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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

DANNY VILLANUEVA, NIALL STALLARD, RUBEN BARRIOS, CHARLIE COX, MARK STROH, ANTHONY MENDOZA, AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, Plaintiffs, **v.** **XAVIER BECERRA, in his official capacity as Attorney for the State of California; STEPHEN LINDLEY, in his official capacity as Chief of the California Department of Justice, Bureau of Firearms; CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-10,** Defendants.	Case No. 17CECG03093 **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: 3:30 p.m. Time: January 30, 2018 Dept.: 501 Judge: Hon. Mark W. Snauffer Action Filed: Sept. 7, 2017

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INTRODUCTION

Plaintiffs ask this Court to preliminarily enjoin DOJ regulations implementing the registration process for a new category of prohibited assault weapons. As a threshold matter, the motion is procedurally improper because relief is not available pursuant to the provision under which Plaintiffs have brought all claims, and a court cannot grant a preliminary injunction pending a ruling on the merits of a challenge that was improperly filed. Although it is sufficient that the motion fails on these grounds, it also fails because Plaintiffs have not met their burden to justify a preliminary injunction. Specifically, Plaintiffs fail to show a likelihood of success on the merits of their claims. As demonstrated in DOJ's pending demurrer and as set forth below, all the challenged regulations are consistent with the assault weapons law, and all are reasonably necessary for the registration process. Plaintiffs have also failed to demonstrate that irreparable harm would result in the absence of an injunction. And, an injunction would directly harm the public interest, by interfering with DOJ's ability to ensure that registration is available only for eligible bullet-button assault weapons, and only for eligible applicants. This would severely compromise a vital component of legislation passed in recognition of the dangerous nature of these weapons. For all of these reasons, the preliminary injunction motion should be denied.

BACKGROUND

The Assault Weapons Control Act ("assault weapons law") (Pen. Code, §§ 30500, et seq.) restricts the possession, purchase, sale, manufacture, and distribution of assault weapons.[1] Recent amendments to the assault weapons law established a new prohibition on and registration process for so-called "bullet-button" assault weapons.[2] A bullet button is a magazine release device on a firearm that requires the use of a tool (which can be a bullet or ammunition cartridge) to remove

[1] DOJ's Memorandum of Points and Authorities in Support of Its Demurrer ("Demurrer," at 6-8), provides more detailed background on the assault weapons law.

[2] Stats.2016, c. 40 (A.B. 1135), §§ 1, 3; Stats.2016, c. 48 (S.B. 880), §§ 1, 3.

the magazine from the firearm. The Legislature found that unless the bullet-button loophole is closed, "the assault weapon ban is severely weakened, and these types of military-style firearms will continue to proliferate on our streets and in our neighborhoods."[3] Firearms equipped with a bullet button are now considered assault weapons if they also have one of several specified attributes. (Pen. Code, § 30515, subds. (a)(1), (a)(4).) Weapons lawfully possessed before January 1, 2017 may be grandfathered if they are registered before July 1, 2018. (*Id.*, §§ 30900, subd. (b)(1), 30680.)

DOJ may promulgate "regulations for the purpose of implementing" the new registration process, without complying with the Administrative Procedures Act ("APA"). (Pen. Code, § 30900, subd. (b)(5).) DOJ submitted regulations for the registration process to the Office of Administrative Law ("OAL"), for publication in the California Code of Regulations, as a "file and print" submission. (See Gov. Code, § 11343.8; Cal. Code Regs., tit. 1, § 6, subds. (b)(3)(F), (G).) OAL published these regulations on July 31, 2017, in title 11 of the Code of California Regulations.[4] (Opp. RJN, Ex. 15.) The registration system became available to the public on August 3, 2017. (Declaration of Blake Graham ("Graham Decl.") ¶ 18.)

LEGAL STANDARDS APPLICABLE TO A PRELIMINARY INJUNCTION

An injunction is an extraordinary power that should rarely, if ever, be exercised in a doubtful case. "The right must be clear, the injury impending and threatened, so as to be averted only by the protective preventive process of injunction." (*City of Tiburon v. Northwestern Pac. R. Co.* (1970) 4 Cal.App.3d 160, 179, citation omitted.) "[A] plaintiff must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions prior to a trial on the merits." (*Tahoe Keys Property Owners' Ass'n. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1471 (*Tahoe Keys*).)

[3] See, e.g., Request for Judicial Notice in Support of Opposition to Motion for Preliminary Injunction ("Opp. RJN"), Ex. 1 at 3, Ex. 2 at 3, Ex. 5 at 6.

[4] Unless otherwise specified, all future references to a section are to a section within title 11 of the California Code of Regulations.

Plaintiffs must make a showing of the "two interrelated factors" that courts use in determining whether to issue a temporary restraining order or a preliminary injunction: "The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the [restraining order] were denied as compared to the harm that the defendant is likely to suffer if the [order] were issued." (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251, citation omitted.) "Where, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties, the public interest must be considered," and there must be a significant showing of irreparable injury for an injunction to issue. (*Tahoe Keys, supra,* 23 Cal.App.4th at pp. 1471-1473.)

ARGUMENT

I. THE PRELIMINARY INJUNCTION MOTION IS PROCEDURALLY IMPROPER

A. In an Action that Should Have Been Brought as a Writ, A Preliminary Injunction Cannot Be Granted

Although Plaintiffs purport to sue under Government Code section 11350, that section does not apply to APA-exempt regulations. (Demurrer at 8-9.) Accordingly, Plaintiffs' claims are foreclosed by governing Supreme Court law: "Section 11350 has no application to the guidelines . . . because the Legislature specifically exempted the guidelines from the provisions of the California Administrative Procedure Act." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169 fn.4.) Plaintiffs should have challenged DOJ's administrative decision to use an APA-exempt process for these regulations through a writ petition. (*State v. Superior Court* (1974) 12 Cal.3d 237, 249 ["[i]t is settled that an action for declaratory relief is not appropriate to review an administrative decision"].) A court cannot grant a preliminary injunction pending a ruling on the merits of a challenge to an administrative decision that was improperly filed as an action for declaratory relief. (*City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1467.) Even construing the complaint as a writ petition, a preliminary injunction would still be improper, because the Court should rule on the merits of the challenge to the administrative determination, instead of granting preliminary relief. (*Ibid*.) The Court should deny the motion on this ground alone.

II. PLAINTIFFS HAVE FAILED TO MEET THE STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

A. Plaintiffs Have Failed to Demonstrate a Likelihood of Success on the Merits

1. Legal Standard for a Challenge to Regulations

DOJ's regulations are quasi-legislative rules because they are "the substantive product of a delegated legislative power conferred on the agency." (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 (*Yamaha Corp.*).) In reviewing a quasi-legislative rule, a court must determine whether in promulgating the rule, the agency acted within the bounds of its statutory mandate, and, if so, whether the regulation is reasonably necessary to effectuate the purpose of the statute. (*Id*. at pp. 9-11; see also Demurrer at 9-10.) "Where the Legislature has delegated to an administrative agency the responsibility to implement a statutory scheme through rules and regulations, the courts will interfere only where the agency has clearly overstepped its statutory authority or violated a constitutional mandate." (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 356 (*Ford Dealers*); see also Demurrer at 9-10.)

The Supreme Court has consistently interpreted delegations of rulemaking authority broadly, to include the authority to "fill up the details" and make specific the operation of a statutory scheme. (*Ford Dealers, supra*, 32 Cal.3d 347, 362-363 [regulation barring specific class of misleading statements]; see also *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1013-1014 [regulation prohibiting use of accountancy titles by unlicensed persons]; *Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 656 [regulation capping commissions paid to agents on sale of credit life and disability insurance]; *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 182-183 (*Ralphs Grocery Co.*) [regulations prohibiting discounts on wholesale price of beer].) "[T]he Legislature may . . . choose to grant an administrative agency broad authority to apply its expertise in determining whether and how to address a problem without identifying specific examples of the problem or articulating possible solutions." (*Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, 399 (*Jones*), citation omitted.)

2. The Regulations All Support the Administration of the Registration Process and Are Thus Within the Scope of the APA Exemption

Plaintiffs fail to identify or apply the legal standard discussed above. Instead, they assert that DOJ can only issue regulations for "registration procedures," "the process requiring registration submissions via the internet," "the requirements for providing description and source information of the firearm" and "personal information of the individual registrant," and the "registration fee." (Pls.' Am. Mem. of Ps & As ISO Mot. for Prelim. Inj. ("MPA") at 9.) But DOJ's rulemaking authority under the APA exemption is not so limited. DOJ is authorized to "adopt regulations for the purpose of implementing" the registration process, and the authority to implement a provision includes the authority to do whatever is necessary to administer the statutory scheme being implemented. (Pen. Code, § 30900, subd. (b)(5); *Jones*, *supra*, 2 Cal.5th at p. 391 [grant of regulatory authority to "administer" the authorizing statute is equivalent to authority to "carry out" or "implement" the statute]).

DOJ thus has the authority to make rules pursuant to the APA exemption for anything necessary to administer the bullet-button registration process. This includes providing definitions that make clear the types of firearms to be registered (registration definitions); registering weapons that the Legislature has required to be registered (registration of bullet-button shotguns); obtaining information necessary to uniquely identify each registered weapon (serial number and digital photo requirements) or confirming an applicant's eligibility to register a firearm (registration information requirements); preventing abuse of the joint registration option ("family member" definition and proof-of-address requirements); or establishing parameters for the electronic registration process required by law (terms of use). These regulations are all directly related to the registration process, and are critical to the orderly administration of the registration system. The regulations help DOJ to ensure that only eligible weapons are registered by eligible applicants, through a transparent, reliable process. The regulations are therefore well within DOJ's APA-exempt rulemaking authority.

3. The Regulations Are Reasonably Necessary to Implement the Registration and Are Consistent With the Assault Weapons Law

The challenged regulations are also consistent with the assault weapons law. Although Plaintiffs argue that a regulation conflicts with a statute if the statute does not set forth every component of a regulation, this is legally incorrect. The Legislature may choose to specify information necessary for registration, but this does not rob DOJ of its authority to require additional information. (See *Jones, supra,* 2 Cal.5th at p. 398.) Plaintiffs essentially argue that *expressio unius est exclusio alterius*, i.e., that "the explicit mention of some things in a text may imply other matters not similarly addressed are excluded." (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 514 (*Howard Jarvis Taxpayers Assn.*).) But the Supreme Court has squarely rejected application of the *expression unius* cannon in the rulemaking context. (*Jones, supra,* 2 Cal.5th at p. 398 [finding that even though the Legislature had defined certain practices as unfair or deceptive, the agency retained rulemaking authority to define additional practices as such].)

The challenged regulations are consistent with the assault weapons law because they are reasonably necessary to effectuate the statutory purpose—the implementation of the bullet-button registration process. (*Yamaha Corp., supra*, 19 Cal.4th at pp. 9-11; Demurrer at 9-10.) Thus, as described below and as set forth in DOJ's demurrer, the regulations are consistent with and reasonably necessary to implement the registration process.[5]

a. Preexisting definitions

Plaintiffs inaccurately contend that DOJ has improperly repealed five preexisting definitions of statutory terms. Instead, those definitions have been moved to a new section that contains all of the registration definitions.[6] (See Demurrer at 13; former § 5469 (2016).) This

[5] Plaintiffs' do not contend that they are likely to succeed on their challenge to the regulation prohibiting post-registration alteration to the bullet button. (Compl. ¶¶ 168-175; § 5477, subd. (a).) Plaintiffs have thereby waived this argument, which nonetheless fails. (Demurrer at 16-17.)

[6] Two of the previous definitions ("Forward pistol grip" and "Thumbhole stock") were incorporated exactly as they previously existed. (§ 5471, subds. (t), (qq).) The new versions of the remaining three (for "Detachable magazine," "Flash suppressor," and "Pistol grip that protrudes conspicuously beneath the action of the weapon") consist of the preexisting definitions

reorganization is related to and reasonably necessary for the registration process because it will reduce the risk of confusion that might result from having two overlapping sets of definitions.

b. New definitions

Plaintiffs' objections that the file-and-print definitions "make previously legal firearms now illegal to possess," or that they apply in the context of "restrictions on 'short-barreled' rifles and shotguns," are contradicted by their acknowledgement that DOJ is currently undertaking APA notice-and-comment rulemaking to allow it to use the section 5471 definitions for non-registration purposes. (MPA at 9, 13.) That is, DOJ is using APA rulemaking procedures as required for regulations that are not exempt from the APA. Plaintiffs also recognize that the APA-exempt file-and-print definitions apply only for APA-exempt registration purposes—as the regulations specifically state. (§ 5471.)

Plaintiffs essentially argue that DOJ cannot define *any* terms through its registration regulations. They object to definitions relating to weapons that cannot be registered, and to definitions of statutory terms that were not amended by the Legislature in 2016. (MPA at 12-13.) This argument improperly takes the amendments to the assault weapons law out of context. Although the Legislature created the bullet-button prohibition by amending a specific statutory term (changing "capacity to accept a detachable magazine" to "does not have a fixed magazine"), implementation of the registration process for grandfathered bullet-button assault weapons must take into account the entire statutory scheme of which it is a part, and that identifies the weapons that may be registered. If a bullet-button weapon that may be registered is defined as "a semiautomatic, centerfire rifle that does not have a fixed magazine . . . that has a grenade launcher or flare launcher," it is entirely reasonable for implementing regulations to define the terms "semiautomatic," "centerfire," "rifle," "grenade launder," or "flare launcher," when none of those terms are defined in the statute. (Pen. Code, § 30515, subd. (a)(1)(D).) If a "semiautomatic, centerfire rifle that has an overall length of less than 30 inches" is ineligible for registration (because it was previously prohibited and should have been registered in a previous registration

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plus examples of items that would fall within those definitions. (§ 5471, subds. (m), (r), (z).)

cycle), it is also reasonable for implementing regulations to define those terms, when none of them are defined in the statute. (*Id*., subd. (a)(3); see also Demurrer at 12.)

c. Shotgun registration

Requiring registration of bullet-button shotguns (§§ 5470, subd. (a), 5471, subd, (a)) is also consistent with the registration provision, which applies to any person in lawful possession of "an assault weapon that does not have a fixed magazine, as defined in Section 30515, *including those weapons* with an ammunition feeding device that can be readily removed from the firearm with the use of a tool." (Pen. Code, § 30900, subd. (b)(1), emphasis added.) Weapons required to be registered include "weapons" with a bullet button. (Demurrer at 14-15.) As commonly understood and as used in the assault weapons law, the term "weapons" encompasses shotguns.[7] It does not matter that bullet-button shotguns are not defined as assault weapons by statute. The Legislature has the power to require the registration of weapons that are not considered assault weapons under the statute, and the plain language of the registration requirement is *not* limited to assault weapons defined by statute. (See *Howard Jarvis Taxpayers Assn., supra*, 62 Cal.4th at pp. 497-498 [discussing plenary power of Legislature].)

d. Serial numbers

A DOJ-provided serial number permits registration of weapons that would not otherwise be registrable because they lack a unique identifier. (Demurrer at 17-18; § 5472, subds. (f), (g).) These requirements apply only to bullet-button weapons that the owner wants to register, not to all homebuilt firearms or all firearms without a serial number. The fact that other legislation imposes a serial number requirement on homebuilt firearms does not limit DOJ's authority to require a serial number for purposes of the APA-exempt process for registering bullet-button weapons. In *Ralphs Grocery Co., supra*, the Supreme Court upheld an agency's regulation of quantity discounts for beer even though a separate statute governed quantity discounts on milk

[7] The phrase "including those weapons" indicates that the second category expands upon what is already encompassed by the first, such that the registration requirement also applies to bullet-button "weapons," such as bullet-button shotguns. This is because "'[i]ncludes' [is] ordinarily a term of enlargement rather than limitation." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101; see also Demurrer at 14-15.)

and wine. The Court rejected the inference that the statutory restriction invalidated the agency's authority to impose a similar requirement on another product, declaring "plaintiffs fail to appreciate the function of specific statutory mandates and general grants of power in a delegation of authority by the Legislature." (69 Cal.2d at p. 182.) Plaintiffs here have a similar misunderstanding. The serial number requirement is reasonably necessary to implement the registration process with respect to unserialized weapons and is thus within DOJ's APA-exempt rulemaking authority and reasonably necessary for the registration process.

e. Required registration information

Plaintiffs object to the regulations requiring "military ID number, U.S. citizenship status, place of birth, country of citizenship, and alien registration number," because they are not explicitly required by statute.[8] (MPA at 16; § 5474, subd. (a).) These requirements are nonetheless valid, because they allow DOJ to confirm an applicant's eligibility to register an assault weapon, as required by Penal Code section 30950, which provides, "No person who is under the age of 18 years, and no person who is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm, may register or possess an assault weapon or .50 BMG rifle." An applicant may provide "a military identification number (if applicable)" (§ 5474, subd.(a)) because some military personnel in California might not have a California driver's license or identification card, and the military identification number is an alternative way to verify the identity of the applicant. Citizenship information is required to confirm eligibility to possess a firearm under federal law, in accordance with 18 U.S.C. § 922(g)(5).[9]

Plaintiffs also object to the regulations requiring digital photos of weapons sought to be registered or de-registered. (MPA at 16; §§ 5474, subd. (c), 5478 subd. (a)(2).) Such photos help DOJ confirm the unique identity of a weapon (Pen. Code § 30900, subd. (b)(3)), as well as confirm the accuracy of the weapon description submitted by the applicant. (Demurrer at 18-19.)

[8] Plaintiffs do not argue that they are likely to succeed in their challenge to regulations requiring applicants to undergo the eligibility check. (Compl. ¶¶ 159-160; § 5476, subds. (d), (e).) Plaintiffs have thereby waived this argument, which nonetheless fails. (Demurrer at 18.)

[9] This provision prohibits the possession of firearms by aliens illegally or unlawfully in the United States or admitted under a nonimmigrant visa.

These regulations are all consistent with and reasonably necessary to implement the registration requirement in accordance with the assault weapons law. Plaintiffs' objection that the assault weapons law does not contain the text of these regulations is without merit. (See *Jones*, *supra*, 2 Cal.5th at p. 398.)

f. Joint registration

Plaintiffs contend that because the assault weapons law provides for joint registration in a section (Pen. Code § 30955) apart from the section providing for bullet-button assault weapon registration (*id*. § 30900, subd. (b)(1)), DOJ has no authority to make a regulation relating to allowing joint registration for the bullet-button registration process. (MPA at 17; § 5474.1, subd. (b).) Once again, Plaintiffs' objection that the assault weapons law does not contain the text of this regulation is without merit. (See *Jones*, *supra*, 2 Cal.5th at p. 398.) Plaintiffs' objections to the proof-of-address requirements (§ 5474.1, subd. (c)) are similarly unfounded. A regulation specifying sufficient forms of proof of address is reasonably necessary to prevent abuse of the joint registration option by family members who do not actually reside at the same address. (Demurrer at 19-20.)

g. Terms of Use

Plaintiffs' assertion that providing terms of use to govern the electronic registration system required by statute is "patently unrelated to implementing registration procedures" (MPA at 17-18) also fails under *Jones*. Terms of use directly support the registration of bullet-button assault weapons via the electronic registration system. Plaintiffs' position makes sense only if agencies cannot enact any regulations that are not specifically set forth in the text of the statute, but that is not the case. (See *Jones*, *supra*, 2 Cal.5th at p. 398.) The terms of use do not conflict with the California Constitution (art. I, § 1) or the Information Practices Act (Civ. Code, §§ 1798 et seq.), because the non-liability clause applies "[e]xcept as may be required by law." (§ 5473, subd. (b)(1); Demurrer at 20.)

B. Plaintiffs Have Not Met Their Burden of Demonstrating Immediate Irreparable Harm

Because Plaintiffs cannot demonstrate a "reasonable probability" of prevailing on the merits, the Court need not balance the parties' respective hardships. (See *Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 786-787 [order denying a motion for preliminary injunction should be affirmed if the trial court correctly found that the moving party failed to satisfy either of the two factors].) However, even if it were appropriate for the Court to consider the relative harms, Plaintiffs have failed to demonstrate they are likely to suffer irreparable harm in the absence of the requested injunction. Instead, Plaintiffs have proffered insufficient evidence based on the assumption that notice and comment is a freestanding right, instead of a statutory procedure that the Legislature chose to do away with for these regulations.

It is well settled that the plaintiff bears the burden of producing evidence of irreparable interim injury. (*Loder v. City of Glendale* (1989) 216 Cal.App.3d 777, 782-783.) Conclusory allegations that such injury will result is not sufficient. (*E.H. Renzel Co. v. Warehousemen's Union I.L.A. 38-44* (1940) 16 Cal.2d 369, 373.) A preliminary injunction motion must be supported either by a verified complaint or by affidavits. (Code Civ.Proc., § 527, subd. (a).)

Plaintiffs are not entitled to interim injunctive relief because they have not shown by admissible evidence that they will suffer significant irreparable injury. Plaintiffs offer conclusory assertions without specifying the exact nature of the harm they would suffer, or that they would suffer irreparable harm at all. The declarations of the individual plaintiffs all state, "I filed this lawsuit for the purpose of being able to register my [weapon], and thus continue to possess, my property ('assault weapon') without being subjected to Defendant's illegally adopted and invalid regulations," but make no mention of any harm that would result if the Court did not enjoin the regulations.[10] The declarations of the associational defendant's representatives also state that the association "filed this lawsuit for the purposes of representing the interests of its members,

[10] Declaration of Anthony Mendoza ¶ 6; Declaration of Charlie Cox ¶ 5; Declaration of Danny Villanueva ¶ 5; Declaration of Mark Stroh ¶ 5; Declaration of Niall Stallard ¶ 6; Declaration of Ruben Barrios ¶ 5.

[which] include being able to register, and thus continue to lawfully possess, their property without being subject to Defendant's illegally adopted and invalid regulations."[11] The declarations thus contain *no evidence at all* that Plaintiffs will suffer irreparable harm.

And although Plaintiffs do allege in the verified complaint that they will suffer "irreparable injury" based on the denial of "their statutory right to be heard and to provide input regarding regulations governing a program that significantly affects both their property and liberty interests" (e.g., Compl. ¶¶ 81, 104, 121), Plaintiffs have not filed a constitutional due process challenge, and even if they had, a court should not "presume irremediable injury or the inadequacy of legal remedies based simply on assertion of a constitutional theory for relief." (*Tahoe Keys*, supra, 23 Cal.App.4th at p. 1472.) Furthermore, the irreparable injury required for a preliminary injunction must result from the lack of an injunction, and here the lack of an injunction would result in the continued application of the regulations to the registration process, not the loss of opportunity to comment on proposed regulations.

In any event, as set forth in the declaration submitted by Plaintiffs' counsel, Plaintiffs had multiple opportunities to review and comment upon draft regulations. Plaintiffs' counsel obtained a copy of DOJ's draft regulations and "submitted a formal request to [OAL] on January 9, 2017 to reject DOJ's proposed regulations." (Declaration of Sean A. Brady ("Brady Decl.") ¶ 3.) Plaintiffs' counsel also "submitted a pre-litigation demand to [DOJ] to withdraw [its] proposed regulations from consideration." (*Id*. ¶ 4; Request for Judicial Notice in Support of Motion for Preliminary Injunction ("Pls.' RJN"), Ex. C.) Subsequently, "Plaintiffs' counsel submitted a comprehensive opposition letter addressing all of the arguments raised by DOJ as well as highlighting in detail all of the legal and practical issues with DOJ's second set of

[11] Declaration of Michael Barranco ¶ 8; Declaration of Rick Travis ¶ 8. In addition, these conclusions are based on information and belief, as opposed to personal knowledge. Statements based on mere speculation are inadmissible and do not have any evidentiary value. (Evid. Code, §§ 702, 800; *Marrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424, 1444-1445.) The declarations are thus insufficient to support a preliminary injunction. (*Riviello v. Journeymen Barbers, Hairdressers and Cosmetologists' Intern. Union of America, Local No. 148* (1948) 88 Cal.App.2d 499, 503 [affidavits made upon information and belief as to facts which had transpired were hearsay and would be disregarded in considering application for a preliminary injunction].) DOJ's separate written evidentiary objections are submitted herewith.

proposed regulations." (Brady Decl. ¶ 6; Pls.' RJN, Ex. F.) "After reviewing DOJ's cover letter and the comprehensive opposition letter from Plaintiffs' counsel, OAL officially denied DOJ's request to file and publish the regulations." (Brady Decl. ¶ 7; Pls.' RJN, Ex. G.) Plaintiffs thus provided significant and substantive comments on the proposed regulations on several occasions.

Even assuming that Plaintiffs had no opportunity to comment on regulations, and assuming that the Court should consider this as a possible harm resulting from the lack of an injunction, Plaintiffs are simply objecting that they have been denied a right to be heard under the APA. However, the APA is a statutory creation, and the Legislature can decide to exempt certain regulations from the APA, as it did here. Any lack of opportunity to comment reflects the legislative intent that DOJ promulgate registration rules without a formal public comment procedure. So long as the regulations are within the scope of the rulemaking exemption, then lack of opportunity to comment reflects the Legislature's intent, and not any irreparable harm.[12]

C. The Balance of Harms Favors Denial of the Motion

Even if Plaintiffs had met their burden on likelihood of success on the merits or irreparable harm, the public interest would weigh against a preliminary injunction. When injunctive relief is sought, consideration of public policy is required. (*Tahoe Keys, supra,* 23 Cal.App.4th at p. 1471.) An injunction against enforcement of the regulations could significantly harm the public interest, because it would directly interfere with the registration of prohibited assault weapons. Registration is a key component of the Legislature's attempt to regulate weapons that the Legislature determined to be "designed only to facilitate the maximum destruction of human life." (See, e.g., Opp. RJN Ex. 1 at 3, Ex. 2 at 3, Ex. 5 at 6.)

Depending on the scope of any injunction, DOJ would likely need to redesign the electronic registration system that is required by law (Pen. Code § 30900, subd. (b)(2)) before accepting

[12] The allegations in the complaint that Plaintiffs are "subjected to and forced to comply with these illegal regulations" also fall far short of establishing irreparable harm. (See, e.g., Compl. ¶¶ 84, 106, 123.) Plaintiffs "have not alleged nor made any attempt to show by their declarations that the application of [regulations] would preclude any of them from" registering their bullet-button assault weapons, and Plaintiffs have thus "failed to make any showing that they would be harmed by enforcement" of the regulations. (*EWAP, Inc. v. City of Los Angeles* (1979) 97 Cal.App.3d 179, 188 [finding issuance of preliminary injunction to be improper].)

further registrations. (Graham Decl. ¶ 19.) The original development of the electronic registration system took six months. (*Id*. ¶ 17.) The programmers who created this system for DOJ are now working on other legislatively mandated projects that are also on tight deadlines. Nor does DOJ have funding for modification of the electronic registration system, which means that DOJ would have to cut other programs and activities if an injunction resulted in the need for costly alterations to the existing registration system. (*Id*. ¶ 19.) Because the regulations at issue cover basic registration procedures, as well as substantive issues relating to what and who can be registered, DOJ might also need to promulgate replacement regulations before it could continue to process registrations. (*Id*. ¶ 20.) And even if new regulations are not necessary, DOJ would still need to redesign its procedures for processing registrations. (*Id*. ¶ 21.) For example, if DOJ is enjoined from requiring applicants to provide the information necessary to confirm that an applicant is not prohibited from possessing an assault weapon, DOJ is still prohibited from registering persons who are prohibited from possessing a firearm under state or federal law (Pen. Code § 30950), and so must find an alternative method of confirming eligibility to register. (*Id*. ¶ 22.) In addition, a delay in the registration process could mean that DOJ would no longer have staff available to process registrations for thousands of Californians. DOJ received funding to hire 24 analysts and two managers to process registration applications. These are limited term positions that will cease to exist one year after these employees' start dates. (*Id*. ¶ 23.) There is no guarantee that modifications to the electronic registration system, the promulgation of replacement regulations, or the development of alternative procedures for processing registrations, could be completed without drastically shortening the available time left to register, which runs through June 30, 2018. (*Id*. ¶ 24.)

This interference with the registration process would directly impact public safety, as law enforcement officials rely upon registration information in determining whether someone is in possession of a prohibited assault weapon. (Graham Decl. ¶ 25.) For example, DOJ relies on registration information in carrying out its statutory duty to disarm persons who become prohibited or are otherwise disqualified from possessing firearms. (*Id*. ¶26; see Pen. Code §§ 30000 et seq [armed prohibited persons].) DOJ is required by law to maintain an online

database (the Armed Prohibited Persons System), which cross-references all handgun and assault weapon owners across the state against criminal history records to determine persons who have been, or will become, prohibited from possessing a firearm subsequent to the legal acquisition or registration of a firearm or assault weapon. (*Id*. ¶ 27.) DOJ is also required to provide authorized law enforcement agencies with inquiry capabilities and investigative assistance to determine the prohibition status of a person of interest. (*Id*. ¶ 28.) Assault weapon registration information is part of the data used to identify armed prohibited persons. (*Id*. ¶ 29.) Any impediment to registration would similarly impede DOJ's ability to identify and disarm persons who are prohibited from possessing firearms. (*Id*. ¶ 30.) Because registered bullet-button assault weapons are exempt from statutory prohibitions on the possession of assault weapons, an injunction against enforcement of the regulations would also interfere with law enforcement officials' ability to distinguish between lawful and prohibited bullet-button assault weapons. (*Id*. ¶ 31.)

Most significantly, an injunction would directly compromise public safety by preventing DOJ from running an effective registration process, because it would significantly hinder DOJ's ability to process registrations and ensure that only eligible weapons are registered by eligible applicants. The public interest would be directly harmed if DOJ is unable to perform all of the important functions relating to public safety and the integrity of the registration process that the regulations directly support. (Graham Decl. ¶ 32.) This is "a matter of significant public concern and provisional injunctive relief which would deter or delay defendants in the performance of their duties and would necessarily entail a significant risk of harm to the public interest." (*Tahoe Keys, supra*, 23 Cal.App.4th at p. 1473.) The public interest thus weighs strongly against an injunction.[13]

CONCLUSION

For the foregoing reasons, the preliminary injunction motion should be denied.

[13] Plaintiffs' reliance on a purported "pattern of APA abuses" by DOJ (MPA at 9 and Brady Decl. ¶¶ 13-23) is misplaced. This litigation concerns whether the registration regulations are within DOJ's rulemaking authority and are reasonably necessary to effectuate the registration process. In addition, much of the Brady Declaration consists of improper legal argument, and appears to be an attempt to exceed the briefing limitations of the California Rules of Court. DOJ's separate written evidentiary objection to the Brady Declaration is submitted herewith.

Dated: January 17, 2018

Respectfully Submitted,

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DECLARATION OF SERVICE

Case Name: **Villanueva, Danny, et al. v. Xavier Becerra, et al.**

No.: **17CECG03093**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 17, 2018, I served the attached **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** by transmitting a true copy via electronic mail, addressed as follows:

Sean A. Brady, Esq.
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Long Beach, CA 90802
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 17, 2018, at San Francisco, California.

Susan Chiang
Declarant

Signature

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