

1 C. D. Michel - SBN 144258  
Joseph A. Silvos, III - SBN 248502  
2 Sean A. Brady - SBN 262007  
Anna M. Barvir - SBN 268728  
3 MICHEL & ASSOCIATES, P.C.  
180 East Ocean Blvd., Suite 200  
4 Long Beach, CA 90802  
Telephone: (562) 216-4444  
5 Fax: (562) 216-4445  
cmichel@michellawyers.com

6 Attorneys for Plaintiffs

7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF FRESNO

10 KIM BELEMJIAN; JONATHAN  
FAIRFIELD; T.J. JOHNSTON;  
11 MATTHEW PIMENTEL; STANLEY ROY;  
FFLGUARD, INC.; CALIFORNIA RIFLE  
12 AND PISTOL ASSOCIATION;

13 Plaintiffs,

14 vs.

15 KAMALA D. HARRIS, in her official  
capacity as Attorney General for the State  
16 of California; STEPHEN LINDLEY, in his  
official capacity as CHIEF OF THE  
17 CALIFORNIA DEPARTMENT OF  
JUSTICE BUREAU OF FIREARMS;  
18 CALIFORNIA DEPARTMENT OF  
JUSTICE; and DOES 1-10,

19 Defendants.  
20  
21  
22  
23  
24  
25  
26  
27  
28

FILED

APR 02 2015

FRESNO COUNTY SUPERIOR COURT

By

GAR - DEPUTY

CASE NO. 15-CE-CG-00029

**PLAINTIFFS' NON-OPPOSITION TO  
DEFENDANTS' AND RESPONDENTS'  
DEMURRER TO FIRST AMENDED  
COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND PETITION  
FOR WRIT OF MANDATE**

Date: April 15, 2015  
Time: 3:30 p.m.  
Dept: 503  
Judge: Hon. Alan M. Simpson  
Trial Date: None  
Action Filed: January 6, 2015

1 Plaintiffs Kim Belemjian, Jonathan Fairfield, T.J. Johnston, Matthew Pimentel, Stanley  
2 Roy, *FFLGuard*, Inc., and California Rifle and Pistol Association (“Plaintiffs”) agree with  
3 Defendants Kamala D. Harris, Stephen Lindley, and the California Department of Justice  
4 (“Defendants”) that there remains nothing to be litigated as regards the merits of the claims raised  
5 in Plaintiffs’ First Amended Complaint. Plaintiffs thus file this non-opposition to Defendants’  
6 Demurrer to First Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ  
7 of Mandate, and support the granting of Defendants’ demurrer without leave to amend. Plaintiffs  
8 believe, however, that Defendants’ suggestion that they have not disputed Plaintiffs’ position is  
9 misleading (if not patently false). As such, they also request that the Court delay entering  
10 judgment pending limited discovery to investigate the extent to which this litigation prompted  
11 Defendants’s actions and to establish that Plaintiffs have a valid catalyst-based fee claim.

12 On October 2 and December 18, 2014, Defendants announced, by way of letter to various  
13 interested parties, four regulations for the implementation and administration of the newly enacted  
14 Firearm Safety Certificate Program (“FSC Program”) and long-gun safe-handling demonstrations.  
15 (Barvir Decl. Supp. Pls.’ Non-oppn. to Defs.’ Demurrer (“Barvir Decl.”), Exhs. B-C.) Those  
16 regulations were not adopted pursuant to the stringent notice and comment requirements of the  
17 California Administrative Procedure Act (“APA”). On December 29, 2014, Plaintiff *FFLGuard*,  
18 Inc., thus submitted a petition to the Office of Administrative Law (“OAL”) complaining of  
19 Defendants’ failure to adhere to the APA when adopting those implementing regulations. (Barvir  
20 Decl., Exh. D.) Petitioners submitted a copy of their OAL complaint to Defendants Harris and  
21 Lindley. (Barvir Decl., ¶ D.) Defendants did not respond to *FFLGuard*’s petition; they instead  
22 began enforcing the challenged rules on January 1, 2015, when the FSC Program took effect.

23 Plaintiffs thus brought suit on January 6, 2015, challenging the four underground  
24 regulations adopted and enforced by Defendants. (Verified Compl. for Decl. & Inj. Rel (“Verified  
25 Compl.”), ¶¶ 1-11, 78-126.) Plaintiffs also brought a writ of mandate to compel Defendants to  
26 adopt formal regulations implementing the long-gun safe-handling demonstrations as mandated by  
27 state law. (Verified Compl., ¶¶ 127-131.) On January 7, 2015, Plaintiffs filed an application for an  
28 order to show cause and temporary restraining order. (Pls.’ Ex Parte Appln. Order to Show Cause

1 & Temp. Rest. Order, Jan. 7, 2015.) That request was denied in response to Defendants’ argument  
2 that Plaintiffs had not established the irreparable harm necessary for such extraordinary relief.  
3 (See Barvir Decl., Exh. F, pp. 8-14; Defs.’ Mem. Oppn. Pls.’ Order to Show Cause & Temp. Rest.  
4 Order, p. 4.) Two days later, on January 9, Defendants notified Plaintiffs for the first time that they  
5 were “in the process of preparing emergency regulations and final regulations, pursuant to the  
6 Administrative Procedures [sic] Act. . . .” (Barvir Decl., ¶ 8, Exh. H.) That emergency regulation  
7 package would not be finalized and submitted to OAL until February 25, 2015—nearly seven  
8 weeks later. (Defs.’ Req. Jud. Not. Supp. Defs.’ Demurrer, ¶ 1, Exh. 1.)<sup>1</sup> In the intervening weeks,  
9 Defendants continued to enforce the challenged underground regulations.

10 When Defendants filed their demurrer, OAL had not yet ruled on Defendants’ proposed  
11 package of “emergency” regulations for the implementation and maintenance of the FSC Program  
12 and safe-handling demonstrations. On March 9, 2015, however, OAL adopted the “emergency”  
13 regulations and those regulations took immediate effect. (Pls.’ Req. Jud. Not., ¶ 1 [filed  
14 simultaneously herewith]; Pls.’ Req. Jud. Not., Exh. A.) The newly adopted regulatory package  
15 formalized each of the four illegally adopted and previously enforced rules challenged in  
16 Plaintiffs’ first through sixth causes of action for declaratory relief. (Pls.’ Req. Jud. Not., Exh. A;  
17 Pls.’ First Am. Compl. & Writ of Mand. (“First Am. Compl.”), pp. 17-25.) Adoption of the  
18 emergency package also formalized regulations for the implementation of the long-gun  
19 safe-handling demonstration as requested in Plaintiffs’ seventh cause of action for writ of  
20 mandate. (Pls.’ Req. Jud. Not., Exh. A; First Am. Compl., pp. 25-26.) As such, Plaintiffs have  
21 achieved exactly the result they sought in their First Amended Complaint. (First Am. Compl., pp.  
22 26-28.) The underground regulations at the heart of this dispute are no longer being unlawfully  
23 enforced against Plaintiffs, their members, or clients. Because Defendants’ promulgation of the  
24 emergency regulations has favorably mooted each of Plaintiffs’ claims, Plaintiffs agree that there

---

26  
27 <sup>1</sup> Two weeks later, Plaintiffs, in an attempt to gauge whether they could settle this dispute  
28 without resort to further litigation, contacted Defendants’ counsel to ask if and when the  
Department of Justice intended to begin the emergency rule-making process. (Barvir Decl., ¶ 9,  
Exh. I, p. 1-2.) They would learn two days later that Defendants would not submit the emergency  
package for at least another month. (Barvir Decl., ¶ 10, Exh. I, p. 1.)

1 remains no reason for this Court to consider or for the parties to continue litigating the merits of  
2 those claims.

3         Plaintiffs dispute, however, Defendants’ contention that no actual controversy has existed  
4 between the parties because “(1) the defendants do not actually oppose the position taken by the  
5 plaintiffs that Penal Code section 26860, subdivision (b), requires regulations, and (2) the  
6 defendants submitted emergency regulations under the APA, . . . .” (Defs.’ Mem. Supp. Demurrer,  
7 p. 7.) Defendants have actively resisted Plaintiffs’ attempts to resolve the matter at every juncture.  
8 And, though they were given many opportunities in the earliest stages of this dispute, Defendants  
9 made no mention to Plaintiffs that they were working on formal regulations, emergency or  
10 otherwise, until two days after the hearing on Plaintiffs’ application for TRO/OSC. (Barvir Decl.,  
11 ¶ 8, Exh. H.) In fact, during a week of communications with Plaintiffs’ counsel resulting from  
12 Plaintiffs’ December 30th notice that they’d be filing suit and seeking preliminary relief,  
13 Defendants’ counsel never disclosed his clients’ intention to promulgate emergency regulations,  
14 nor did he suggest that litigation could be avoided as a result. (Barvir Decl., ¶ 5; Exh. E.)  
15 Defendants, in responding to Plaintiffs’ request for temporary injunctive relief, did not take the  
16 position they do now that Plaintiffs could not succeed on the merits for lack of controversy or  
17 admit that they should have adopted formal regulations. (Defs.’ Mem. Oppn. Pls.’ Order to Show  
18 Cause & Temp. Rest. Order, pp. 4-5.) And at the TRO/OSC hearing, Defendants never discussed  
19 their intention to promulgate regulations for the FSC Program or safe-handling demonstrations.  
20 (Barvir Decl., ¶ 6; Exh. F.) Instead, they waited until Plaintiffs reached out to engage in  
21 settlement negotiations to claim that they were “in the process of drafting emergency regulations.”  
22 (Barvir Decl., ¶¶ 7-8; Exhs. G-H.) What’s more, Defendants never stopped enforcing the illegal  
23 safe-handling demonstration rules, even though they now claim that they agree with Plaintiffs’  
24 position that Penal Code section 26860 mandated the adoption of formal regulations. (Defs.’  
25 Mem. Supp. Demurrer, pp. 5-11.) And Defendants still do not claim to have ever agreed with  
26 Plaintiffs’ contention that the four FSC Program rules announced by letter were underground  
27 regulations that should have been adopted pursuant to the APA.

28         For these reasons, among others, Plaintiffs strongly suspect that the parties did, in fact,

1 face an actual controversy at the start of this litigation and that this case was the very impetus for  
2 Defendants' promulgation of emergency regulations. So while Plaintiffs believe they are entitled  
3 to attorneys' fees based on the catalyst theory, it is their burden to establish such and Defendants  
4 have only recently begun to suggest that formal regulations were being prepared independent of  
5 this litigation. But because this case is still in its infancy, no discovery has yet taken place and  
6 Plaintiffs have not had the opportunity to test the veracity of Defendants' claims. (Decl. of Jeffrey  
7 A. Rich Supp. Defs.' Mem. Supp. Demurrer, Exh. 2; Defs.' Mem. Supp. Demurrer, p. 3.) Plaintiffs  
8 thus require limited discovery at this stage for that very purpose.

9         Again, Plaintiffs do not oppose Defendants' request that the Court sustain their demurrer  
10 without leave to amend. But Plaintiffs respectfully ask the Court to delay entering a final  
11 judgment on Defendants' demurrer to allow for Plaintiffs to engage in limited discovery for the  
12 purpose of investigating and confirming the validity of their attorneys' fees claim. Alternatively,  
13 Plaintiffs request that the Court order such relief as it deems necessary to allow Plaintiffs to  
14 engage in limited discovery for the purpose of supporting their fee motion.

15         Date: April 2, 2015

MICHEL & ASSOCIATES, P.C.



Anna M. Barvir  
*Counsel for Plaintiffs*

1 **PROOF OF SERVICE**

2 I, Laura Quesada, am employed in the City of Long Beach, Los Angeles County,  
3 California. I am over the age eighteen (18) years and am not a party to the within action. My  
4 business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

5 On April 2, 2015, I served the foregoing document(s) described as:

6 **PLAINTIFFS' NON-OPPOSITION TO DEFENDANTS' AND RESPONDENTS'  
7 DEMURRER TO FIRST AMENDED COMPLAINT FOR DECLARATORY AND  
8 INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE**

9 on the interested parties in this action by placing

10 [ ] the original

11 [X] a true and correct copy

12 thereof enclosed in sealed envelope(s) addressed as follows:

13 Mr. Jeffrey Rich  
14 Deputy Attorney General  
15 1300 I Street, Suite 125  
16 P.O. Box 944255  
17 Sacramento, CA 95814

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

20 Executed on \_\_\_\_\_, 2015, at Long Beach, California.

21 X (OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of  
22 collection and processing correspondence for overnight delivery by UPS/FED-EX. Under  
23 the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for  
24 receipt on the same day in the ordinary course of business. Such envelope was sealed and  
25 placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for  
26 in accordance.

27 Executed on April 2, 2015, at Long Beach, California.

28 X (STATE) I declare under penalty of perjury under the laws of the State of California that  
the foregoing is true and correct.

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

29   
30 \_\_\_\_\_  
31 LAURA L. QUESADA