*XAVIER BECERRA*
*Attorney General*

*State of California*
*DEPARTMENT OF JUSTICE*

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 323-8050
Facsimile: (916) 324-8835
E-Mail: George.Waters@doj.ca.gov

January 30, 2017

Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7203

RE: *Parker v. State of California*, No. S215265
Opposition to Request for Republication of Fifth District Court of Appeal Opinion
in Nos. F062490, F062709

Dear Chief Justice and Associate Justices:

Appellants State of California, California Department of Justice, and California Attorney General Xavier Becerra (collectively the "State"), oppose the request for republication filed by respondent California Rifle and Pistol Foundation on January 19, 2017. The Fifth District's opinion—*Parker v. State of California*, Nos. F062490 and F062709—was filed on November 16, 2013. The Court of Appeal held that several criminal statutes restricting the transfer of "handgun ammunition" were unconstitutionally vague, and therefore upheld a pre-enforcement facial challenge prohibiting enforcement of those statutes. The opinion was depublished when this Court granted review on February 19, 2014.[1] After briefing, the appeal was dismissed as moot on December 14, 2016, after both a statute and a ballot measure amended the challenged statutes. (See Sen. Bill 1235 (2015-2016 Reg. Sess.) § 4; Prop. 63, as approved by voters, Gen. Elec. (Nov. 8, 2016) [Safety for All Act of 2016].) This Court's dismissal order did not order republication.

As an initial matter, Plaintiffs' reliance on the Rule 8.1105 criteria is not appropriate. While this Court has not articulated specific criteria for "republication" of a decision, certainly the mere fact that review was granted indicates that the courts of appeal require further guidance on the issues presented. That fact would weigh against republication. Yet, any decision for

[1] The order granting review mooted the State's request for depublication filed January 6, 2014.

which review is granted would presumably meet the Rule 8.1105 criteria. Thus, reliance on that rule for republication does not provide a useful framework for analysis.

Instead, *Parker* should not be republished because the Court of Appeal made serious errors—errors that will cause confusion and uncertainty if the decision is allowed to stand as precedent—and because the appropriate resolution of a mooted appeal is reversal of the judgment with instructions to dismiss.

First, *Parker* applied the wrong constitutional standard. This Court has long held that an unconstitutionally vague criminal statute is one that is impermissibly vague in *all* applications. (*People ex re. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116; *People v. Morgan* (2007) 42 Cal.4th 593, 605-606.) *Parker* deviated from this precedent, and declared that "California's more lenient standard of review is appropriate here." (Slip. Op., p. 33.) The more lenient standard requires on a showing of unconstitutionality "in the generality or great majority of cases" to establish invalidity. (*San Remo Hotel. L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 673.)

In the past, the more lenient standard has been reserved for cases involving the First Amendment and abortion rights. (See *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679 ["there is no warrant for refusing to apply (the strict void-in-all-applications standard) outside the First Amendment overbreadth and abortion areas until a majority of the Supreme Court gives clear direction to do so"].) *Parker* uncritically extends the protection of the more lenient standard to cases that "implicate" the Second Amendment. (Slip Op., p. 31.) This uncritical expansion conflicts with federal authority and has potentially far-reaching implications. (See *District of Columbia v. Heller* (2008) 554 U.S. 570, 626-627 [laws "imposing conditions and qualifications on the commercial sale of arms" are presumptively lawful]; *Kachalsky v. County of Westchester* (2d Cir. 2012) 701 F.3d 81, 91 ["We are hesitant to import *substantive* First Amendment principles wholesale into Second Amendment jurisprudence"].) Thus, because the decision conflicts with state and federal case law, republication would cause confusion and uncertainty in these crucial areas of legal jurisprudence.

Second, *Parker* erroneously concluded that a more lenient standard for review should apply because the challenged statutes "do not contain a scienter requirement." (Slip Op., p. 29.) While the statutes do not explicitly state a required mental state, there is abundant case law that a scienter requirement will be read into criminal statutes such as these. (See *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [finding scienter requirement for Assault Weapons Control Act despite lack of specific mental state requirement in statute].) Thus, allowing the decision to stand would cause confusion in the application of many other Penal Code statutes that do not explicitly state a scienter requirement, but have—until now—always been construed to include one.

Third, *Parker* erroneously concluded that the challenged statutes are unconstitutionally vague because they "provide no guidance or objective criteria" to determine whether ammunition is "principally for use" in a handgun. (Slip Op., p. 36.) This conclusion fails to account for

myriad criminal statutes that use similar terms. (See *People v. Morgan* (2007) 42 Cal.4th 593, 606 ["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"].) Although it was extensively cited in the briefs filed in the Court of Appeal, *Parker* fails to cite or analyze *Morgan*, or account for the principles it recites. Republication would create uncertainty as to the level of certainty required for a penal statute.

Finally, *Parker* should not be republished because the appropriate action for a court when an appeal becomes moot is to reverse the judgment. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134 ["it is appropriate to avoid thus 'impliedly' affirming a judgment which holds unconstitutional" a law no longer in effect]; see also *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 947 [appeal of challenge to construction project that was subsequently abandoned; judgment reversed with directions to dismiss action as moot]; *City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 959 [challenge to county property tax distributions subsequently mooted by Proposition 13; judgment reversed with directions to dismiss action as moot].)

In sum, *Parker* broadly and erroneously rewrites California law on facial challenges to criminal statutes. If the law on facial challenges is to be rewritten, the writing should be done by the Supreme Court, not by a single appellate district in an unreviewable opinion. Accordingly, the State respectfully requests that this Court deny respondent California Rifle and Pistol Foundation's request for republication.

Sincerely,

Paul Stein /For

GEORGE WATERS
Deputy Attorney General

For XAVIER BECERRA
Attorney General

GW:

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## DECLARATION OF SERVICE BY U.S. MAIL

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

No.: **S215265**

I declare:

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

On January 30, 2017, I served the attached

**OPPOSITION TO REQUEST FOR REPUBLICATION**

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 30, 2017, at San Francisco, California.

A. Bermudez
Declarant

Signature

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**Sheriff Clay Parker v. State of California**
**Case No. S215265**

## SERVICE LIST

| Party | Attorney |
|---|---|
| Clay Parker : Plaintiff and Respondent | Carl Dawson Michel, Esq.<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Clinton Barnwell Monfort<br>Michel and Associates, PC<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Anna M. Barvir<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802 |
| Tehama County Sheriff : Plaintiff and Respondent | Carl Dawson Michel, Esq.<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Clinton Barnwell Monfort<br>Michel and Associates, PC<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Anna M. Barvir<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802 |
| Herb Bauer Sporting Goods : Plaintiff and Respondent | Carl Dawson Michel, Esq.<br>Trutanich & Michel LLP<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Clinton Barnwell Monfort<br>Michel and Associates, PC<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Anna M. Barvir<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802 |

| | |
|---|---|
| California Rifle and Pistol Association : Plaintiff and Respondent | Carl Dawson Michel, Esq.<br>Trutanich & Michel LLP<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Clinton Barnwell Monfort<br>Michel and Associates, PC<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Anna M. Barvir<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802 |
| Able's Sporting Inc. : Plaintiff and Respondent | Carl Dawson Michel, Esq.<br>Trutanich & Michel LLP<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Clinton Barnwell Monfort<br>Michel and Associates, PC<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Anna M. Barvir<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802 |
| RTG Sporting Collectibles LLC : Plaintiff and Respondent | Carl Dawson Michel, Esq.<br>Trutanich & Michel LLP<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Clinton Barnwell Monfort<br>Michel and Associates, PC<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Anna M. Barvir<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802 |
| Steven Stonecipher : Plaintiff and Respondent | Carl Dawson Michel, Esq.<br>Trutanich & Michel LLP<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802 |

| | |
|---|---|
| | Clinton Barnwell Monfort<br>Michel and Associates, PC<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802<br><br>Anna M. Barvir<br>Michel & Associates, P.C.<br>180 East Ocean Boulevard, Suite 200<br>Long Beach, CA 90802 |
| State of California : Defendant and Appellant | P. Patty Li<br>Office of the Attorney General<br>455 Golden Gate Avenue, Suite 11000<br>San Francisco, CA<br><br>George Waters<br>Office of the Attorney General<br>1300 I Street, Suite 125<br>Sacramento, CA 95814 |
| Kamala D. Harris : Defendant and Appellant | George Waters<br>Office of the Attorney General<br>1300 I Street, Suite 125<br>Sacramento, CA 95814<br><br>P. Patty Li<br>Office of the Attorney General<br>455 Golden Gate Avenue, Suite 11000<br>San Francisco, CA |
| California Department of Justice : Defendant and Appellant | P. Patty Li<br>Office of the Attorney General<br>455 Golden Gate Avenue, Suite 11000<br>San Francisco, CA<br><br>George Waters<br>Office of the Attorney General<br>1300 I Street, Suite 125<br>Sacramento, CA 95814 |
| FFL Guard LLC : Amicus curiae | Bruce Edward Colodny<br>Attorney at Law<br>P.O. Box 10787<br>San Bernardino, CA 92433 |
| Gun Owners of California, Inc. : Amicus curiae | Bruce Edward Colodny<br>Attorney at Law<br>P.O. Box 10787<br>San Bernardino, CA 92433 |

| | |
|---|---|
| National Shooting Sports Foundation, Inc. : Amicus curiae | Robert C. Wright<br>Wright, L'Estrange & Ergastolo<br>402 West Broadway, Suite 1800<br>San Diego, CA 92101<br><br>Andrew Edward Schouten<br>Wright, L'Estrange & Ergastolo<br>402 West Broadway, Suite 1800<br>San Diego, CA 92101 |
| National Rifle Association of America, Inc. : Amicus curiae | H. Thomas Watson<br>Horvitz & Levy, LLP<br>15760 Ventura Boulevard, 18th Floor<br>Encino, CA 91436 |
| Western States Sheriffs' Association : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Law Enforcement Alliance of America : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| International Law Enforcement Educators and Trainers Association : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Law Enforcement Legal Defense Fund : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Law Enforcement Action Network : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| California Reserve Peace Officers Association : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Tom Allman : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |

| | |
|---|---|
| Tom Bosenko : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Adam Christianson : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| John D'Agostini : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Michael Downey : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Steve Durfor : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Dean Growdon : Amicus curiae | |
| Greg Hagwood : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Dave Hencratt : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Larry Jones : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Scott Jones : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |

| | |
|---|---|
| Jon E. Lopey : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| John McMahon : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| James Mele : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Margaret Mims : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| J. Paul Parker : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Ian S. Parkinson : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Mike Pointdexter : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Martin A. Ryan : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Dean Wilson : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |
| Donny Youngblood : Amicus curiae | Allan S. Haley<br>Haley & Bilheimer<br>505 Coyote Street, Suite A<br>Nevada City, CA 95959 |

| | |
|---|---|
| | Fifth District Court of Appeal<br>2424 Ventura Street<br>Fresno, CA 93721 |