IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Respondents, **v.** **THE STATE OF CALIFORNIA; KAMALA D. HARRIS,** in her official capacity as Attorney General for the State of California; **AND THE CALIFORNIA DEPARTMENT OF JUSTICE,** Defendants and Appellants.	Case No. S215265

Fifth Appellate District, Case Nos. F062490, F062079
Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeffrey Y. Hamilton, Judge

RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEF OF NATIONAL SHOOTING SPORTS FOUNDATION, INC.

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I. INTRODUCTION

Amicus National Shooting Sports Foundation, Inc. ("NSSF"), presents a comprehensive brief in support of Respondents' facial vagueness challenge to the provisions of Assembly Bill 962 ("AB 962"). While Respondents largely agree with Amicus's varied arguments, they write separately to respond to and clarify a few points. Specifically, Respondents seek to draw the Court's attention to NSSF's discussion of whether the Court should infer a scienter requirement to foreclose application of the more-lenient "generality of cases" standard.

As Amicus NSSF explains, the State's attempt to inject a knowledge requirement into the Challenged Provisions, without support from the statutory language or legislative history, must be rejected. (NSSF Amicus Br. at pp. 32-35.) Contrary to the State's claims, the general intent provision of Penal Code section 20 is necessarily excluded from the Challenged Provisions because the Legislature is presumed to have acted purposefully and intentionally when it included scienter language in portions of AB 962, while excluding it from others. (*Id.* at p. 33; NRA Amicus Br. at p. 8 fn. 3.)

Further, the State relies entirely on inapposite case law to support its claim that the Challenged Provisions require intent because they are not public welfare offenses. (NSSF Amicus Br. at pp. 34-35, citing Appellants'

Br. at p. 6.) And it altogether fails to address the various factors articulated in *In re Jorge M.* that frame that analysis. When properly viewed in light of those factors, however, it is clear that the Challenged Provisions are to be read without inferring mens rea.

But ultimately, it makes little difference whether the Court infers scienter. For, as Respondents describe in their principal briefing, the three factors that trigger the "generality of cases" standard are not to be mechanically applied—they are factors to be weighed. (Respondents' Br. at pp. 16-17.) As Amicus Curiae National Rifle Association ("NRA") explains, "[d]ue process protection is at its peak when unduly vague laws subject violators to criminal penalties or burden constitutionally protected conduct," *without regard to whether mens rea is an element of the crime.* (NRA Amicus Br. at pp. 6-7 & fn. 3 citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 498-499 (*Hoffman Estates*); Respondents' Br. at pp. 16-17, 31.) As such, "when a plaintiff facially attacks an allegedly vague law that 'reaches "substantial amount of constitutionally protected conduct," ' especially one that 'imposes criminal penalties,' the Supreme Court has expressly rejected the notion that a law must be vague 'in all of its possible applications.' " (NRA Amicus Br. at p. 6, quoting *Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8, quoting

Hoffman Estates, *supra*, 455 U.S. at p. 497 and *City of Chicago v. Morales* (1999) 527 U.S. 41, 55 (plur. opn. of Stevens, J.).)

II. NSSF RIGHTLY ARGUES THAT SCIENTER CANNOT BE INFERRED

A. The Inference of a Knowledge Requirement Is Excluded from the Challenged Provisions by Necessary Implication

Amicus NSSF raises several apt arguments rebutting the State's claims that the Court should imply a scienter requirement despite the Challenged Provisions' failure to include one. Of particular importance is Amicus's observation that because various other provisions of AB 962 not challenged in this case expressly include a knowledge requirement, such cannot be inserted into the laws at issue here. (NSSF Amicus Br. at pp. 33-34.) Respondents agree with NSSF's analysis.

"[T]he office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ." (Code Civ. Proc., § 1858.) It is not the place of the courts to "rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed." (*Cornette v. Dept. of Transp.* (2001) 26 Cal.4th 63, 73-74, citing *People v. Gardelely* (1996) 14 Cal.4th 605, 621-622.) Particularly "[w]hen one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the

Legislature intended to convey a different meaning." (*Ibid.*; see also *Clay v. United States* (2003) 537 U.S. 522, 528-529 ["When '[a legislature] includes particular language in one section of a statute but omits it in another section of the same Act,' . . . 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (quoting *Russello v. United States* (1983) 464 U.S. 16, 23)].)

Again, one may be charged with violating the Challenged Provisions even if he or she does not know whether the ammunition at issue is actually "handgun ammunition" as defined by law. For, the Challenged Provisions do not by their express terms limit criminal liability to those instances in which the accused knew the nature of the ammunition he or she was transacting in.[1] But, as Amicus NSSF observes, several statutes adopted or

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[1] See, e.g., Pen. Code, § 30312, subd. (a) ("[T]he delivery or transfer of ownership of handgun ammunition may only occur in a face-to-face transaction with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee."); Pen. Code, § 30350 ("A vendor shall not sell or otherwise transfer ownership of, offer for sale or otherwise offer to transfer ownership or, or display for sale or display for transfer of ownership of any handgun ammunition in a manner that allows that ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or an employee of the vendor."); Pen. Code, § 30352, subd. (a) ("[A] vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly recording the [required] information."); Pen. Code, § 30355 ("[T]he records required by this article shall be maintained on the premises of the vendor for a period of not less than five years from the date of the recorded transfer.").

amended by AB 962 *do* expressly include scienter elements of varying degrees. (NSSF Amicus Br. at p. 33.) For instance, Penal Code section 30300, subdivision (a)(2) (former section 12316, subdivision (a)(1)(B)) prohibits the sale of ammunition designed and intended for use in a handgun to persons under 21, unless a vendor *reasonably believes* the ammunition is being acquired for use in a rifle. (Penal Code, § 30300(a)(2), italics added.) And section 30306, subdivision (a) (former section 12317, subdivision (a)) prohibits any person from transferring "any ammunition to any person who he or she *knows or using reasonable care should know* is prohibited from owning, possessing, or having under custody or control, any ammunition or reloaded ammunition." (Italics added.)

The fact that the Legislature included a knowledge requirement in various laws it passed simultaneously with the Challenged Provisions is telling. For, "[t]he specification of scienter in some, but not all, of AB 962's offense provisions evinces legislative intent to require different levels of culpability, ranging from strict liability to actual knowledge . . . ." (NSSF Amicus Br. at p. 33.)

B. The Possession of Deadly Weapons Cases the State Relies on Are Distinguishable

Amicus NSSF next characterizes as inapposite those cases the State cites to support its claim that a knowledge element must be required. (NSSF

Amicus Br. at p. 34, citing Appellants' Reply Br. at p. 6.) Again, Respondents agree with Amicus's assessment.

As an initial matter, the State misleadingly suggests that because the Challenged Provisions are more akin to bans on deadly weapons laws than to other public welfare offenses, they too must include a scienter element. (Appellants' Reply Br. at p. 6 ["The challenged statutes are more analogous to *other* legislative prohibitions or restrictions on dangerous items, for which a knowledge element typically has been required."], italics added.) But the Challenged Provisions, unlike the laws the State references, do not prohibit the possession or sale of dangerous and unusual items, like cane guns, flechette darts, or short-barreled shotguns. They place regulations, albeit significant ones, on the *sale or transfer of popular and otherwise lawful ammunition*. The State's attempt to equate these laws is wide of the mark.

And, as Amicus NSSF correctly observes, the knowledge standards articulated as to each of those possession bans make little sense as applied to the sales regulations enacted by AB 962. (NSSF Amicus Br. at p. 34.) In each case the State cites where a deadly weapons statute was interpreted to include a knowledge requirement, such interpretation followed naturally in light of the factors that give rise to an implication that scienter must be

required.[2]

For instance, in *In re Jorge M.* (2000) 23 Cal.4th 866, this Court recognized that, on balance, it is clear the legislature intended to require some level of intent when it banned the possession of unregistered "assault weapons." (*Id.* at p. 887.) Applying the various factors, the Court reasoned:

> Section 20's *generally applicable presumption* that a penal law requires criminal intent or negligence, the *severity of the felony punishment* imposed for violation of section 12280(b), and the *significant possibility innocent possessors would become subject to that weighty sanction* were the statute construed as dispensing entirely with mens rea, convince us section 12280(b) was not intended to be a strict liability offense.

(*Ibid.*, italics added.) But because the challenged law addressed what the legislature considered a *grave public safety threat*, "together with the *substantial number of prosecutions to be expected* under it and the potential *difficulty of routinely proving actual knowledge* on the part of defendants," *ibid.* (italics added), the Court found that requiring actual knowledge was

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[2] Respondents discussed these factors at length in Respondents' Brief. (Respondents' Br. at pp. 27-28, citing *In re Jorge M.*, *supra*, 23 Cal.4th at p. 873.) Again, those factors include: (1) legislative history and context; (2) any general provision on mens rea; (3) the severity of the punishment; (4) the seriousness of harm to the public that may be expected to follow from the forbidden conduct; (5) the defendant's opportunity to ascertain the true facts; (6) the difficulty prosecutors would have in proving a mental state for the crime; and (7) the number of prosecutions to be expected under the law. (*Ibid.*)

equally unintended. On balance, because effective prosecution of the law would not be hindered by a "reasonably should have known" standard of intent, the Court construed the law to require "knowledge of, or negligence in regard to, the facts making possession criminal." (*Ibid.*)

Similarly, in *People v. King* (2006) 38 Cal.4th 617, *People v. Rubalcava* (2000) 23 Cal.4th 322, and *People v. Westlund* (2001) 87 Cal.App.4th 652, each reviewing court was faced with a statute that imposed significant felony penalties for the possession of certain arms. And while innocent violations would be sparse because the characteristics making the arms at issue in those cases unlawful were easily identifiable by reference to their inherent physical features, imputing some knowledge requirement in light of those steep penalties would not unduly hinder effective prosecutions. *See People v. King*, *supra*, 38 Cal.4th at pp. 627-628 [ban on possessing "short-barreled rifles,"[3] then punishable by up to five years in state prison, required actual knowledge because "[a] person possessing a short-barreled rifle, and having actually observed the weapon, necessarily knows of its shortness" and "proving a defendant's knowledge

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[3] "Short-barreled rifle" defined as a rifle having a barrel less than 16 inches in length or a rifle with an overall length of less than 26 inches. (*People v. King*, *supra*, 38 Cal.4th at p. 621-622, citing former Pen. Code, § 12020, subd. (c)(2).)

of [that] illegal characteristic generally will not be too difficult a task"]; *People v. Rubalcava*, *supra*, 23 Cal.4th at pp. 327-328, 332 [ban concealed carry of a "dirk or dagger," then punishable by imprisonment for up to one year in county jail or state prison, required the general intent to carry concealed any instrument "capable of ready use as a stabbing weapon that may inflict great bodily injury or death"]; *People v. Westlund*, *supra*, 87 Cal.App.4th at p. 658 [ban on possession of "firearm silencer," then punishable by imprisonment and/or a fine up to $10,000, required some level of knowledge that item possessed was a "silencer" because "felony offenses which bear harsh punishment are not the type of 'public welfare' offenses for which courts will readily dispense with the mens rea requirement . . . ."].

Contrast these cases with Respondents' challenge, where the same factors do not favor requiring scienter at all. The Challenged Provisions impose only misdemeanor liability punishable by imprisonment not exceeding six months and/or by fine not exceeding $1000. (Pen. Code, § 30365, subd. (a).) While not insignificant, it is simply not comparable to the penalties imposed in the deadly-weapons cases the State cites. (Appellants' Reply Br. at p. 6, citing *In re Jorge*, *supra*, 23 Cal.4th at pp. 879-880 [scienter required because felony/misdemeanor "wobbler" was punishable

by imprisonment for up to 25 years]; *People v. King*, *supra*, 38 Cal.4th at p. 623; *People v. Rubalcava*, *supra*, 23 Cal.4th at p. 327; *People v. Westlund*, *supra*, 87 Cal.App.4th at p. 658.)

What's more, requiring either actual or reasonable knowledge that one is transacting in ammunition that is "principally for use" in handguns simply defines the standard of intent in the very same terms as the impossibly vague statute. Such a construction does not make the law more definite. (NSSF Amicus Br. at p. 35, citing *People v. McCaughan* (1957) 49 Cal.2d 409, 414.) Inferring a scienter requirement would thus do nothing but create a requirement that one knows something they cannot know, resulting in a law that cannot be enforced as no one could ever harbor the requisite intent. (Respondents' Br. at p. 30.) And so, unlike the laws at issue in *Jorge*, *King*, *Rubalcava*, and *Westlund*, imputing some knowledge requirement would unduly hinder the ability to prosecute a substantial number of violators. (*Id.* at pp. 30-31.) The Court should avoid such a construction. (*Id.* at p. 31.) Certainly, it is not what the Legislature intended when it enacted AB 962.

C. The State Made Precious Little Effort to Address the *In re Jorge M.* Factors that Strongly Suggest No Scienter Requirement Should Be Inferred

It is not enough to simply point to the title and chapter in which the

statute is found and assume, as the State does, that a challenged law cannot be a public welfare offense simply because it is found alongside criminal laws found to require a mental state. (Appellants' Reply Br. at p. 6.) Instead, the courts must determine whether the factors articulated in *In re Jorge M.* counsel in favor of inferring a scienter requirement. (Respondents' Br. at pp. 27-28, citing *In re Jorge*, *supra*, 23 Cal.4th at p. 873.) As described above and in Respondents' principal brief, those factors do not point to such an interpretation here. (*Id.* at pp. 27-32.)

The State largely ignores Respondents' authority and argument on this point. And it makes no effort to argue that, upon balancing these factors, the Challenged Provisions should not be considered public welfare offenses. (Appellants' Reply Br. at pp. 5-6.) In fact, of the seven *In re Jorge M.* factors, the State references only two of them—i.e., whether the law was enacted to promote public health and safety and whether moral obloquy attaches to a violation of the law—both of which strengthen Respondents' argument that the Challenged Provisions are public welfare offenses, not weaken it.

The State simply declares that the Challenged Provisions are not like a "traffic or regulatory offense," and so should not be considered public welfare offenses. (Appellants' Reply Br. at p. 6.) But to make its argument

that the Challenged Provisions are not the sort of regulatory laws enacted to promote public health and safety, it necessarily contradicts its own statements regarding the regulatory nature of the laws. Recall, in its Opening Brief, the State claims the Challenged Provisions were enacted "in an effort to *protect public safety*" by "*regulat[ing]* the commercial sale, display, and transfer of ammunition 'principally for use' in handguns." (Appellants' Opening Br. at p. 1, italics added.) And, on reply, the State claims no Second Amendment activity is implicated because the Challenged Provisions are merely "presumptively lawful regulatory measure[s]." (Appellants' Reply Br. at p. 10, italics added.)

What's more, the State provides a non-exhaustive list of public welfare offenses that includes regulating hazardous waste, motor oil, food, and poison, but notably does *not* include criminal laws prohibiting the giving or sale of alcohol to minors. (Appellants' Reply Br. at p. 6, quoting *In re Jennings* (2004) 34 Cal.4th 254, 267. But see *People v. King*, *supra*, 38 Cal.4th at pp. 623 [including laws against furnishing alcohol to a minor on a list of public welfare offenses].) Much like laws enacted to prevent alcohol from getting into the hands of minors to prevent the alcohol-related death or serious injury of youth, AB 962 was introduced and enacted "to prevent [certain ammunition] from falling into the hands of felons or gang

members" to reduce violent crime. (Appellants' Reply Br. at p. 6.) And, further illustrating the Challenged Provisions' regulatory nature, legislative history reveals the laws' intent to "assist law enforcement in tracking down criminal purchasers."[4] Nothing in the legislative history evinces a goal to crack down on and punish ammunition retailers, as opposed to prohibited end users. While the Challenged Provisions impose on criminal sanctions, the penalty is relatively light, and "the primary purpose of the [Challenged Provisions is quite clearly] regulation rather than punishment or correction." (*People v. King*, *supra*, 38 Cal.4th at p. 623, quoting *People v. Coria* (1999) 21 Cal.4th 868, 877.)

Regarding the moral obloquy factor, the State claims that, because the law was meant to prevent access to felons or gang members, a conviction for violating it would not be free from moral obloquy. (Appellants' Reply Br. at p. 6.) This is doubtful. A violation of the law is not premised on gang members or felons *actually* accessing the ammunition transferred (conduct which might very well invite public scorn), but on the mere regulatory act of not registering even a single sale of a single cartridge

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[4] Sen. Com. on Pub. Safety, analysis of Assem. Bill No. 962, 2009-2010 Reg. Session (July 7, 2009) pp. X-Z, available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0951-1000/ab_962_cfa_20090706_155139_sen_comm.html.

of so-called "handgun ammunition." The simple failure of a store clerk to register a particular transaction is hardly a crime worthy of moral obloquy—except perhaps in the eyes of those who are philosophically opposed to civilian firearm ownership.

Even if a particular violation did encourage moral obloquy where an unregistered sale to a gang member resulted in the use of the ammunition in a violent crime, it would not invite any more scorn than similar public welfare offenses. Consider, again, state laws barring providing alcohol to minors. That prohibited conduct, in the instance that it does lead to an alcohol-related death, would invite a similar sort of public outcry. And even that crime remains strict liability, though it is arguably worse, for not every ammunition sale is a sale to an otherwise prohibited person (in fact, most are not)—but every sale of alcohol to a minor is.

For these reasons, as well as those described above and in Respondents' brief, the public welfare offense factors articulated in *In re Jorge M.* counsel against implying a scienter requirement in this case. (See also Part II.B, *supra*; Respondents' Br. at pp. 27-32.) And, accordingly, it is proper to apply the "generality of cases" standard to Respondents' facial, vagueness claim. (Respondents' Br. at pp. 1, 15-18.)

But even if the Court does find it prudent to read a scienter

requirement into the Challenged Provisions, the more lenient test must still apply because the laws levy criminal sanctions and reach a substantial amount of constitutional conduct. (Respondents' Br. at pp. 15-26, 31-32; NRA Amicus Br. at pp. 5-9 & fns. 2-3.) As described in briefs by Respondents and the NRA, the three factors are not to be mechanically construed; rather, the analysis is guided by a mix of these factors. (Respondents' Br. at pp. 16-17, 31.[5]) Casting aside the "generality of the cases" standard in this case solely on the basis that a scienter requirement could be inferred would permit courts to avoid the more lenient standard in the vast majority of cases—no matter how significantly the law impacts constitutionally protected liberties or whether criminal penalties attach. (Respondents' Br. at p. 31.) In short, the more-lenient (and well-established) facial test would cease to have any valid application.

III. CONCLUSION

For these reasons, and for the reasons raised in Respondents' Brief and the amicus curiae briefs filed in support of Respondents, this Court

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[5] See also NRA Amicus Br. at pp. 7-8 ("In *Hoffman Estates*, the Supreme Court mentioned only that 'a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.' . . . Neither Respondents nor amicus curiae contends that the absence of scienter is a factor *required* to trigger the 'generality of cases' standard.")

should affirm the reasoned decision of the majority panel of the Fifth Appellate District.

Dated: December 23, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204, subdivision (c)(1), of the California Rules of Court, I hereby certify that the attached Respondents' Brief is double-spaced, typed in Times New Roman proportionally spaced 13-point font, and the brief contains 3502 words of text, including footnotes, as counted by the WordPerfect word-processing program used to prepare the brief.

Dated: December 23, 2014 **MICHEL & ASSOCIATES, P.C.**

By: _____
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Attorneys for Plaintiffs-Respondents

DECLARATION OF SERVICE

Case: *Parker, et al., v. State of California, et al.*
No.: S215265

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, CA 90802.

On December 23, 2014, I served the attached **RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEF OF NATIONAL SHOOTING SPORTS FOUNDATION, INC.,** on the interested parties in this action by placing a true and correct copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

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, CA, 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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed on December 23, 2014, at Long Beach, California.

Laura L. Quesada

SERVICE LIST

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