 16, 2016, I served the foregoing document(s) described as:

RESPONSE TO DEFENDANTS-APPELLANTS' SUPPLEMENTAL LETTER BRIEF

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

___ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.

_X_ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Executed on August 16, 2016, 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.

___ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

Laura L. Quesada

SERVICE LIST

Sheriff Clay Parker, et al. v. State of California, et al.
Case No. S215265

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