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

AMICI CURIAE BRIEF OF *FFLGUARD* LLC AND GUN OWNERS OF CALIFORNIA, INC. IN SUPPORT OF RESPONDENTS SHERIFF CLAY PARKER *et al.*

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STATEMENT OF THE CASE

Amici curiae adopt the statement of the case set forth in the Respondents' Brief.

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Introduction

This case concerns various crimes which require citizens and law enforcement officers to know what specifically constitutes "handgun ammunition," which is vaguely defined as "ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, notwithstanding that the ammunition may also be used in some rifles." (Pen. Code, § 16650, subd. (a).)[1] It excludes "[a]mmunition designed and intended to be used in an antique firearm" and "[b]lanks." (Pen. Code, § 16650, subd. (b).) Pistols, revolvers, and other concealable firearms are defined as any firearm "that has a barrel less than 16 inches in length" or "that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length." (Pen. Code, § 16530, subd. (a).)

A "handgun ammunition vendor" is a person or firm "that is engaged in the retail sale of any handgun ammunition . . . ." (Pen. Code, § 16662.) Transfer of "handgun ammunition" must be face-to-face with evidence of

[1] Unless otherwise indicated, all section numbers are to the current Penal Code.

the identity of the transferee, violation of which is a misdemeanor. (Pen. Code, § 30312, subds. (a),(c).)

A vendor may not permit any employee with a felony or other legal disability to handle or sell "handgun ammunition." (Pen. Code, § 30347.) A vendor may not allow "handgun ammunition" to be accessible to a purchaser without assistance by the vendor or employee. (Pen. Code, § 30350.)

A vendor may not sell "handgun ammunition" without recording the date, the purchaser's identification number and state, the brand, type, and amount of ammunition sold, the purchaser's signature, the salesperson's name, the purchaser's right thumbprint, and the purchaser's address, telephone number, and birth date. (Pen. Code, § 30352, subd. (a).) A vendor may not fail to make a required entry or fail to maintain the records. (Pen. Code, § 30360.)

Such records must be kept for five years. (Pen. Code, § 30355.) Records are subject to inspection by peace officers and other officials. (Pen. Code, § 30357.) A vendor may not refuse to permit such examination or use of the records. (Pen. Code, § 30362.)

Violation of any of the above provisions is a misdemeanor. (Pen. Code, § 30365.)

I. BY RELYING ON DEFINITIONS OF HANDGUN BASED ON BARREL LENGTH OR BARREL INTERCHANGEABILITY DESIGN, AND EXCLUDING AMMUNITION DESIGNED FOR ANTIQUE FIREARMS, "HANDGUN AMMUNITION" IS INDISTINGUISHABLE FROM RIFLE AMMUNITION AND HAS NO DEFINITE MEANING

A. Section 16650(a) Inappropriately Defines "Handgun Ammunition" Based on Barrel Length

In ordinary language, a pistol or revolver has a hand grip which one may grasp with one or both hands. By contrast, a rifle has a shoulder stock, allowing the forward hand to hold its forend, the rear hand to grip it near the trigger, and the shoulder and cheek to be positioned on the stock. These fundamentally different types of firearms are not defined by barrel length or barrel interchangeability.

Contrary to ordinary usage, the Penal Code defines a pistol or revolver solely as a firearm having a barrel less than 16 inches or as a firearm with a longer barrel designed to be interchangeable with a barrel less than 16 inches. (Pen. Code, § 16530, subd. (a).) Defining "handgun ammunition" as "principally for use in" pistols and revolvers as defined by the Penal Code creates an incomprehensible, inherently vague standard under which ammunition is classified by the barrel lengths, or the interchangeability thereof, of the firearms that "principally" use them. This creates even more vagueness than would be the case if pistols and revolvers

were defined in the ordinary sense as firearms with a hand grip, in contrast with rifles, which have a shoulder stock.

Section 16650(a) provides: "As used in this part, 'handgun ammunition' means ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, notwithstanding that the ammunition may also be used in some rifles." The definition excludes "[a]mmunition designed and intended to be used in an antique firearm" and "[b]lanks." (Pen. Code, § 16650, subd. (b).) However, pistols, revolvers, and concealable firearms are defined not by ordinary usage,[2] but solely by reference to barrel length or barrel interchangeability design. Penal Code section 16530 provides:

> (a) As used in this part, the terms "firearm capable of being concealed upon the person," "pistol," and "revolver" apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.
>
> b) Nothing shall prevent a device defined as a "firearm capable of being concealed upon the person," "pistol," or "revolver" from also being found to be a short-barreled rifle or a

[2] The term "other firearms capable of being concealed upon the person" is descriptive but does not refer to a type of firearm such as pistol, revolver, rifle, or shotgun.

short-barreled shotgun.

Under the above, what is ordinarily called a pistol or revolver is a pistol or revolver if its barrel is less than 16 inches, but is not a pistol or revolver if its barrel is more than 16 inches. If it is a pistol or revolver as defined, it may also be a rifle or shotgun (albeit of the short-barreled variety).

Thus, where a .22 caliber revolver was 3/8 inch longer than the defined length, it was not considered a revolver or other concealable weapon under the statutory definition. (*People v. Osterman* (2d Dist. 1970) 4 Cal.App.3d 763, 765, 84 Cal.Rptr. 769.)[3] Similarly, in *People v. Boyd* (4th Dist. 1947) 79 Cal.App.2d 90, 92, 178 P.2d 797, an expert testified that "he had seen revolvers with barrels twelve inches in length; and that he had shot such guns with barrels about fourteen or sixteen inches long," but the court held there was insufficient evidence of the barrel length to prove that it was a revolver in the special meaning of the statute.[4]

When used to define "handgun ammunition," the above definitions create insurmountable ambiguities by categorizing firearms solely by barrel

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[3] In measuring the barrel length, the count noted that "the barrel screws into . . . the receiver, and extends to within a small fraction of an inch of the revolver's cylinder (in the instant case, approximately 1/32 of an inch). The fact that a portion of the barrel extends into or through the frame which is referred to as the 'receiver' does not reduce the barrel's length." (*Osterman*, *supra*, 4 Cal.App.3d at p. 765.)

[4] At the time, the defining length was 12 inches.

length, instead of distinguishing handguns, which in common parlance have only a hand grip, from rifles, which in common parlance have a shoulder stock. Even if there is a reasonable difference between "handgun ammunition" and "rifle ammunition," and even if specific ammunition is known to be "principally for use in" a handgun – two very dubious propositions – that would be based on the ordinary meaning of a handgun or rifle, not on the unusual Penal Code definition based solely on barrel length or interchangeability.

Further, even if an objective meaning exists as to the concept of "rifle" ammunition, it would be based on the firearm being a rifle in the ordinary sense, without regard to barrel length. A rifle with a barrel over 16 inches will obviously fire the same ammunition as a rifle with a barrel under 16 inches. Since any rifle, based on barrel length, can be a Penal Code handgun, all ammunition that fires in a rifle could be considered "handgun ammunition."

In short, section 16650(a), imposes an impossible task by requiring knowledge of what ammunition is "principally for use in" pistols and revolvers. It then makes the task even more hopeless by incorporating a wholly-inappropriate definition of pistols and revolvers as firearms with a certain barrel length, which – again, based on barrel length – could include

what are ordinarily defined as rifles and could exclude what are ordinarily known as pistols and revolvers.

B. Defining a Pistol, Revolver, or Rifle by Barrel Length is Contrary to Common Usage

Defining a pistol, revolver, or rifle solely by reference to barrel length of under 16 inches, as does section 16530, is contrary to common linguistic usage. That may be appropriate, and creates clear, objective standards, for regulating firearm sales, the carrying of concealed weapons, or similar laws. However, defining "handgun ammunition" as "ammunition principally for use in" firearms with a barrel length of under 16 inches, even though it "may also be used in some rifles," as does section 16650(a), obliterates any fixed meaning for such ammunition. This is the case wholly apart from the additional vagueness of the phrase "principally for use in."

While section 16650(a) states that "handgun ammunition" "may also be used in some rifles," the term "rifle" is defined in a manner that is entirely inconsistent with categorizing firearms by barrel length. Specifically, section 17090 provides in part:

> As used in Section[] . . . 16650 . . ., "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each

single pull of the trigger.

Federal law uses an identical definition. (18 U.S.C. § 921(a)(7) ["The term 'rifle' means . . ."].) And that is the ordinary linguistic usage. "Rifle. A firearm having rifling in the bore and designed to be fired from the shoulder." (*Glossary of the Association of Firearm & Toolmark Examiners* 115 (2d ed. 1985) [hereafter "*Glossary AFTE*"].) "Rifle. A firearm having spiral grooves in the bore and designed to be fired from the shoulder." Glossary, *NRA Firearms Sourcebook* 452 (2006).

So section 16650(a) says that "handgun ammunition" is "principally for use in" pistols, revolvers, and other concealable firearms, and those terms are defined as any firearm with a barrel under 16 inches, which would include any rifle with such barrel length. But when section 16650(a) adds that "handgun ammunition" "may also be used in some rifles," it understands "rifle" to be a weapon that is "fired from the shoulder," without any reference to barrel length, the same as defined in section 17090.

In contrast to rifles, which have shoulder stocks, pistols and revolvers are defined in ordinary usage as firearms which have a hand grip only and not a shoulder stock. Federal law defines "handgun" as "a firearm which has a short stock and is designed to be held and fired by the use of a

single hand . . . ." (18 U.S.C. § 921(a)(29)(A).) Federal regulations, 27 C.F.R. § 478.11, include the following definitions:

> *Pistol.* A weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand, and having (a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and (b) a short stock designed to be gripped by one hand and at an angle to and extending below the line of the bore(s).
>
> *Revolver.* A projectile weapon, of the pistol type, having a breechloading chambered cylinder so arranged that the cocking of the hammer or movement of the trigger rotates it and brings the next cartridge in line with the barrel for firing.

The above definitions follow ordinary linguistic usage. "Handgun. A firearm designed to be held and fired with one hand." (*Glossary AFTE*, *supra*, at p. 69.) "Pistol. A handgun in which the chamber is part of a barrel." (*Id.* at 98.) "Revolver. A firearm, usually a handgun,[5] with a cylinder having several chambers so arranged as to rotate around an axis

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[5] A revolver is "usually a handgun," but not always, as there are rifles and shotguns with revolving cylinders. Samuel Colt manufactured the Model 1839 Patterson Revolving Cylinder Percussion Carbine (see photo at http://www.nramuseum.org/the-museum/the-galleries/the-prospering-new-republic/case-31-the-age-of-industry/colt-1839-revolving-percussion-rifle.aspx) (visited Oct. 12, 2014). Currently, Rossi manufactures rifle revolvers with 18.5" barrels that shoot .410 shotgun shells, .45 Colt cartridges, and .22 long rifle cartridges. http://www.rossiusa.com/product-list.cfm?category=15 (visited Oct. 12, 2014). Perhaps the State would consider .410 shotgun shells to be "handgun ammunition."

and be discharged successively by the same firing mechanism." (*Id.* at 114.) "Pistol. A generic term for a hand-held firearm." (*NRA Firearms Sourcebook*, *supra*, at p. 443.) "Revolver. A firearm, usually a handgun, with a cylinder having several chambers so arranged as to rotate around an axis and be discharged successively by the same firing mechanism through a common barrel." (*Id.* at 452.)

The State appears to be oblivious to the above fundamental distinctions. It quotes the definition of "pistol, revolver, and other firearm capable of being concealed upon the person" as a weapon "that has a barrel less than 16 inches in length," but ignores the further definition as "any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length." *Compare* P.C. § 16530(a) *with* Appellants' Opening Brief 3 (hereafter "State Br."). The State fails to acknowledge that these definitions are contrary to common usage, and fails to explain how types of ammunition may be distinguished on the basis of what is, for purposes of the definition at issue, an arbitrary barrel length. Indeed, not a single further reference is made to § 16530 in the State's entire brief, and *no* reference is made to § 16530 in its Reply Brief.

The State purports to have expert opinion that certain cartridges are "loaded more frequently in handguns than in rifles." (State Br. 26.) It

claims that respondents concede that certain ammunition is "handgun ammunition" or, in one instance, is "used exclusively in pistols." (*Id.*) It further states that vendors distinguish between "handgun ammunition" and "rifle ammunition." (*Id.*) But the State's expert, respondents, and vendors all refer to pistols, handguns, and rifles in the conventional sense, not in Penal Code § 16530's unconventional sense. The State cannot seriously think that such persons define handguns and rifles according to an unusual definition found in the law of a single State, i.e., by barrel length rather than by the features of a hand grip versus a shoulder stock.

The above contrast is particularly stark in the dissenting opinion to the decision below. The dissent repeatedly refers to references to "handgun ammunition" in "ammunition vendors' Web sites" and in "*Cartridges of the World*, a recognized ammunition reference encyclopedia." (Dis. Op. pp. 12, 15-16.) Clearly, these sources referred to the term "handgun" as used in common parlance, not as unconventionally defined in the California Penal Code.

The Declaration of Blake Graham in support of the State uses the terms pistol, revolver, and handgun in the conventional sense, and never refers to them under § 16530's definition based on barrel length. He attended a "firearms identification class" and also co-taught one, which included "firearms nomenclature." (Joint Appendix ["J.A."] VIII 2254.)

He is "proficient in the use and disassembly of" revolvers, pistols, and rifles. (J.A. VIII 2256.) He made a list of alleged "handgun ammunition" for this case. (J.A. VIII 2257.) But nowhere, not once, does he depart from the ordinary linguistic usage of the relevant terms or utter any opinion about how one could determine what is "handgun ammunition" if handguns are defined solely by barrel length.

The State's expert Graham follows ordinary usage even when stating his assignment to create a list of "handgun ammunition" for this case. He repeated phrases from the Penal Code, *excluding* any reference to its non-ordinary definition of handguns based on barrel length: "I was asked to identify calibers and cartridges of ammunition that are principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, not withstanding that the ammunition may also be used in some rifles." (J.A. VIII 2257.) Instead of noting the non-ordinary definition of those terms in § 16530, he reverted to the ordinary usage of those terms, stating: "I interpreted and applied this standard to mean ammunition that is chambered, or loaded, more frequently in handguns than in rifles." (J.A. VIII 2257.)

Put otherwise, Mr. Graham utterly disregarded § 16530's definition of handgun based on barrel length, and instead sought to categorize ammunition based on its use in a handgun as ordinarily defined or in a rifle

as ordinarily defined. He viewed pistols and revolvers (firearms with only a hand grip), in contrast with rifles (firearms having a shoulder stock), in ordinary linguistic usage. When he sought to list ammunition that is "principally for use in" pistols and revolvers, he was referring to pistols and revolvers in the conventional sense, not in section 16530's non-conventional sense based solely on barrel length.

The State asserts 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." (State Br. 26,, citing JA XI 2893.) But the context was "pistols" in the ordinary sense, which presents its own vagueness issues, not in the unrelated Penal Code sense, which compounds the vagueness problems. Had respondents and their experts been asked about the use of cartridges in pistols as defined in the Penal Code sense, they could not have even responded, as no one thinks of cartridges in that sense.

In sum, defining "handgun ammunition" as "ammunition principally for use in" firearms with a barrel length of under 16 inches, even though it "may also be used in some rifles," does violence to ordinary linguistic usage, is internally inconsistent, and wreaks havoc to any comprehensible meaning.

C. The Terms "Designed to Be Interchanged" Exacerbate the Vagueness

Pistols and revolvers are defined not only by reference to barrel length being under 16 inches, but also by reference to a design for interchangeability with a barrel under 16 inches, even if the firearm possessed only has a barrel over 16 inches. Since the barrel of any rifle which is over 16 inches can be interchanged with a barrel under 16 inches, any rifle can be considered a pistol or revolver, and its ammunition is "handgun ammunition."

Specifically, after defining pistol, revolver, or firearm capable of being concealed on the person as a weapon "that has a barrel less than 16 inches in length," section 16530(a) adds: "These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length." In short, a handgun is a firearm (a) "that has" a barrel less than 16 inches, or (b) "that has" a barrel *over* 16 inches if it "is designed to be interchanged" with a barrel less than 16 inches.

The latter definition could be said about every rifle with a barrel over 16 inches, and thus its ammunition is "handgun ammunition" under section 16650(a) because it is "principally for use in" a firearm with a longer barrel that "is designed to be interchanged" with a shorter barrel. As

noted, to meet this expansive definition, a barrel less than 16 inches in length need not be possessed. Whether attached by threads or by some other method to the frame or receiver,[6] a rifle that can accept a barrel over 16 inches in length will also accept a barrel less than 16 inches in length. The common threading or other common attachment method alone arguably demonstrates that the former is "designed to be interchanged" with the latter. Design is an objective characteristic.[7] However, whether a barrel attaches to a rifle manifestly does not depend on the barrel length.

Since every barrel of a given model of rifle is interchangeable regardless of length, does that mean that every rifle is a concealable weapon under this definition, and thus all "rifle ammunition" is actually "handgun ammunition"? The legislature could not have possibly meant that. Indeed, it drafted the statute to refer to a firearm with a barrel over 16 inches that "is *designed to be* interchanged" – not "*is* interchangeable" – with a barrel

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[6] "*Firearm frame or receiver.* That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually *threaded at its forward portion to receive the barrel.*" (27 C.F.R. § 478.11, emphasis added.)

[7] "Design" means "the arrangement of parts, details, form, color, etc., so as to produce a complete and artistic unit . . . ." (Webster's New World Dictionary 373 (1991). *See People v. Redd* (2010) 48 Cal.4th 691, 699, 229 P.3d 101 ["a laser sight designed to be attached to a firearm"]; *People v. Doolin* (2009) 45 Cal.4th 390, 406, 198 P.3d 11 ["that handgun was designed to be concealable"].)

less than 16 inches.[8] But it gives no hint as to the objective difference between the two.

While the term "designed" as applied above is inherently vague, that term may be used in an objective sense. For instance, Penal Code section 12022.2(a) punishes a person armed with a firearm in commission of a felony in immediate possession of "ammunition for the firearm designed primarily to penetrate metal or armor . . . ." The State refers to this and other Penal Code provisions that use terms similar to "principally," but those other definitions are not comparable. (State Br. 24-25 n. 5.) In this statute, the term "primarily" is less significant than "designed . . . to penetrate metal or armor" – that refers to highly specialized ammunition that is not in common use by the public at large, what it is "designed" for has objective characteristics, and its possession with a firearm during a felony implicates no constitutional right. Unlike here, such a provision is hardly a trap for the unwary.

The above concerns the objective untenableness of the terms at issue, but a vagueness analysis must go further and ask what a reasonable

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[8] The fact that an object can be used for a given purpose does not mean that it was "designed" for that purpose. Some objects are "designed" as weapons, and others are not, although they "may be used" as such. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028, 945 P.2d 1204. See *People v. Burton* (3d Dist. 2006) 143 Cal. App.4th 447, 457, 49 Cal.Rptr.3d 334 [contrasting "weapons in the strict sense" from "instrumentalities which may be used as weapons but which have nondangerous uses, such as hammers and pocket knives"].)

civilian or police officer would know. Even if the terms were theoretically clear enough, how would a person know that a barrel is "designed to be interchanged" with another barrel? How would a person who possesses a firearm with a barrel over 16 inches know if a similar barrel under 16 inches even exists, much less that the two are interchangeable? And even disregarding what a person may or may not know, given that barrels that are over 16 inches are interchangeable with barrels under 16 inches, does "handgun ammunition" include all "rifle ammunition"? In its briefs, the State does not even acknowledge the incorporation in the meaning of "handgun ammunition" of the definition of a handgun in section 16530(a) as including firearms with barrels over 16 inches that are interchangeable with barrels under that length, much less does it suggest any answers to these questions.

D. The Exclusion of "Ammunition Designed and Intended to Be Used in an Antique Firearm" Creates Further Guesswork

The definition of "handgun ammunition" not only keeps one guessing what is included, it also keeps one guessing what is excluded. Section 16650(a), states that "handgun ammunition" is "principally for use in" handguns, even though it "may also be used in some rifles," but section 16650(b), states that it completely excludes two other categories:

> As used in Section 30312 and in Article 3 (commencing with Section 30345) of Chapter

> 1 of Division 10 of Title 4, "handgun ammunition" does not include either of the following:
>
> (1) Ammunition designed and intended to be used in an antique firearm.
>
> (2) Blanks.

Before one can seek to know what ammunition is "designed and intended to be used in an antique firearm," one must seek to know what is an "antique firearm." The Penal Code has at least three different definitions, but section 16170(b), applies here: "As used in . . . Section 16650 . . . , 'antique firearm' has the same meaning as in Section 921(a)(16) of Title 18 of the United States Code." 18 U.S.C. § 921(a)(16) in turn provides in part:

> The term "antique firearm" means -
>
> (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or
>
> (B) any replica of any firearm described in subparagraph (A) if such replica–
>
> (I) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
>
> (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade . . . .

Thus, "any firearm . . . manufactured in or before 1898" is an antique even if it uses rimfire or conventional centerfire fixed ammunition

that is readily available in the ordinary channels of commercial trade today. (To be an antique, a "replica" of an antique may not use such ammunition.) To put the pieces of the puzzle together, "handgun ammunition" is "principally for use in" handguns, even though it "may also be used in some rifles," but "does not include . . . [a]mmunition designed and intended to be used in an antique firearm," which includes "any firearm . . . manufactured in or before 1898."

Put otherwise, "handgun ammunition" does *not* include ammunition even though it *is* "principally for use in" handguns if it was "designed and intended to be used in" any firearm manufactured in or before 1898. Add that to the non-ordinary meaning of handgun (pistol or revolver) as a firearm that has a barrel less than 16 inches, or that has a barrel *over* 16 inches if it "is designed to be interchanged" with a barrel less than 16 inches, and one has a veritable witches' brew of extraordinary vagueness. One can bet that would baffle historians of firearms and ammunition, and one can further bet they don't teach that at the Police Academy.

It is telling that the Declaration of Blake Graham, the State's expert, makes no mention of the exclusion from "handgun ammunition" of ammunition "designed and intended to be used in" any firearm manufactured in or before 1898, nor does he list what would be included. Nor does the State. It is as if section 16650(b) does not exist.

Without reference to the antique exclusion, the State claims that its expert found cartridges "loaded more frequently in handguns than rifles" to include "calibers .45, 9mm, 10mm, .357, .38, .44, .380, .454, .25, and .32 . . . ." (State Br. 26.) Aside from the fact that "caliber" simply means diameter in inches, the State admitted that at least some of these calibers can be used in antique firearms: "There are multiple cartridges that can be used in firearms manufactured both before and after 1898, including but not limited to, cartridges in the following calibers: .22, .32, .38, .44, .45, and .50." (Defendants' Response to Separate Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment, ¶ 108, J.A. VIII 2201.) The State also wrote "undisputed" (subject to a separately-made vagueness objection) to the following: "The calibers Defendants claim to be 'handgun ammunition' include cartridges that are designed and intended to be used in 'antique firearms,' and thus should be exempt from the Challenged Provisions." (*Id.*, ¶ 111, J.A. VIII 2202.)

Two further propositions are self-evident. First, "[a]mmunition that can be used in a modern firearm chambered to fire that cartridge can also be used in an antique firearm chambered to fire that same cartridge." (*Id.*, ¶ 109, J.A. VIII 2202.) Second, "[a]mmunition, when it is manufactured, is designed and intended to be used in any firearm that is chambered for that cartridge, regardless of when the firearm it will be used in was

manufactured." (*Id.*, ¶ 110, J.A. VIII 2202.) Plaintiffs cited their expert Helsley Declaration at ¶¶ 20-25 (J.A. VIII 2022-2024), for these propositions, and the State responded "[m]ischaracterizes the witnesses's testimony," but did not dispute them.[9] (J.A. VIII 2202.)

At any rate, the convoluted statutory scheme here simply requires citizens and the police to know the unknowable. Subject to criminal sanctions, one must recognize that ammunition is "handgun ammunition" based on it being "principally for use in" handguns, even though it "may also be used in some rifles"; must ascertain this based on the non-ordinary meaning of handgun (pistol or revolver) as a firearm that has a barrel less than 16 inches, or that has a barrel over 16 inches if it "is designed to be interchanged" with a barrel less than 16 inches; and must determine whether the ammunition was "designed and intended to be used in" any firearm manufactured in or before 1898. Knowing all of this is simply too much to ask of citizens and police officers.

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[9] Plaintiffs made a vagueness argument in the Superior Court based on the above, Mem. of Pts. & Auth. in Support of Mot. for Sum. Judg. at 24, but did not repeat it in the Court of Appeal. However, "[w]e may affirm the trial court's ruling on any ground supported by the record." (*Taylor v. Elliott Turbomachinery Co., Inc.* (1st Dist. 2009) 171 Cal. App.4th 564, 573, fn.5, 90 Cal. Rptr.3d 414.)

II. BY LACKING SPECIFICITY, "HANDGUN AMMUNITION" IS VAGUE UNDER ESTABLISHED JURISPRUDENCE

Instead of specifying and listing the actual cartridges that constitute "handgun ammunition,"[10] the term is defined by the vague phrase "ammunition principally for use in" pistols and revolvers, which in turn are defined not only by barrel length but also whether a longer barrel is "designed to be interchanged with" a shorter barrel. Such phrases are facially vague.

Harrott v. County of Kings (2001) 25 Cal.4th 1138, 25 P.3d 649 (hereafter "*Harrott*"), is on point. To know whether a firearm is an "assault weapon," the court reasoned, a person must rely on the manufacturer and model markings inscribed on the firearm, and then consult the Department of Justice's Identification Guide. (*Id.* at pp. 1146-1147.) "Not only would ordinary citizens find it difficult, without the benefit of the Identification Guide, to determine whether a semiautomatic firearm should be considered an assault weapon, ordinary law enforcement officers in the field would have similar difficulty." (*Id.* at p. 1147, fn.4.) And there was an even further source of knowledge: "To determine whether the differences between their firearms and the series assault weapons listed in section

[10] Compare the exact specificity of listings of controlled substances in, *e.g.*, P.C. § 11054 (Schedule I substances).

12276 are considered to be only "minor," gun owners need only consult the California Code of Regulations." (*Id.* at 1151.)

It goes without saying that no Identification Guide exists for "handgun ammunition," nor is it listed in the Code of Regulations. The vague statutory language here would provide no basis for any such listing of specific cartridges as "handgun ammunition" by the Department of Justice for the same reasons that civilians and police officers have no way to know what is encompassed in that term.

Harrott found two other cases where laws were held vague to be instructive, but distinguished them because the list provided clarity. (25 Cal.4th at pp. 1152-1153.) *Springfield Armory, Inc. v. City of Columbus* (6th Cir. 1994) 29 F.3d 250, 251, declared as vague a list of firearms and other models "with the same action design that have slight modifications or enhancements." *Harrott* repeated that's court's question of how would one know "which changes may be considered slight?" (*Id.* at p. 253.) "Even if the term 'slight' did not render this provision void, the ordinance's 'modifications' requirement would." (*Ibid.*) After all, "ordinary consumers cannot be expected to know the developmental history of a particular weapon . . . ." (*Ibid.*) The same could be said about what ammunition is "principally for use in" firearms with barrels under 16 inches as well as

firearms with barrels over 16 inches that are designed to be interchangeable with shorter barrels.

Because of the specific list of what was restricted, *Harrott* also distinguished the law found vague in *Robertson v. City & County of Denver* (Colo. 1994) 874 P.2d 325. (*Harrott*, *supra*, 25 Cal.4th at pp. 1153-1154.) The Denver law was vague because it defined "assault weapons" to include certain pistols that were "modifications" of certain rifles or "modifications" of certain firearms "originally designed to accept" certain magazines. (*Id.* at p. 334.) Civilians and law enforcement officers would have no way to know what was a modification of something else, or the original design of something. (*Id.*) That brings to mind the second sentence of Penal Code section 16530(a), which requires civilians and officers to know that one thing "is designed to be interchanged with" something else.

Rejecting the argument also made here by the State that the law was saved from vagueness "simply because publications exist which contain the information needed to establish the design history," *Robertson* stated: "Whether persons of ordinary intelligence must necessarily guess as to an ordinance's meaning and application does not turn on whether some source exists for determining the proper application of a law." (*Id.* at pp. 334-335.) Indeed, the ordinance "does not specify any source which would aid in

defining what an assault pistol is, nor does it state where such a source can be found." (*Id.* at p. 335.) The same situation exists here.

Robertson concluded that the ordinance did not provide sufficient information to determine whether a pistol "has a design history of the sort which would bring it within this section's coverage." (*Ibid.*) Nor do civilians and law enforcement officers here have the required information.

The vague phrases here also parallel the definition of "assault weapon" as a rifle "that accepts a detachable magazine with a capacity of 20 rounds or more," declared vague in *Peoples Rights Organization, Inc. v. City of Columbus* (6th Cir. 1998) 152 F.3d 522, 535-536 (hereafter "*PRO*"). That could mean any of four alternatives, about which one had to guess:

> (1) The owner must actually possess a detachable magazine with a twenty round capacity; (2) the weapon, as manufactured and sold, included a twenty round magazine; (3) the owner does not possess a twenty round magazine, but one is commercially available; or (4) a twenty round magazine is unavailable or does not exist, but one would fit the weapon if it existed.

(*Id.* at p. 535.)

Here, a "device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length" could mean alternatively that a person with a firearm with barrel more than 16 inches in length: (1) also possesses an interchangeable barrel less than

16 inches in length; (2) the rifle, as manufactured and sold, included an interchangeable barrel less than 16 inches in length, even though not now possessed by the owner; (3) the owner does not possess an interchangeable barrel less than 16 inches in length, but one is commercially available; or (4) an interchangeable barrel less than 16 inches in length is unavailable or does not exist, but one would fit the firearm if it existed.

"As currently written, the provision is little more than a trap for the unwary." (*PRO*, *supra*, 152 F.3d at 535.) It is thus unconstitutionally vague. (See *id.* at 536.)

It is noteworthy that *PRO* declared the ordinance void even though the court thought that "there can be no serious claim to any express constitutional right of an individual to possess a firearm." (152 F.3d at 538, citation omitted.) It said that "the Second Amendment guarantees a collective rather than an individual right" and that "the Due Process Clause of the Fourteenth Amendment does not incorporate the Second Amendment . . . ." (*Id.* at 539 n.18.) "Nevertheless, it is well established that due process protects our citizens from vague legislation even when that legislation regulates conduct which otherwise does not enjoy constitutional protection." (*Id.* at 538-539.)

Those views on the Second Amendment were rejected by *District of Columbia v. Heller* (2008) 554 U.S. 570, 635, which held that the Second

Amendment protects the individual right to possess handguns and to render them "operable," which means that ammunition used in handguns, and thus its acquisition, is constitutionally protected. Further, the Second Amendment applies to the states through the due process clause of the Fourteenth Amendment. (*McDonald v. City of Chicago* (2010) __ U.S. __, 130 S.Ct. 3020.)

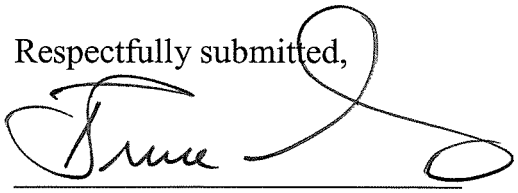
In short, the provision at issue not only subjects persons to criminal liability, it also implicates a constitutional right, rendering the vagueness standard all the more strict.

CONCLUSION

This Court should affirm the judgment of the Court of Appeal.

Date: October 23, 2014

Respectfully submitted,



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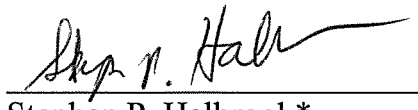

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the foregoing Brief of Amici Curiae is double-spaced, typed in Times New Roman proportionally spaced 13-point font, and the brief contains 6233 words of text, including footnotes, as counted by the Word word-processing program used to prepare the brief.

Date: October 27, 2014

Stephen P. Halbrook*
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[PROPOSED] ORDER

Upon consideration of the application of *FFLGuard* LLC and Gun Owners of California, Inc. for leave to file an *Amici Curiae* Brief in support of Respondents Sheriff Clay Parker *et al.*, the Court orders as follows:

The application of *FFLGuard* LLC and Gun Owners of California, Inc. for leave to file an *Amici Curiae* Brief is granted, and the Brief is hereby filed.

Date: _____ _____

Presiding Justice

PROOF OF SERVICE

I, Bruce Colodny, declare as follows:

I am employed with the Law Offices of Bruce Colodny located at 1881 Business Center Drive Suite 8-B, San Bernardino, California 92423. I am over the age of eighteen years, and am not a party to the within action.

On October 27, 2014, I served the following: described as

APPLICATION OF *FFLGUARD* LLC & GUN OWNERS OF CALIFORNIA, INC. TO FILE *AMICI CURIAE* BRIEF; *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENTS SHERIFF CLAY PARKER *et al.*

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

PLEASE SEE ATTACHED SERVICE LIST

X (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Bernardino, California.
Executed on October 27, 2014, at San Bernardino, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on October 27, 2014, at San Bernardino, California.

BRUCE COLODNY

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