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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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The Opposition is extraordinary for the fact that DOJ did not get around to defending its new position on the merits until page nine of a twelve-page brief. But that pales in comparison to DOJ's claim that its new enforcement policy is the "is the only legally tenable interpretation" of the licensed collector exemption, notwithstanding the fact that it is a complete reversal of its longstanding prior policy, a point the Opposition utterly ignores.

Indeed, DOJ had so little to work with that it chose a diversionary, non-merits-based strategy for opposing the preliminary injunction. This strategy can be summed up simply as: (1) argue that Plaintiffs are not alleging harm (despite the opening brief's discussion at page 11), and (2) ignore the statutory language in favor of as many policy arguments as possible (the scarier the better), even if it means disparaging existing licensing standards and suggesting that federally-licensed collectors are just gun nuts who are likely to commit crimes. As shown below, this strategy fails, and the preliminary injunction should be granted.

REPLY ARGUMENT

A. Plaintiffs Have Demonstrated Sufficient Harm To Warrant An Injunction.

DOJ is correct that Plaintiffs believe this Court could – and should – issue injunctive relief based solely on their extremely high likelihood of prevailing, a result expressly permitted by *Common Cause v. Bd. of Supervisors*, 49 Cal.3d 432, 447 (1989). But DOJ is quite wrong to suggest that Plaintiffs raised a white flag on the issue of harm. Plaintiffs have demonstrated that they will suffer irreparable harm by the DOJ's enforcement of its new policy, which conflicts with the statute and exceeds the Department's power.

Far from being a "conclusory assertion" of harm, Opp. at 6:16, the threat of criminal prosecution if Plaintiffs pursued their intended course of conduct is sufficient harm to warrant injunctive relief. *McKay Jewelers, Inc. v. Bowron*, 19 Cal.2d 595, 599 (1942) (irreparable injury from threatened enforcement of statute); *Ebel v. City of Garden Grove*, 120 Cal.App.3d 399, 410 (1981) (threatened arrest or fear of arrest sufficient to show irreparable injury). Plaintiffs wish to submit applications for the purchase of more than one handgun in a 30-day period. If the DOJ actually intends to enforce its new policy, such applications would subject Plaintiffs to criminal

liability. Penal Code §§ 27535 ("No person *shall make an application* to purchase more than one handgun within any 30-day period.") (emphasis added); 27590(e) (establishing criminal penalties for violations of Section 27535). This potential prosecution, based on an enforcement policy that violates the law, is sufficient in and of itself to justify a preliminary injunction.

Courts similarly recognize that "[i]njunctive relief may be granted against illegal enforcement of valid statutes." *Novar Corp. v. Bureau of Collection & Investigative Servs.*, 160 Cal.App.3d 1, 6 (1984) (upholding injunction and rejecting argument that it would prevent exercise of public official's duties). *See Startrack, Inc. v. Cnty. of Los Angeles*, 65 Cal.App.3d 451, 457 (1976) (upholding injunction where public official's interpretation of a statute "was both mistaken and illegal," and holding that plaintiffs were exempt from the ordinance as properly interpreted). Moreover, the enforcement policy interferes with Plaintiffs' Second Amendment right to keep and bear arms, which is "among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago,* 561 U.S. 742, 130 S. Ct. 3020, 3042 (2010). "[A]n alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir.1997) (citation and quotation marks omitted).

Plaintiffs have thus stated classic grounds for preliminary injunctive relief. The DOJ has already directly applied its policy to the detriment of Plaintiff Gladden, and it continues to enforce its policy through its direction to licensed firearms dealers and through the DROS clearinghouse.

DOJ is not protected by the "general rule against enjoining public officers or agencies from performing their duties." (Opp. at 5:14-15.) That rule does not apply here because (1) the DOJ's enforcement policy is "not within the scope of the statute" and (2) the policy "exceeds [the Attorney General's] power." *Associated Cal. Loggers, Inc. v. Kinder*, 79 Cal.App.3d 34, 45 (1978); 6 Witkin Cal. Proc. (5th ed. 2008) Prov. Rem., § 331, p. 275.

Finally, Plaintiffs' potential legal remedies if an injunction is not issued would be inadequate and ineffective. They would be inadequate because the denial of a statutory right does not have a readily ascertainable monetary value, and ineffective because even ultimate exoneration would not erase the interim stain of criminal liability due to the DOJ's invalid enforcement policy.

In sum, Plaintiffs have demonstrated sufficient harm to warrant injunctive relief.

B. DOJ's "Public Harm" Theory Makes No Sense Given That An Injunction Would Restore The Status Quo That Held From 1999 Until The Announcement Of The New Policy A Few Weeks Ago.

DOJ claims that enjoining its new policy would "threaten public safety with the prospect of large arsenals of handguns amassing very quickly into the hands of persons likely to commit crimes," and this risk justifies denying the injunction. (Opp. at 8:8-9.) While this theory suffers from many flaws outlined below, it is worth noting at the outset that DOJ's claim cannot possibly constitute a "public harm" that is properly weighed against plaintiffs' interest in a lawful application of the statute. After all, a preliminary injunction would merely restore the status quo that existed for fifteen years under DOJ's prior policy. And, to be sure, DOJ has not cited a single instance where a federally-licensed collector actually committed acts consistent with the opposition's scare-tactic scenario. Rather, the argument vividly illustrates that DOJ is simply pushing for a change in policy – a change that denies a statutory right granted by the Legislature.

DOJ tries again to fall back on the general maxim that this Court must consider public policy. (Opp. at 8:3-18.) But this only restates the rule discussed above; a government agency's public policy claims do "not preclude a court from enjoining unconstitutional or void acts." *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.*, 23 Cal.App.4th 1459, 1471 (1994); *see also Kinder*, 79 Cal.App.3d at 45.

C. Plaintiffs Have Demonstrated They Will Prevail On Their Claim That The DOJ's Enforcement Policy Conflicts With And Is Inconsistent With Section 27535.

In a statutory construction case, the Court is guided by three fundamental rules of interpretation. "First, a court should examine the actual language of the statute. In examining the language, the courts should give to the words of the statute their ordinary, everyday meaning . . . . If the meaning is without ambiguity, doubt, or uncertainty, then the language controls." *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal.App.4th 1233, 1238-39 (1992); *see also*, *e.g.*, *People v. Traylor*, 46 Cal.4th 1205, 1212 (2009) (if language "is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary"). This is "because the statutory language is generally the most reliable indicator of legislative intent." *Klein v. United States*, 50 Cal.4th 68, 77 (2010).

Second, "if the meaning of the words is not clear," "courts must . . . refer to the legislative history." *Halbert's Lumber*, 6 Cal.App.4th at 1239; *accord People v. Albillar*, 51 Cal.4th 47, 56, 67 (2010) (while "[t]he absence of ambiguity in the statutory language dispenses with the need to review the legislative history," resort to extrinsic aids is appropriate to confirm that a plain language construction is consistent with legislative intent.). The third and final step, which "should only be taken when the first two steps have failed to reveal clear meaning," "is to apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable, practical, and in accord with common sense and justice, and avoid an absurd result." *Halbert's Lumber*, 6 Cal.App.4th at 1239.

The Opposition essentially skips the first two steps and focuses entirely on the DOJ's view about what makes good policy sense. Applying these rules in the proper sequence leads to the conclusion that the licensed collectors exemption applies to the purchase of any handgun.

1. The Language Of Section 27535 Is Unambiguous.

The "actual language of the statute" exempts a class of purchasers (licensed collectors) from the one-handgun limit, and the exemption is not limited to curios and relics. Because this "meaning is without ambiguity, doubt, or uncertainty," "the language controls," and Plaintiffs' likelihood of success is established. *Halbert's Lumber*, 6 Cal.App.4th at 1239; *see Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (1988) ("If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature.").

DOJ cannot dispute what the words of the statute actually say. Rather, it argues that "[t]he 'plain meaning' rule does not prevent a court from determining whether the literal meaning of the statute comports with its purpose," Opp. 9:12-13, and that the collectors exemption is "naturally limit[ed]" to curio and relic purchases. *Id.* at 9:15-18, 11:3-5. This argument, like its protest that "Plaintiffs' interpretation leads to absurd results," Opp. 11:16-12:8, is only relevant if it is necessary to reach the third and final step of statutory interpretation, which it is not. Even if it were, DOJ's arguments fail for the reasons discussed below.

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

Even though "[c]onsideration of extrinsic aids to statutory construction is proper only if a statute is ambiguous," *StorMedia Inc. v. Super. Ct.*, 20 Cal.4th 449, 459 (1999), the legislative intent weighs overwhelmingly in Plaintiffs' favor. This history demonstrates without question that the Legislature understood that licensed collectors, as a class, were to be exempt from the one-handgun limit without respect to the type of handgun purchased:

> (1) The committee analyses of the underlying bill state that licensed collectors are exempt without limitation (Mot. at 8:8-8:17);
>
> (2) Bill analysis of the predecessor bill that was the source of the licensed collectors' exemption states that it would exempt "California federally licensed collectors as to *any firearm acquisition*" (Mot. at 8:18-9:2);
>
> (3) The bill's author explained that the licensed collectors' exemption would "permit serious collectors of *new handguns* . . . to qualify as an exempt party" (Mot. at 9:3-10); and
>
> (4) When the Legislature has intended to regulate the transfer and sale of curios and relics, it has done so expressly (Mot. at 9:11-23).

DOJ does not – and cannot – refute any of this. Its only argument in response is that it believes the exemption is inconsistent with the Legislature's general intent to limit straw purchases of handguns. (Opp. at 10:3-9.) The obvious problem with this argument is that the Legislature stated its specific intent to allow the types of purchase at issue here. DOJ cannot override both the plain language of the statute and the evidence that the Legislature understood and intended the exemption to apply to licensed collectors as a class. Section 25735, "like most laws, might predominantly serve one general objective," "while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole." *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003). After all, legislation is the "product of multiple and somewhat inconsistent purposes that led to certain compromises." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring); *accord Hernandez v. City of Hanford*, 41

Cal.4th 279, 300-02 (2007) (citing *Fitzgerald* and *Fritz*).[1]

In any event, the logic supporting DOJ's legislative intent argument is dubious and conflicts with the Legislature's own analysis. Contrary to DOJ's argument, the legislative analysis contemporaneous with the statute's enactment explains that the exemptions actually advance the purpose of reducing straw purchases by channeling purchases that may otherwise take place on the black market through licensed firearms dealers, subject to law enforcement oversight through the DROS system – thereby assisting DOJ in tracking and prosecuting the straw transactions targeted by the statute. *See* Plaintiffs' RJN, Ex. 1, Assem. Com. on Public Safety, Analysis of Assem. Bill 202 as amended March 10, 1999, at 4 ("The bill also provides numerous exemptions which are salutary because they encourage a person who may be involved lawfully in multi-gun exchanges to go to a licensed dealer, or to the local sheriff, in order to facilitate the exchange.").

Take a simple example. Fred is a licensed collector who relies on the exemption to purchase multiple handguns from a dealer. If one of the firearms is later transferred to Dean in a straw transaction, the Attorney General can track the handgun back to Fred. On the other hand, if Fred cannot purchase the handguns from a dealer, he may turn to his neighbor Barney (or search Craigslist, or solicit a stranger) – and there is no record of that sale, or any further transfer. In this way, the Attorney General's interpretation not only drives the initial purchase underground, it frustrates the ability of law enforcement to track and prosecute straw purchases of handguns.

3. A Plain Language Interpretation Of Section 27535 Does Not Lead To Absurd Results.

DOJ argues that Plaintiffs' interpretation would lead to absurd results, namely, that it would enable licensed collectors to stockpile modern weapons. (Opp. at 11:16-12:8.) But the

[1] In a similar vein, the *Halbert's Lumber* court explained: "[I]t is the language of the statute itself that has successfully braved the legislative gauntlet. It is that language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor." 6 Cal.App.4th at 1238. Indeed, the Court is bound to follow the plain meaning of the statute, "whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature." *In re D.B.*, 58 Cal.4th 941, 948 (2014).

prospect of a licensed collector purchasing multiple modern handguns is not absurd in light of the Legislature's express recognition that the licensed collectors would be exempt "as to any firearm acquisition," and its author's observation that it would allow "serious collectors of new handguns" to qualify as exempt under the statute. (Mot. at 8:18-9:10.) "Whatever may be thought of the wisdom, expediency, or policy of the act," courts "have no power to rewrite [a] statute to make it conform to a presumed intention that is not expressed." *Cnty. of Santa Clara v. Perry*, 18 Cal.4th 435, 446 (1998).

Moreover, the premise of DOJ's "absurd results" argument – that the Court should fear the prospect of federally-licensed collectors stocking up on guns, going rogue, and selling the guns to criminals – ignores two important and obvious points. First, the citizens subject to the new policy are already collectors of guns – by definition they are already sitting on an "arsenal" as DOJ would surely view it.[2] *See also* "Arsenal," Dictionary.com Unabridged (Random House 2014) (defining "arsenal" as "a collection or supply of weapons or munitions."). Never mind that this same argument could be used against the 1-in-30 Rule itself: Any citizen can purchase a gun every 30 days, and at that pace it would not take long to develop what DOJ would consider an unsavory "arsenal."

Second, the citizens subject to the new policy have already been screened by the federal and state government for the very purpose of purchasing firearms, and these processes confirm that those subject to the licensed collectors' exemption do not have a disqualifying criminal history. To obtain a COE, the licensed collector undergoes a fingerprint-based background check performed by DOJ as well. DOJ argues that this screening process is so superficial that it cannot be trusted, and the licensees cannot be trusted either, so surely the Legislature did not mean what it said. *See* Opp. at 8:8-10 (Plaintiffs' interpretation "will threaten public safety with the prospect of large arsenals of handguns amassing very quickly into the hands of persons likely to commit crimes and whose intentions and background could bring forth the hazards [the statute] was

[2] DOJ even goes so far as to claim that licensed collectors do not, in fact, have collections of curios and relics. (Opp. at 8:11-15 (citing Lindley Decl., ¶ 7.).) There is no foundation for this statement or evidence to support it; in any event, the DOJ has no means or authority to monitor licensed collectors' inventories.

enacted to prevent."); *id.* at 10:12-13 ("Unsurprisingly, the particulars of weapons licensing do not support any special trust or confidence either."). Of course, DOJ offers no evidence to support its claim that federally licensed collectors with COEs have "intentions" or "backgrounds" that make them "likely to commit crimes." Regardless of DOJ's current views about whether licensed collectors are screened closely enough, the Legislature has already made its policy judgment that they are exempt.[3]

Similarly, the DOJ's pseudo-expert opinion statements about the firepower of modern weapons do not impact the statutory analysis. (*See* Opp. at 11:24-12:3.) DOJ's improper opinion testimony is rebutted by a wealth of resources demonstrating that the difference between modern handguns and 19th- and early-20th century pistols – which are certainly curios and relics – is not nearly as significant as supposed.[4] And the DOJ's attempt to draw this distinction between curios/relics and "modern" weapons misses the mark. Curios and relics include "[f]irearms which were manufactured at least 50 years prior to the current date." 27 C.F.R. 478.11(1). The Smith & Wesson Model 29 – the .44 Magnum made famous in "Dirty Harry" – first manufactured in 1955, is on the BATFE's Curios or Relics List. So are the Browning M1911 (first produced in 1911) and Hi-Power (1935), the semi-automatic handguns carried on the hip of U.S. Armed Forces for every major armed conflict in the twentieth century. Certain models of the AR-15 (in service since 1957) even qualify. Contrary to the image conjured by the Opposition, licensed collectors are not limited to muzzle-loading flintlock pistols, powder horns, and coonskin caps.

At bottom, this last ditch appeal is a scare tactic, a tacit recognition that the language of the statute, its legislative history, and even the DOJ's own longstanding policy are in Plaintiffs' favor. The colorful hypotheticals and foreboding language is employed to distract from the absence of

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[3] Not all of the statutory exemptions involve a background check. *See* Penal Code § 27535(b)(6) (exempting "[a]ny motion picture, television, or video production company or entertainment or theatrical company whose production by its nature involves the use of a firearm.").

[4] *See, e.g.*, authorities cited in Br. *Amicus Curiae* of Pink Pistols In Support Of Plaintiffs' Motion For Preliminary Injunction at 7 and n.7, *San Francisco Veteran Police Officers Ass'n v. San Francisco*, No. 13-CV-05351WHA (N.D. Cal. Jan. 15, 2014) (discussing historical prevalence of large-capacity magazines; "the 1896 Mauser C/96 could accept a detachable 20-round box magazine, the famous 1908 Luger could accept a detachable 32-round magazine, and the Browning High-Power pistol designed in 1926 came standard with a 13-round magazine.").

any *evidence* to support DOJ's position.

4. DOJ's Assertion That Its New Policy Is Entitled To Deference And Represents The "Only Reasonable Interpretation" Of The Statute Shows How Extreme The Opposition Really Is.

In the opening brief, we explained that the DOJ's new enforcement policy marks a complete reversal from its "longstanding policy" that "all firearms purchases" by licensed collectors were exempt, "even if the firearms are not curios and relics." (Mot. at 7:12-25 (quoting Lunde Decl., ¶ 6 & Ex. 3).) DOJ does not dispute this. Instead, it goes on to claim that its about-face represents "the only reasonable interpretation" of the statute, Opp. at 2:3-4, and that it "is the only legally tenable interpretation." Opp. at 12:14-15. Typical brief-writing words like "chutzpah" and "audacious" are inadequate to describe this remarkable position.

For similar reasons, the DOJ's faint suggestion that its interpretation is entitled to "great weight and respect" from the Court is wrong. (Opp. at 11:9-15.) "A vacillating position is entitled to no deference." *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal.4th 1, 13 (1998). And "when an agency's construction 'flatly contradicts' its original interpretation, it is not entitled to 'significant deference.'" *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1105 n.7 (2007) (quoting *Henning v. Indus. Welfare Comm'n.*, 46 Cal.3d 1262, 1278 (1988)). In short, the Attorney General's new interpretation – flatly contrary to its prior one – should command no respect from the Court.[5]

* * *

Sweeping aside the plain language and the legislative history of the statute, the Opposition boils down to an argument that DOJ's interpretation of the statute is better policy. But the

[5] Under familiar *Yamaha* standards, which do not apply here in light of the DOJ's flip-flop, "the degree of deference due an agency's interpretation depends upon two factors. First, the interpretation is entitled to significant deference if the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. Second, the interpretation is entitled to even greater deference if it is the result of high-level, formal agency decisionmaking." *S. Cal. Cement Masons Joint Apprenticeship Comm. v. Cal. Apprenticeship Council*, 213 Cal.App.4th 1531, 1542 (2013) (quotation marks and citations omitted). Neither one of these factors weighs in favor of deference here. Section 27535 does not involve technical, obscure, or complex language, and the enforcement policy is not the result of "high-level, formal agency decisionmaking." "Nevertheless, the proper interpretation of a statute is ultimately the court's responsibility." *Am. Coatings Ass'n, Inc. v. S. Coast Air Quality Dist.*, 54 Cal.4th 446, 462 (2012).

Attorney General mistakes her forum: "[T]he Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state," *Green v. Ralee Eng'g Co.*, 19 Cal.4th 66, 71 (1998), and Courts must not "mistake their own predilections for public policy which deserves recognition at law." *Hentzel v. Singer Co.*, 138 Cal.App.3d 290, 297 (1982).

Simply put, the statute that DOJ seeks to enforce is not the statute the Legislature enacted. DOJ's duty is to enforce the statute as written. As the D.C. Circuit put it, "[t]he agency's policy preferences cannot trump the words of the statute." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 865 (D.C. Cir. 2006). And courts do not "alter [statutory] text in order to satisfy the policy preferences of [an] agency." *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1054 (9th Cir. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002); brackets omitted). If the Attorney General disagrees with the law, her remedy is to lobby the Legislature to change it.

D. Plaintiffs Have Demonstrated That The Enforcement Policy Is An Underground Regulation.

DOJ concedes that it did not comply with the APA before adopting the enforcement policy. DOJ contends that the policy is exempt from APA rulemaking procedures because it represents "the only legally tenable interpretation" of Section 27535. (Opp. at 12: 9-16.) This cannot be taken seriously, since the interpretation flatly contradicts the DOJ's own "longstanding policy" that "all firearms purchases" by licensed collectors were exempt, "even if the firearms are not curios and relics." (Mot. at 7:12-25 (quoting Lunde Decl., ¶ 6 & Ex. 3).) The invalid adoption of the underground regulation provides an independent basis for the preliminary injunction.

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For the foregoing reasons and those stated in our opening brief, Plaintiffs' motion for preliminary injunction should be granted.

Dated: June 30, 2014

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