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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

ALVIN DOE and PAUL A. GLADDEN,

Plaintiffs,

v.

KAMALA D. HARRIS, in her official capacity
as Attorney General of California; and
STEPHEN J. LINDLEY, in his official capacity
as Chief of the California Department of Justice
Bureau of Firearms,

Defendants.

Case No.: 34-2014-00163821

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY INJUNCTION**

Date: July 8, 2014
Time: 2:00 p.m.
Dept: 53

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 Please take notice that on July 8, 2014, at 2:00 p.m., in Department 53 of the above-entitled
3 court, located at 720 Ninth Street, Sacramento, California, Plaintiffs Alvin Doe and Paul A.
4 Gladden will and hereby do move pursuant to Code of Civil Procedure §§ 526 and 527, et seq. for
5 the issuance of a preliminary injunction preventing Defendants Kamala A. Harris and Stephen J.
6 Lindley from enforcing the California Department of Justice's policy that the licensed collectors'
7 exemption in Penal Code § 27535(b)(9) applies only to the purchase of curios and relics. This
8 motion is made on the ground that Plaintiffs have established that they are likely to prevail on the
9 merits of this action and that the interim harm that they are likely to sustain if the injunction is not
10 entered far outweighs any harm the defendants might suffer in the preliminary injunction were
11 granted.

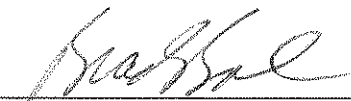
12 Pursuant to Local Rule 1.06, the parties are further notified as follows:

13 Pursuant to Local Rule 1.06(A), the court will make a tentative ruling on the merits of this
14 matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings
15 for the department may be downloaded off the court's website. If the party does not have online
16 access, they may call the dedicated phone number for the department as referenced in the local
17 telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the
18 hearing and receive the tentative ruling. If you do not call the court and the opposing party by 4:00
19 p.m. the court day before the hearing, no hearing will be held.

20 This motion is based on this notice; the attached memorandum of points and authorities;
21 the accompanying declarations of Plaintiffs Alvin Doe and Paul A. Gladden, as well as the
22 attached exhibits; the accompanying declaration of Ken Lunde, as well as the attached exhibits; the
23 accompanying request for judicial notice; the files and records in this action; and any further
24 evidence or argument that the Court may properly receive at or before the hearing.
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1 Dated: June 6, 2014

BENBROOK LAW GROUP, PC

2
3 By 

4 BRADLEY A. BENBROOK

Attorneys for Plaintiffs

ALVIN DOE and PAUL A. GLADDEN

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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SACRAMENTO
10

11 ALVIN DOE and PAUL A. GLADDEN,
12 Plaintiffs,

13 v.

14 KAMALA D. HARRIS, in her official capacity
15 as Attorney General of California; and
16 STEPHEN J. LINDLEY, in his official capacity
as Chief of the California Department of Justice
Bureau of Firearms,

17 Defendants.
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Case No.: 34-2014-00163821

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Date: July 8, 2014

Time: 2:00 p.m.

Dept: 53

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I.

INTRODUCTION

This motion is brought to prevent the California Department of Justice (“DOJ”) from refusing to allow eligible persons to purchase handguns. The Legislature directs the DOJ to oversee firearms dealers’ processing of paperwork associated with handgun purchases. In an ill-fated power play to restrict a relatively narrow class of gun purchases, the DOJ has recently instructed firearms dealers not to sell modern handguns to federally-registered collectors who are plainly eligible to buy them under the California Penal Code.

California Penal Code section 27535 (“Section 27535”) generally prohibits a person from applying to purchase multiple handguns in any thirty-day period. Penal Code § 27535(a). The statute exempts several types of organizations and classes of people from the one-handgun-per-thirty-day limit, however. The exemption at the heart of this lawsuit provides that Section 27535’s prohibition does not apply to any person who is both (a) licensed under federal law as a collector of curios and relics and (b) possesses a current certificate of eligibility to possess and purchase firearms issued by the DOJ. *Id.*, § 27535(b)(9).

The DOJ Bureau of Firearms recently notified the state’s firearms dealers that it had adopted an enforcement policy interpreting the licensed collectors’ exemption to apply only to purchases of curios or relics. The Department directed dealers to cancel and refuse to process any transactions in which persons falling within the Section 27535(b)(9) exemption proposed to purchase a handgun *other than* a curio or relic. It also notified dealers that it would cancel transactions that did not conform to this new policy.

Plaintiffs are licensed collectors of curios and relics and have current certificates of eligibility issued by the DOJ. They are therefore exempt from the one-handgun-per-thirty-day limit imposed by Section 27535. They seek a preliminary injunction to block the DOJ from continuing to enforce its erroneous interpretation of state law. Because the DOJ does not have the authority to alter or amend a statute, or enlarge or impair its scope, its new policy is void. It is this Court’s obligation to strike it down. *Morris v. Williams*, 67 Cal.2d 733, 748 (1967).

Moreover, DOJ's new policy must be struck down because it is an invalid underground regulation since DOJ did not comply with the Administrative Procedure Act's "basic minimum procedural requirements" before its adoption. The enforcement policy is therefore void. *Morning Star Co. v. State Bd. of Equalization*, 38 Cal.4th 324, 332-36 (2006); Gov. Code § 11342.2.

II.

FACTUAL BACKGROUND

A. Penal Code Section 27535 Exempts Federally-Registered Collectors From The General Prohibition On Purchasing More Than One Handgun Of Any Type In A Thirty Day Period.

Section 27535(a) of the Penal Code provides that "[n]o person shall make an application to purchase more than one handgun within any 30-day period." California is one of only three states in the Country that imposes such a limitation,¹ and Federal law imposes no similar prohibition.² The first two violations of Section 27535 are infractions punishable by fines of \$50 and \$100; subsequent violations constitute misdemeanors. Penal Code § 27590(e).

Subdivision (b) of the statute lists thirteen exemptions from the one-handgun-per-thirty-day limitation. As relevant here, it states that the limitation in "[s]ubdivision (a) shall not apply to" "[a]ny person who is licensed as a collector pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code³ and the regulations issued pursuant thereto, and has a

¹ The three states are California, Maryland (Md. Code Ann., Pub. Safety § 5-128), and New Jersey (N.J. Stat. Ann. § 2C:58-2(a)(7)). Like California, New Jersey's statute (enacted in 2009) contains a blanket exemption for licensed collectors. N.J. Stat. Ann. § 2C:58-2(a)(7)(b); *see also* Senate Law and Public Safety and Veterans' Affairs Committee Statement to Assem., No. 339, L. 2009, ch. 104 ("Also exempt from the one-gun-a-month limitation are collectors of firearms as curios or relics as defined in Title 18, United States Code, section 921 (a) (13) who have in their possession a valid Collector of Curios and Relics License issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives."), *available at* http://www.njleg.state.nj.us/2008/Bills/A0500/339_S2.PDF.

² Federal law does, however, require firearms dealers to report the purchase of multiple handguns within a single five-day period. 18 U.S.C. 923(g)(3)(A); 27 C.F.R. § 478.126a.

³ 18 U.S.C. § 921 *et seq.*, the Gun Control Act of 1968, defines "collector" as "any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define." Federal regulations define "[c]urios or relics" as "[f]irearms which are of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons." 27 C.F.R. § 478.11. This includes "[f]irearms which were manufactured at least 50 years prior to the current date," "[f]irearms which are certified by the curator of a municipal, State, or Federal museum which

1 current certificate of eligibility issued by the Department of Justice.” Penal Code § 27535(b)(9).
2 The licensed collectors’ exemption is thus available only to individuals who have been vetted by
3 both the Bureau of Alcohol, Tobacco, Firearms and Explosives (“BATFE”) and the DOJ.

4 A federal collector’s license allows the licensee to purchase, transport, and transfer curios
5 and relics in interstate commerce; a license, standing alone, does not affect a person’s ability to
6 possess, purchase, or transfer a firearm, which is generally controlled by state law. *See* 47 C.F.R.
7 § 478.41(c), (d); 27 C.F.R. § 478.93. Licensed collectors are subject to ongoing BATFE oversight,
8 which includes reporting, recordkeeping, and inventory inspection requirements. 18 U.S.C. § 923
9 (g)(1)(C), (D) (providing for annual inspection of collector’s inventory and records); (g)(2)
10 (licensed collector must maintain “records of the receipt, sale, or other disposition of firearms”).

11 A certificate of eligibility (“COE”) issued by the California Department of Justice confirms
12 a person’s eligibility to lawfully possess and/or purchase firearms under state law. Penal Code §
13 26710; Cal. Code Regs. tit. 11, § 4031(g) (“‘Certificate of Eligibility’ means a certificate which
14 states that the DOJ has checked its records and determined that the applicant is not prohibited from
15 acquiring or possessing firearms . . . at the time the check was performed.”). COE applicants must
16 answer questions regarding their criminal record and mental illness history, and provide personal
17 information (including fingerprints) to the DOJ, which then runs a background check to ensure an
18 applicant is not prohibited by state or federal law from possessing, receiving, owning, or
19 purchasing a firearm. Cal. Code Regs. tit. 11, § 4037.

20
21 **B. The DOJ’s New Enforcement Policy Prevents Federally-Registered Collectors From
Exercising Their State Exemption Right.**

22 On May 8, 2014 the DOJ’s Bureau of Firearms sent a letter notifying licensed firearms
23 dealers in the state of a new enforcement policy interpreting Section 27535(b)(9)’s licensed
24 collectors’ exemption to apply only if the purchaser applies to purchase a handgun that is a curio
25 or relic:

26 exhibits firearms to be curios or relics of museum interest,” and “[a]ny other firearms which derive
27 a substantial part of their monetary value from the fact that they are novel, rare, bizarre, or because
28 of their association with some historical figure, period, or event.” *Id.*

1 It has come to the attention of the California Department of Justice, Bureau of
2 Firearms that dealers are selling handguns that are not defined as curio and relics
3 under federal law to persons holding the license and certificate described in Penal
4 Code section 27535, subdivision (b)(9) under this exemption. By doing so, these
dealers are allowing the buyers to purchase multiple, non curio and relic handguns
at one time, which violates both state and federal law.

5 The letter concluded:

6 [T]he exemption provided in Penal Code section 27535, subdivision (b)(9), shall
7 not be used for the sale of any handguns other than those defined as curio and relics
8 under federal law, and any such transaction shall be discontinued immediately.
9 Any transactions violating California or federal law that are not canceled by the
dealer will be canceled by the California Department of Justice, Bureau of
Firearms.

10 Ex. A to Verified Complaint for Declaratory and Injunctive Relief, DOJ Bureau of Firearms, May
11 8, 2014 Information Letter re Penal Code section 27535, Subdivision (a) – Proper Use.

12 Plaintiffs are licensed collectors of curios and relics and have current certificates of
13 eligibility issued by the DOJ. (Declaration of Alvin Doe ISO Prelim. Injunction (“Alvin Decl.”),⁴
14 ¶ 2; Declaration of Paul A. Gladden ISO Prelim. Injunction (“Gladden Decl.”), ¶ 2.) They are
15 therefore exempt from the one-handgun-per-thirty-day limit imposed by Section 27535(a).
16 However, the DOJ has enforced, and threatens to enforce, its interpretation of Section 27535 in a
17 manner that prevents Plaintiffs from lawfully purchasing firearms under the licensed collectors’
18 exemption provided by Section 27535(b)(9).

19 On prior occasions, Alvin Doe applied to purchase multiple non-curio or relic handguns
20 within a thirty-day period and was been allowed to complete those purchases based on the
21 statutory exemption in Section 27535(b)(9). (Alvin Decl., ¶ 3.) On April 24, 2014, Plaintiff Alvin
22 Doe applied to purchase multiple non-curio or relic handguns from a licensed firearms dealer in
23 Orange County. (*Id.*, ¶ 5.) On or about May 1, 2014, the DOJ cancelled all but one of the
24 applications based on its new enforcement policy. (*Id.*)

25 ⁴ Plaintiff Alvin Doe proceeds under a fictitious name to protect his or her privacy due to
26 fear of criminal prosecution and retaliation based on the activities described in the complaint. *Doe*
27 *v. Lincoln Unified Sch. Dist.*, 188 Cal.App.4th 758, 765-67 (2010). Plaintiff Doe has signed a
28 supporting declaration using the fictitious name as permitted under California law. *Doe v. Super.*
Ct., 194 Cal.App.4th 750, 754-55 (2011).

1 On prior occasions, Plaintiff Gladden applied to purchase multiple non-curio or relic
2 handguns within a thirty-day period and has been allowed to complete those purchases based on
3 the statutory exemption in Section 27535(b)(9). (Gladden Decl., ¶ 3.)

4 But for the fear of prosecution or threat of adverse action by the DOJ, each Plaintiff would
5 submit additional applications to purchase non-curio or relic handguns that would violate the
6 DOJ's new policy. (Alvin Decl., ¶ 6; Gladden Decl., ¶ 4.)

7 8 III.

9 PRELIMINARY INJUNCTION STANDARDS

10 A preliminary injunction is appropriate "[w]hen it appears by the complaint that the
11 plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining
12 the commission or continuance of the act complained of, either for a limited period or
13 perpetually." Code Civ. Proc. § 526(a)(1). The court may also grant an injunction "[w]hen it
14 appears . . . that a party to the action is doing, or threatens, or is about to do, . . . some act in
15 violation of the rights of another party to the action respecting the subject of the action, and
16 tending to render the judgment ineffectual," *id.*, subd. (a)(3), or "where pecuniary compensation
17 would not afford adequate relief." *Id.*, subd. (a)(4).

18 The Court must examine two interrelated factors in connection with issuance of a
19 preliminary injunction: "(1) the likelihood that the plaintiff will prevail on the merits, and (2) the
20 relative balance of harms that is likely to result from the granting or denial of interim injunctive
21 relief." *White v. Davis*, 30 Cal.4th 528, 554 (2003). "The more likely it is that plaintiffs will
22 ultimately prevail, the less severe must be the harm that they allege will occur if the injunction
23 does not issue." *Right Site Coalition v. Los Angeles Unified Sch. Dist.*, 160 Cal.App.4th 336, 338-
24 39 (2008) (citing *King v. Meese*, 43 Cal.3d 1217, 1226 (1987)). And "if the party seeking the
25 injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial
26 court has discretion to issue the injunction notwithstanding that party's inability to show that the
27 balance of harms tips in his favor." *Common Cause v. Bd. of Supervisors*, 49 Cal.3d 432, 447

1 (1989). In considering a request for a preliminary injunction, a trial court “must exercise its
2 discretion in favor of the party most likely to be injured.” *Robbins v. Super. Ct.*, 38 Cal.3d 199,
3 205 (1985) (internal quote and citation omitted).

4 5 IV.

6 ARGUMENT

7 **A. Plaintiffs Will Prevail On The Merits Because DOJ’s Enforcement Policy Prevents 8 Them From Exercising Statutory Rights Granted To Them In Section 27535.**

9 The DOJ’s new enforcement policy is void because it alters the scope of Section 27535.
10 Specifically, it diminishes the scope of Section 27535(b)(9)’s exemption. “[A]n agency does not
11 have discretion to promulgate regulations that are inconsistent with the governing statute, alter or
12 amend the statute, or enlarge its scope.” *Cal. Sch. Bds. Ass’n v. State Bd. of Educ.*, 191
13 Cal.App.4th 530, 544 (2010). And “[w]here regulations are void because of inconsistency or
14 conflict with the governing statute, a court has a duty to strike them down.” *Id.*; *Morris v.*
15 *Williams*, 67 Cal.2d 733, 748 (1967) (“Administrative regulations that alter or amend the statute or
16 enlarge or impair its scope are void and courts not only may, but it is their obligation to strike
17 down such regulations.”).

18 **1. The DOJ’s Enforcement Policy Is Inconsistent With The Plain Meaning Of 19 Section 27535.**

20 The “first step” in a case involving a dispute over the meaning of a statute “is to scrutinize
21 the actual words of the statute, giving them a plain and commonsense meaning. If the words of the
22 statute are clear, the court should not add to or alter them to accomplish a purpose that does not
23 appear on the face of the statute or from its legislative history.” *Goodman v. Lozano*, 47 Cal.4th
24 1327, 1332 (2010) (internal quotation marks and citations omitted). The Court “may not, under
25 the guise of construction, rewrite the law or give the words an effect different from the plain and
26 direct import of the terms used.” *Cal. Fed. Savings & Loan Ass’n v. City of Los Angeles*, 11
27 Cal.4th 342, 349 (1995).

1 The DOJ's enforcement policy is contrary to the plain language of Section 27535(b)(9)'s
2 exemption, which takes eligible collectors outside of Section 27535(a)'s prohibition on the
3 purchase of more than one handgun of *any* type in a 30-day period. Subsection (a)'s one-
4 purchase-every-thirty-days limitation applies to all types of handguns, and subsection (b)(9) says
5 that the limitation simply "shall not apply." The exemption is not limited in any way. It does not
6 restrict the licensed collectors' exemption to transactions involving curios or relics. And, since
7 subsection (a)'s limit does not apply, there is no other California law preventing plaintiffs and
8 persons similarly situated from purchasing more than one handgun in a thirty-day period. Because
9 "there is no ambiguity in the language of the statute," "the Legislature is presumed to have meant
10 what it said, and the plain meaning of the language governs." *Lennane v. Franchise Tax Bd.*, 9
11 Cal.4th 263, 268 (1994); *People v. Traylor*, 46 Cal.4th 1205, 1212 (2009).

12 Nevertheless, it is certainly noteworthy that the DOJ's new policy marks a complete
13 reversal of its long held policy, which did no violence to the statutory scheme. Nearly 10 years
14 ago, the DOJ's position on the matter was settled enough that it was considered the "long-standing
15 policy" of the DOJ that the licensed collectors' exemption applied to "all firearms purchases . . . ,
16 even if the firearms are not curios and relics." (Declaration of Ken Lunde ISO Prelim. Injunction
17 ("Lunde Decl."), ¶ 6 & Ex. 3.) In September 2005, responding to an e-mail inquiry about the
18 scope of the licensed collectors' exemption, legal counsel for the Bureau of Firearms explained:

19 I have been advised that it is our long-standing policy for DOJ to exempt all
20 firearms purchases by C&R licensees from the provisions of [Penal Code section]
21 12072(a)(9)(A)⁵ [the "one gun per month" limit], even if the firearms are not curios
22 and relics.

23 *Ibid.* (first brackets added; second brackets in original). In the course of that same e-mail
24 exchange, the DOJ repudiated precisely the same logic it now advances as a formal policy: That
25 the exemption does not apply because the federal firearms license only applies to transactions
26 involving curios and relics. (*See* Lunde Decl., ¶¶ 3-6 & Exs. 1-3.)

27 ⁵ Section 12072 was renumbered as Section 27535 in a nonsubstantive reorganization of the
28 Penal Code sections governing deadly weapons. Sen. Bill 1080 (2009-2010 Reg. Sess.).

1 **2. Legislative History Confirms That The Licensed Collectors' Exemption**
2 **Applies To The Purchase Of Any Handgun.**

3 While “[t]he absence of ambiguity in the statutory language dispenses with the need to
4 review the legislative history,” resort to extrinsic aids is appropriate to confirm that a plain
5 language construction is consistent with legislative intent. *People v. Albillar*, 51 Cal.4th 47, 56, 67
6 (2010); accord *Klein v. United States*, 50 Cal.4th 68, 82 (2010). The legislative history of Section
7 27535 confirms that a licensed collector is exempt from the one-handgun limit without respect to
8 whether the collector is purchasing a new handgun or a curio or relic.

9 Section 27535 was enacted by the Legislature in 1999 as part of Assembly Bill 202. The
10 committee analyses of AB 202 state that licensed collectors are exempt without limitation. Assem.
11 Comm. on Public Safety, Analysis of Assem. Bill 202 (1999-2000 Reg. Sess.) as amended March
12 10, 1999, at 3 (“exempt institutions, persons and situations include” “[a]ny licensed collector”);
13 Sen. Comm. on Public Safety, Analysis of Assem. Bill 202 (1999-2000 Reg. Sess.) as amended
14 April 6, 1999, at 2 (“Exempts . . . licensed collectors”); Assem. Comm. on Appropriations,
15 Analysis of Assem. Bill 202 (1999-2000 Reg. Sess.) as amended March 10, 1999, at 1 (“The bill
16 also provides specified exemptions for law enforcement, licensed collectors, etc.”). *See also*
17 Office of Criminal Justice Planning, Enrolled Bill Report, Assem. Bill. 202 (1999-2000 Reg.
18 Sess.) as amended April 6, 1999, at 3 (“This bill will exempt . . . licensed collectors”).⁶

19 That the licensed collectors’ exemption is not limited to purchases of curios or relics is
20 further confirmed by the legislative history of a predecessor bill introduced the previous session by
21 the same author. Assembly Bill 532 (1997-1998 Reg. Sess.) contained a one-handgun-per-month
22 scheme virtually identical to the one adopted in AB 202. The initial draft of AB 532 did not
23 include an exemption for licensed collectors. When the Assembly Committee on Public Safety
24 considered the proposed amendment adding language identical to the exemption in Section
25 27535(b)(9), it observed that “[a]s drafted and proposed to be amended, the bill does not affect”
26 “[t]he 400 some odd California federally licensed collectors *as to any firearm acquisition*.”

27 ⁶ These legislative history materials are attached at Exhibits 1-4 in the Request for Judicial
28 Notice accompanying this motion.

1 Assem. Comm. on Public Safety, Analysis of Assem. Bill 532 for April 8, 1997 hearing (1997-
2 1998 Reg. Sess.), at 5 (emphasis added).⁷

3 To that same end, the author's notes for the hearing on the proposed amendment explain
4 that the collectors' exemption applies to purchases of new handguns:

5 What effect does exempting collectors of curios and relics licensed under federal
6 [law] have?

7 It permits serious collectors of *new handguns* [to] go through the federal
8 licensing process – including undergoing scrutiny of a background check
and payment of a \$30 fee – to qualify as an exempt party under AB 532.

9 Author's file, Assem. Bill 532 (1997-1998 Reg. Sess.), Notes re: April 8, 1997 Hearing of Assem.
10 Comm. on Public Safety, at 2 (emphasis added).⁸

11 The DOJ's enforcement policy is also at odds with the "well recognized principle of
12 statutory construction that when the Legislature has carefully employed a term in one place and
13 has excluded it in another, it should not be implied where excluded." *Brown v. Kelly Broad. Co.*,
14 48 Cal.3d 711, 725 (1989). Where the Legislature has intended to regulate the transfer and sale of
15 curios and relics, it has done so expressly. *See, e.g.*, Penal Code §§ 31700 (exempting from the
16 firearm safety certificate requirement "a federally licensed collector who is acquiring or being
17 loaned a handgun *that is a curio or relic*, . . . who has a current certificate of eligibility . . .")
18 (emphasis added); 26970 (waiting period does not apply to "sale, delivery, loan, or transfer" of a
19 curio or relic to a "licensed collector [who] has a current certificate of eligibility"); 27966
20 (requirement that transactions be processed through a licensed dealer does not apply if the firearm
21 is a curio or relic, and "the person receiving the firearm is a licensed collector" who "has a current
22 certificate of eligibility"). If the Legislature intended the exemption to only apply to purchases of
23 curios or relics, it could have said so.

24
25 ⁷ RJN, Ex. 6.

26 ⁸ RJN, Ex. 6. *See also* Author's file, Assem. Bill 532 (1997-1998 Reg. Sess.), Notes re: June
27 5, 1997 Assembly Floor Debate (AB 532 "[e]xempts . . . gun collectors . . . from the limit."),
attached as RJN, Ex. 7.

1 **3. Applying The Licensed Collectors' Exemption To All Handgun Purchases Is**
2 **Consistent With The Purpose Of The Statute.**

3 Exempting licensed collectors is also consistent with the statute's purpose to limit straw
4 purchases of handguns. *See* Assem. Com. on Public Safety, Analysis of Assem. Bill 202 as
5 amended March 10, 1999, at 3 ("The goal of this bill is to stop one gun purchaser from buying
6 several guns and transferring weapons to another person who does not have the legal ability to buy
7 a gun.") (RJN, Ex. 1). The Assembly Committee on Public Safety explained how the exemptions
8 furthered this goal by channeling handgun purchases through licensed dealers: "The bill also
9 provides numerous exemptions which are salutary because they encourage a person who may be
10 involved lawfully in multi-gun exchanges to go to a licensed dealer, or to the local sheriff, in order
11 to facilitate the exchange." *Id.* at 4. Moreover, licensed collectors are vetted by the BATFE, and
12 are subject to reporting, recordkeeping and inventory inspection requirements. 18 U.S.C. § 923.
13 The COE requirement provides an additional level of scrutiny on a purchaser's background. A
14 certificate is issued only after the DOJ conducts a fingerprint-based background check and ensures
15 an applicant is not prohibited by state or federal law from possessing, receiving, owning, or
16 purchasing a firearm. Penal Code § 26710; Cal. Code Regs. tit. 11, § 4037. The Legislature
17 plainly determined that individuals who have undergone the background checks necessary to
18 possess both a valid collectors' license and a current COE do not pose an unacceptable risk of
19 engaging in the types of transactions targeted by the statute.

20 **4. DOJ's Enforcement Policy Incorrectly Interprets Federal Law.**

21 Finally, the enforcement policy relies on an erroneous interpretation of federal law.
22 Specifically, it states that "dealers are allowing [licensed collectors] to purchase multiple, non
23 curio and relic handguns at one time, which violates both statute and federal law." Compl., Ex. A
24 at 1. Not so. Federal law does not prohibit responsible, law-abiding citizens—whether or not they
25 possess a collectors' license—from purchasing multiple handguns, and citizens are free to do so in
26 the 47 states that do not impose monthly limits. (Federal law does, however, require firearms
27 dealers to report the purchase of multiple handguns within a single five-day period. 18 U.S.C.
28 923(g)(3)(A); 27 C.F.R. § 478.126a.)

In sum, the DOJ's new enforcement policy is void because it limits the scope of Section 27535(b)(9)'s exemption, thereby preventing citizens whom the Legislature determined were eligible from exercising their statutory rights. "[A]n agency does not have discretion to promulgate regulations that are inconsistent with the governing statute, alter or amend the statute, or enlarge its scope." *Cal. Sch. Bds. Ass'n*, 191 Cal.App.4th at 544. And "[w]here regulations are void because of inconsistency or conflict with the governing statute, a court has a duty to strike them down." *Id.*

B. Plaintiffs Are Entitled To An Injunction.

The Court could – and should – issue injunctive relief based solely on the high likelihood that Plaintiffs will prevail. *Common Cause*, *supra*, 49 Cal.3d at 447 (1989) (court may grant injunction based on strong likelihood of success standing alone). Plaintiffs are further entitled to injunctive relief based on factors separate from the merits.

Plaintiffs' remedy at law is inadequate to address the injuries they will suffer during the pendency of this litigation, namely, that Plaintiffs will continue to face the threat of criminal sanctions for engaging in lawful activity or otherwise be prevented from lawfully purchasing firearms under the exemption provided in Section 27535(b)(9). Code Civ. Proc. § 526(a)(3) (court may grant injunction "[w]hen it appears . . . that a party to the action is doing, or threatens, or is about to do, . . . some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual."). The balance of hardships tips in Plaintiffs' favor because (1) Plaintiffs are, in fact, exempt from Section 27535's limit, and both the federal government and the DOJ have confirmed that Plaintiffs are eligible to purchase and possess firearms; (2) Plaintiffs face the threat of criminal sanctions or other adverse action from Defendants in the absence of an injunction; and (3) Defendants will not suffer hardship if they are prevented from enforcing an invalid policy. *Cf. Associated Cal. Loggers, Inc. v. Kinder*, 79 Cal.App.3d 34, 45 (1978) (injunctive relief is appropriate where a court finds that a "public

1 official's action was not within the scope of the statute," or "where the public official's action
2 exceeds his power."); *see* 6 Witkin Cal. Proc. (5th ed. 2008) Prov. Rem., § 331, p. 275.

3 Indeed, the new policy marks a complete reversal of the policy that was "long-standing" as
4 far back as 2005, so the new policy itself changed the status quo that had held for many years.
5 Entering a preliminary injunction would merely restore the status quo – to compliance with the
6 statute.

7
8 **C. Plaintiffs Will Also Prevail On The Merits Because The Enforcement Policy Is An
Invalid Underground Regulation.**

9 The enforcement policy is also void because the DOJ failed to comply with the
10 Administrative Procedure Act ("APA") before its adoption. "If a policy or procedure falls within
11 the definition of a 'regulation' within the meaning of the APA, the promulgating agency must
12 comply with the procedures for formalizing such regulation, which include public notice and
13 approval by the Office of Administrative Law (OAL)." *Kings Rehabilitation Ctr., Inc. v. Premo*,
14 69 Cal.App.4th 215, 217 (1999).⁹

15 In *Morning Star*, the California Supreme Court spelled out the APA's procedural
16 rulemaking requirements:

17 The agency must give the public notice of its proposed regulatory action ([Gov.
18 Code] §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a
19 statement of the reasons for it (*id.*, § 11346.2, subds. (a), (b)); give interested parties
20 an opportunity to comment on the proposed regulation (*id.*, § 11346.8); respond in
21 writing to public comments (*id.*, §§ 11346.8, subd. (a), 11346.9); and forward a file
22 of all materials on which the agency relied in the regulatory process to the Office of
Administrative Law (*id.*, § 11347.3, subd. (b)), which reviews the regulation for
consistency with the law, clarity, and necessity. (*Id.*, §§ 11349.1, 11349.3.) Any
regulation or order of repeal that substantially fails to comply with these
requirements may be judicially declared invalid.

23 38 Cal.4th at 333 (citation omitted). So-called "underground regulations" are regulations adopted
24 without complying with these procedural rulemaking requirements, and are therefore void. *See*,

25
26 ⁹ The Department of Justice qualifies as a state agency subject to the APA. Gov. Code
27 §11340.5(a) (every "state agency" must comply with the APA); *id.*, §§ 11342.520, 11000 ("state
28 agency" includes "every state office, officer, department, division, bureau, board, and
commission," other than California State University).

1 e.g., *Capen v. Shewry*, 155 Cal.App.4th 378, 386-87 (2007). “The statutory constraints on an
2 agency's ability to adopt regulations apply with equal force to more informal agency action
3 because “[a]n agency may not exceed the limits of its authority by adopting and enforcing a policy
4 which would not be permitted as a formally adopted regulation.” *Cnty. of San Diego v. Bowen*,
5 166 Cal.App.4th 501, 508 n.5 (2008) (quoting *Agnew v. State Bd. of Equalization*, 21 Cal.4th 310,
6 321 (1999)); see also *Agnew*, 21 Cal.4th at 321 (“These rules [governing an agency’s rulemaking
7 authority] are equally applicable to an administrative agency policy which has the effect of a
8 regulation.”).

9 Under the APA, “regulation” “means every rule, regulation, order, or standard of general
10 application or the amendment, supplement, or revision of any rule, regulation, order, or standard
11 adopted by any state agency to implement, interpret, or make specific the law enforced or
12 administered by it, or to govern its procedure.” Gov.Code, § 11342.600. “[A]bsent an express
13 exception, the APA applies to all generally applicable administrative interpretations of a statute.”
14 *Morning Star*, 38 Cal.4th at 335. “A regulation subject to the APA . . . has two principal
15 identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a
16 specific case. . . . Second, the rule must ‘implement, interpret, or make specific the law enforced
17 or administered by [the agency], or . . . govern [the agency's] procedure.’” *Tidewater Marine W.,*
18 *Inc. v. Bradshaw*, 14 Cal.4th 557, 571 (1996) (citations omitted); see also *id.* (“a rule applies
19 generally so long as it declares how a certain class of cases will be decided.”).

20 The DOJ’s enforcement policy qualifies as a “regulation”: it purports to interpret Penal
21 Code section 27535, and it generally applies to any transaction involving collectors who are
22 otherwise eligible under Section 27535(b)(9) to purchase more than one handgun in a 30-day
23 period.¹⁰ Gov. Code § 11342.600. Because the DOJ did not comply with the APA’s procedural
24 requirements when adopting the policy, it is void as an underground regulation.

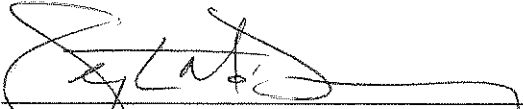
25 ¹⁰ The scope of subsection (b)(9)’s exemption is not subject to discretionary enforcement by
26 the DOJ because (a) there is no express statutory authorization for the DOJ to enact regulations
27 that purport to interpret the statute, and (b) even assuming such authority were implied, the DOJ’s
28 policy is invalid because it conflicts with the unambiguous language of the statute and it is not
“reasonably necessary to effectuate” the statute’s purpose. Gov. Code § 11342.2. But even if the

V.
CONCLUSION

For the reasons set forth above, Plaintiffs' motion for preliminary injunction should be granted.

Dated: June 9, 2014

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Court considered the statute subject to differing interpretations, the policy would constitute a "regulation" under the APA, and would be invalid for the same reasons set forth above. *Cf. Capen*, 155 Cal.App.4th at 383 ("An unwritten, generally applicable interpretation of an ambiguous statute 'amount[s] to a regulation' subject to the APA.") (citation omitted).