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To: Interested Parties
From: Don B. Kates, C. D. Michel, Clint B. Monfort
Re: Senate Bill 124 (De Leon) and *Parker v. California*
Date: June 15, 2011

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Date: June 15, 2011
Re: Impact of Senate Bill 124 (De Leon) 2011

I. INTRODUCTION

In a press release issued by Senator Kevin De Leon, the Senator claims that the purpose of Senate Bill 124 ("SB 124") is to: "protect our law enforcement community and the public by clarifying the definition of handgun ammunition and armor piercing bullets."

Senator De Leon's release goes on to claim that the bill is necessary in light of a recent ruling by the Fresno County Superior Court in the case of *Parker v. California*, which challenged three newly enacted statutes (via Assembly Bill 962 (2009), Penal Code section 12060, 12061, and 12318.

Senator De Leon also suggests that civil rights organizations will challenge California's armor-piercing ammunition statutes next, asserting that:

"[T]he Legislature must act immediately to make certain no future court will invalidate this code section on vagueness grounds and flood our streets with cop-killer bullets."

As explained in detail below, Senator De Leon's allegations about the nature of the *Parker* lawsuit are false, his conclusions about the impacts of the *Parker* decision are incorrect and contrary to law, and his suggestions about the likelihood of future litigation to challenge California's armor-piercing ammunition statutes are wholly unfounded.

Specifically, Senator De Leon alleges that:

> "On January 21, 2011, Fresno County Superior Court Judge Jeffrey Hamilton issued a summary adjudication in *Parker v. California* asserting that Penal Code section 12323 is unconstitutionally vague. That general code section, which was enacted 29 years ago, defines handgun ammunition as well as handgun ammunition capable of piercing body armor, or so-called "cop-killer bullets." Basing a ruling on the theory that this code section is unconstitutionally vague jeopardizes California's prohibition on minors purchasing ammunition. More alarming, however, is that if upheld this reckless decision would jeopardize the ban on cop-killer bullets."

In light of these claims, Senator De Leon asserts he introduced SB 124 to:

> "amend Penal Code Section 12323 to clarify the definition of "handgun ammunition" and cop-killer bullets. The bill deletes the words 'principally for use' and 'designed primarily' from Penal Code section 12323, which the NRA and court argued was unconstitutionally vague."

In reality, Senator De Leon is using SB 124 as a trojan horse bill to further a separate agenda. Senator De Leon is using SB 124 to expand his previous ammunition registration and mail-order prohibition (that was declared unconstitutional) to now include *all* ammunition, including hunting rounds and collectible ammunition that have no association with crime. Senator De Leon cleverly titled SB 124 as the "Cop-Killer Bullet Ban Protection Act,"in order to lure police into supporting the bill and make it more difficult for legislators to vote against the legislation.

The truth is SB 124 has nothing to do with armor-piercing ammunition, and Second Amendment organizations have never challenged, do not plan to challenge, and in fact have a history of not opposing, prohibitions on armor-piercing ammunition.

II. CALIFORNIA'S ARMOR-PIERCING AMMUNITION STATUTES ARE NOT IN JEOPARDY

A. Senator De Leon Incorrectly Claims That Penal Code Section 12323 Was Declared Unconstitutionally Vague and Unenforceable in *Parker*

Plaintiffs in *Parker v. California* challenged sections 12060, 12061, and 12318, which prohibited mail order and internet sales of "handgun ammunition," and required registration and thumb printing for purchase of such ammunition.[1] As Plaintiffs alleged, and the court confirmed, those sections failed to provide constitutionally adequate notice as to what ammunition was to be regulated as "handgun ammunition," *as defined in section 12323(a)*. Penal Code section 12323(a), in turn, defined "handgun ammunition" as ammunition principally for use in a [handgun].[2] The challenged statutes (i.e. sections 12060, 12061, and 12318) did not provide any further clarification to assist individuals, businesses, and law enforcement in determining whether or not any given ammunition is subject to regulation under those statutes.

Contrary to Senator De Leon's statements, Plaintiffs Sheriff Clay Parker, et. al, did not

[1] For purposes of these sections, "Handgun ammunition" means handgun ammunition as defined in subdivision (a) of Section 12323, but excluding ammunition designed and intended to be used in an "antique firearm" as defined in Section921(a)(16) of Title 18 of the United States Code. Handgun ammunition does not include blanks." (See Cal. Pen. Code sections 12060, 12318.)

[2] "Handgun ammunition" means ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, as defined in subdivision (a) of Section 12001, notwithstanding that the ammunition may also be used in some rifles. (Cal. Pen. Code section 12323(a).

challenge Penal Code section 12323, either in part or in its entirety. Section 12323, which is solely a definitional statute, is unquestionably still valid and enforceable. In fact, the Plaintiffs in *Parker* intentionally did not challenge section 12323(a), as it is also referenced by section 12316, which prohibits the transfer of "handgun ammunition" to minors. Unlike sections 12060, 12061, and 12318, however, section 12316 provides additional guidance, aside from the language of section 12323(a), to assist individuals and retailers in determining whether ammunition is regulated under section 12316.[3]

So, contrary to Senator De Leon's press release, *Parker* did not rule section 12323(a) unconstitutional. Rather, the court found that three newly enacted statutes, i.e., Penal Code sections 12060, 12061, and 12318, *which were the first statutes to rely solely on the language found in section 12323(a)*, were unconstitutionally vague.

B. Penal Code Section 12323(a) Is Unrelated to the Armor Piercing Ammunition Statute

Not only was section 12323(a) not declared unconstitutional, this code section has *nothing to do with California's prohibitions on armor-piercing ammunition*. It is paragraph *(b)*[4] of section 12323 – not paragraph (a) – which contains the definition applicable to California's armor piercing ammunition statutes. So, while even section 12323(a) was not challenged or ruled on as being unconstitutional in *Parker*, section 12323*(b)* was *completely unrelated* to Plaintiffs' challenge and the court's decision in the *Parker* case.

The California Law Revision Commission's "Non-Substantive Reorganization of California's Deadly Weapons Statutes" further clarifies that these are separate and distinct definitions using different terms that are subject to entirely different interpretation.

Effective 2012, the definition of "handgun ammunition"(currently found in section 12323(a)) will be codified at section *16650*. Section 16650 provides:

> a) 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*.

[3] See Section II. C. 2. of this memorandum.

[4] "Handgun ammunition designed primarily to penetrate metal or armor" means any ammunition, except a shotgun shell or ammunition primarily designed for use in rifles, that is designed primarily to penetrate a body vest or body shield .... (Cal. Pen. Code section 12323(b).)

Section 166650 is never referenced in any of California's armor-piercing ammunition statutes.[5]

Conversely, effective 2012, the definition of "handgun ammunition designed primarily to penetrate metal or armor," i.e. the definition applicable to California's armor-piercing ammunition statutes (currently codified at section 12323(b)), will be codified at section *16660*. Section 16660 provides:

> As used in this part, "handgun ammunition designed primarily to penetrate metal or armor" *means any ammunition, except a shotgun shell or ammunition primarily designed for use in a rifle, that is designed primarily to penetrate a body vest or body shield, and has either of the following characteristics:*
>
> > *(a) Has projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness.*
> >
> > *(b) Is primarily manufactured or designed, by virtue of its shape, cross-sectional density, or any coating applied thereto, including, but not limited to, ammunition commonly known as "KTW ammunition," to breach or penetrate a body vest or body shield when fired from a pistol, revolver, or other firearm capable of being concealed upon the person.*

Section 16660, current section 12323(b), is not referenced by any of the code sections that were declared unconstitutional in *Parker v. California*.[6] And the legislative staffer who devised the scheme to falsely represent the need for Senate Bill 124 was well-aware of the pending reorganization of the California's Deadly Weapon Statutes, and that the revision further clarifies the distinctions between these separate definitional statutes.

[5] *See* Non-Substantive Reorganization of Deadly Weapon Statutes at sections 30315, 30320, and 30325.

[6] *See* Non-Substantive Reorganization of Deadly Weapon Statutes at sections 30312, 30347, 30350, and 30352.

C. *Parker* Does Not Impact the Constitutionality of Other Statutes That Use the Terms "Principally," "Primarily," or "Chiefly"

In addition to incorrectly identifying the *Parker* court's ruling as one declaring section12323 unconstitutional, Senator De Leon falsely claims that, because the definitional language "ammunition principally for use in a handgun" was unconstitutionally vague on its face within the context of sections 12060, 12061, and 12318, that other statutes which invoke the terms, "principally"or "primarily" must remove all references to those terms to protect against constitutional vagueness challenges.

Senator De Leon's claims are unfounded in both fact and law, and his claims are in direct conflict with the *Parker* court's own ruling.

1. Armor piercing statutes utilize a different standard and are not jeopardized by the *Parker* decision

The validity of a statute utilizing such terms depends on the *context* in which the term is used. Accordingly, both Plaintiffs and Defendants in *Parker v. California* cited to numerous constitutional uses of these terms throughout the California codes. In fact, the *Parker* Court expressly stated in its written Order that:

> In this case, it is *not the definitions of the individual words themselves that cause the confusion*" and "while the meanings of the individual words themselves are clear, the text of the "handgun ammunition" definition provides no objective way or method for a person to determine whether a particular ammunition caliber or cartridge is *used more often* in a [handgun].

(Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication at 8-9, *Parker v. California*, No. 10CECG02116 (Cal. Super. Ct. 2011.) (Emphasis added.)

Moreover, California's armor-piercing statutes use different terms that require a distinct analysis from the statutes at issue in *Parker*. "Armor-piercing" ammunition is currently defined in California as that which is "*primarily designed* to penetrate a body vest or body shield" *and has certain enumerated characteristics*. (Cal. Penal Code § 12323(b).) The statutes struck down in *Parker* do not require an analysis of whether the ammunition was "designed" to be used more often in a handgun. And it is a well-settled legal principle that when a statute contains *different wording* the words are to be *construed as different*.

> It is an equally settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another *it should not be inferred where it has been excluded*.

(*People v. Woodhead* (1987) 43 C.3d 1002, 1010 .0 (Emphasis added.)

Unlike the definition of "handgun ammunition" that was at issue in the *Parker* case, this definition sets a workable standard under which persons can determine which types of ammunition are proscribed by law. One need only ascertain whether a particular type of ammunition was designed primarily to pierce armor, and this can be done by examining its external characteristics, including its shape, design, and construction. And manufacturers are well aware of whether they *designed ammunition for the primary purpose of penetrating armor*.

Unlike the statutes at issue in *Parker*, the "armor-piercing" statutes do not require an individual to determine whether any given ammunition cartridge has *actually* been used, or will be used, more than 50% of the time to penetrate armor when fired from a handgun. That would be impossible for individuals to determine, and is why the *Parker* suit was successful.

2. Restrictions On the transfer of ammunition to minors are not impacted by *Parker*

Senator De Leon also claims the *Parker* decision questions the validity of Penal Code section 12316, which prohibits the transfer of certain ammunition to persons under twenty-one years of age. Although this statute, Penal Code section 12316(a)(1)(B), utilizes the "principally for use in a [handgun]" language that made sections 12060, 12061 and 12318 unconstitutional in *Parker*, section 12316(a)(1)(B) includes *key additional language* that is <u>not</u> <u>found</u> in sections 12060,12061 and 12318.

Section 12316 provides: "Where ammunition or reloaded ammunition *may be used in both a rifle and a handgun, it may be sold* to a person who is at least 18 years of age, but less than 21 years of age, *<u>if the vendor reasonably believes</u> that the ammunition is being acquired for use in a rifle and not a handgun*. This additional language, which allows the retailer to take into account the purchaser's subjective usage intent, was not included in the statutes at issue in *Parker v. California*. So the practice of retailers is to determine whether a purchaser who is under twenty-one years of age intends to use the ammunition in a rifle before proceeding with the sale. Under the separate statutes that were declared unconstitutional in *Parker*, retailers did not have this option.

Finally, Senator De Leon's purported concerns about section 12316 being overturned as a result of the *Parker* decision are completely irrelevant in light of California's Non-Substantive Reorganization of California's Deadly Weapon Statutes. Effective 2012, section 12316 will be re-codified at new section 30300. Contrary to Senator De Leon's contention, former section 12323(a) (re-codified at section 16650) is no longer referenced in California's prohibition on the transfer of handgun ammunition to minors. Rather, new section 30300 provides:

> (a) Any person, corporation, or dealer who does any of the following shall be punished by imprisonment in a county jail for a term not to exceed six months, or by a fine not to exceed one thousand dollars ($1,000), or by both the imprisonment and fine:
>
> > (1) Sells any ammunition or reloaded ammunition to a person under 18 years of age.
> >
> > (2) Sells *any ammunition or reloaded ammunition designed and intended for use in a handgun to a person under 21 years of age. Where ammunition or reloaded ammunition may be used in both a rifle and a handgun, it may be sold to a person who is at least 18 years of age, but less than 21 years of age, if the vendor reasonably believes that the ammunition is being acquired for use in a rifle and not a handgun.*

Accordingly, California's prohibitions on the transfer of "handgun ammunition" to individuals under 21 years of age are not affected by the *Parker* decision. Current section 12316(a)(1)(b) includes key clarifying language which was not included in the statutes declared unconstitutionally vague in *Parker*. Moreover, new section 30300 completely removes any reference to the definition of "handgun ammunition"that provided the sole basis for a determination of whether ammunition was subject to regulation under the statutes declared unconstitutional in *Parker*. Effective 2012, the definition of "handgun ammunition" found in former section 12323(a) (continued at new section 16650) will no longer be employed by any statutes other than those that were specifically struck down in *Parker*.

D. California's Armor-Piercing Statutes Have Never Been Challenged by Self-Defense Civil Rights Organizations

Pro-Second Amendment organizations have never challenged California's prohibitions on armor-piercing ammunition. In fact, the NRA assisted in the drafting and passage of the federal ban on "armor-piercing ammunition."[7] That definition, like California's current definition, adequately restricts true armor-piercing ammunition, such as "KTW" ammunition, and has also been on the books without challenge *for decades*. Conversely, sections 12060, 12061, and 12318 were challenged on Due Process vagueness grounds because they were the first statutes to rely *solely* on the – "principally for use in" a handgun – language found in current section 12323(a) which rendered those specific statutes unconstitutionally vague. California's "armor piercing" statutes do *not* rely on this language, and California's statute regarding the transfer of "handgun

[7] (*See* http://www.nraila.org/Issues/FactSheets/Read.aspx?id=55&issue=005.)

ammunition" to minors (Cal. Pen. Code section 12316) includes additional language which saves the statute from the vagueness that plagued the statutes at issue in the *Parker* case. (In fact, the Plaintiffs in *Parker* explained precisely this in their Motion for Summary Adjudication.)

III. SB 124's TRUE PURPOSE IS TO REQUIRE REGISTRATION OF ALL AMMUNITION PURCHASES BY HUNTERS AND SPORT SHOOTERS, AND TO BAN MAIL-ORDER PURCHASES OF HUNTING CARTRIDGES

In addition to SB 124 being unnecessary to protect California's armor-piercing ammunition statutes, the bill is instead serving as a vehicle to further another agenda. Senator De Leon is using SB 124 to expand his previous ammunition registration and mail-order prohibition[8] to include *all* ammunition, including cartridges popular for hunting that have no association with crime.

SB 124 drastically expands the definition of "handgun ammunition" applicable to sections 12060, 12061, and 12318, which were declared unconstitutional in *Parker v. California*. Rather than provide additional clarity as to the ammunition that will be regulated under these statutes as "handgun ammunition," Senator De Leon has used SB 124 as a clever attempt to expand California law to require the registration of not only "handgun ammunition," but *all* ammunition.

Under AB 962, sections 12060, 12061, and 12318 required the registration of ammunition sales and prohibited mail order purchases of ammunition that is defined, pursuant to section 12323(a) as "handgun ammunition." SB 124, however, would recast the definition of handgun ammunition to include all ammunition which is "capable of being fired from a handgun" which includes virtually all ammunition. Modern handguns such as the Thompson Contender can be configured to accept a barrel capable of firing virtually any cartridge, even popular hunting rounds. There are even handguns capable of firing shotgun ammunition, such as the Taurus Judge. Accordingly, SB 124 will require the registration of all ammunition sales by hunters, sport shooters, and collectors, regardless of whether the ammunition has any association with crime. SB 124's drastic expansion of the definition of handgun ammunition criminalizes the mail order purchase of all ammunition, and will thus make it virtually impossible to acquire many variants of specialized and collectible ammunition in California that are not carried by in-state retail stores.

Senator De Leon previously (and unsuccessfully) attempted to require the registration, and prohibit mail-order sales, of all ammunition including popular hunting rounds via AB 962 in 2009. AB 962 was subsequently amended to limit that bill's application to "handgun ammunition" only. After failing to garner enough support for such widespread restrictions on hunting and collectible ammunition in 2009, Senator De Leon has opted to try and avoid the

[8] *See* Assembly Bill 962 (2009), hereafter ("AB 962").

debate this year with SB 124 by failing to mention that it *expands* AB 962's registration/thumb printing requirement and mail-order ban to include *all hunting ammunition*.

IV. SENATOR DE LEON'S OWN ACTIONS CONFIRM SB 124 IS NOT ABOUT SAVING CALIFORNIA'S ARMOR-PIERCING AMMUNITION STATUTES

A. When *Parker* Was Filed in 2010, Senator De Leon Authored Legislation to Address The Vagueness Of AB 962, And Made No Mention Of California's Armor-Piercing Statutes Even After Consulting With DOJ Attorneys and Experts

A mere two months after *Parker v. California* was filed in June of 2010, which successfully alleged that the definition of "handgun ammunition" was unconstitutionally vague, (then) Assemblyman De Leon amended legislation[9] that he had authored to include a list of ammunition that his previously sponsored registration and mail-order prohibitions (AB 962, 2009) would apply to. During committee hearings, Assemblyman De Leon stated on the record that the most common complaint regarding AB 962 was about its vagueness, and that AB 2358 was being amended to bring clarity to the bill.

At no point during the entire 2010 legislative process did Assemblyman De Leon attempt to amend legislation to "protect" California's armor-piercing ammunition statutes from any supposed similar vagueness issues. In fact, California's armor-piercing statutes were never even mentioned during these hearings. And this is despite Senator De Leon's express statements on the record that he worked with the Department of Justice on this bill, presumably with the attorneys and experts on the *Parker* case who are most knowledgeable about these issues, to address the vagueness problems that were inherent in the ammunition sales registration and mail order prohibition laws challenged in the *Parker* case.

B. Senator De Leon Did Not Obtain Clarification From the DOJ Attorneys in *Parker* That SB 124 Was Necessary To Protect Armor-Piercing Prohibitions

When *Parker* was decided in January of 2011, Senator De Leon acted quickly to spin the decision as jeopardizing California's armor-piercing ammunition statutes. Despite working with the Department of Justice regarding AB 2358 in 2010, Senator De Leon never obtained clarification from the three DOJ attorneys that represented the DOJ, the State, and the Attorney General in the *Parker* case (who would be most-knowledgeable about the impacts of that court decision), that SB 124 was necessary to protect California's armor-piercing ammunition laws.

[9] *See* Assembly Bill 2358 (2010), hereafter ("AB 2358").

If there were real potential concerns that the *Parker* decision might jeopardize California's armor-piercing ammunition statutes, why wouldn't someone from the legislature contact the attorneys who worked on the *Parker* case to gain their insight about the impact of that decision? Why did he work with DOJ lawyers and experts involved in the *Parker* case on Assembly Bill 2358 in 2010, but not now? Instead, Senator De Leon introduced this legislation on the advice of a legislative staff member. At a minimum, shouldn't the opinions of the lawyers intimately involved in that case who are most-familiar with these issues be public? Suspecting that Senator De Leon may have sought input from DOJ attorneys regarding the vulnerability of the armor piercing statutes, our office made a public records request for all of Senator De Leon's communications with DOJ's attorneys about this issue. But production of these communications so far has been denied under the Legislative Open Records Act.

C. Senator De Leon Invented a Problem Where None Existed, Knowing It Would Be More Difficult For Legislators To Vote Against a "Cop-Killer Bullet Ban"

Senator De Leon previously tried to require the registration of all ammunition, and to prohibit the mail order purchase of all ammunition, regardless of its association with crime. He saw the *Parker* decision as an opportunity to spin the decision regarding the impact of that case.

Senator De Leon saw quite clearly that it was more difficult to pass an expanded hunting ammunition registration bill. Accordingly, he titled SB 124 as a "Cop-Killer Bullet Ban Protection Act." The title fails to mention that it will effectively prohibit the internet and mail order purchase of virtually all ammunition, and that it will require the registration of all ammunition, regardless of whether the ammunition has any association with crime. By mis-titling the bill, and asserting that it is absolutely necessary to protect police officers, Senator De Leon has attempted to avoid any debate over whether registration of ammunition sales, and mail order prohibitions, should be expanded to include all ammunition, and uses the very serious issue of police officer safety to accomplish his goal.

Ultimately, Senator De Leon knew that it would be extremely difficult for legislators to put themselves on the record as voting against a bill titled as a "Cop-Killer Bullet Ban Protection Act," even though the bill has no impact, and is not required, to protect California's long-standing prohibitions on armor-piercing ammunition, of which Second Amendment organizations have no intention of challenging.

V. SB 124'S AMENDMENTS TO CALIFORNIA'S ARMOR-PIERCING STATUTES MAY UNINTENTIONALLY EXPAND THEIR SCOPE TO PROHIBIT AMMUNITION POPULAR FOR HUNTING

If passed in its current form, SB 124 may jeopardize ammunition popular among hunters, collectors and long distance shooters.

Date: June 15, 2011
Re: Impact of Senate Bill 124 (De Leon) 2011

By removing the language that limits the definition to ammunition "primarily designed to penetrate a body vest or body shield," SB 124, perhaps inadvertently, could potentially be interpreted by prosecutors to expand the scope of prohibited ammunition. From a common-sense standpoint, removing the limiting descriptor "primarily" from the definition of armor-piercing ammunition, appears to expand the scope of that definition. Prosecutors may now determine that numerous types of commonly-used non-lead ammunition that are not thought of as "armor-piercing handgun ammunition" are designed, at least in part, to penetrate armor because they will do so, by virtue of their design characteristics, when fired from some handguns. These models of handguns, such as the Thompson Contender, nor the many types of ammunition that might be viewed by prosecutors as being prohibited as a result of SB 124's are not associated with criminal activity.

In line with this reasoning, SB 124 may jeopardize big game hunting in most of central California where lead ammunition is prohibited. As a result of SB 124's creation of potential ambiguity for prosecutors, which jeopardizes non-lead ammunition that, by virtue of its design characteristics, will penetrate a body vest or shield, SB 124 jeopardizes hunting in this area where non-lead ammunition is the only option available. That area covers approximately one-fifth of California and includes some of the most popular hunting grounds in the state.

VI. CONCLUSION

Senate Bill 124 is unnecessary to preserve California's ban on armor-piercing ammunition and will have drastic negative impacts on hunters and competitive target shooters throughout California. For further clarification regarding the information contained in this memorandum, please contact my office at (562) 216-4441, or via e-mail at cmichel@michellawyers.com.