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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE 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 General 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

[Assigned for All Purposes to the Honorable Judge Mark Snauffer; Dept.: 501]

PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER

Hearing Date: January 30, 2018
Hearing Time: 3:30 PM
Judge: Mark Snauffer
Department: 501

Action Filed: September 7, 2017

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INTRODUCTION

Defendants demur to Plaintiffs' complaint for declaratory relief from regulations adopted by the California Department of Justice ("DOJ") on two grounds: (1) that the regulations are lawful and Plaintiffs thus have no cause of action; and (2) Plaintiffs are required to bring this challenge as a writ. Defendants are wrong on both scores. First, the law plainly provides a right to seek declaratory relief when challenging the validity of regulations. Defendants' attempt to avoid that rule by declaring Plaintiffs' action a challenge to DOJ's administrative decision fails as a matter of law. Second, DOJ's regulations do not qualify for the exemption to the Administrative Procedure Act ("APA") that DOJ relied on. But, even if they do, the challenged regulations still illegally alter statutes. As such, this Court should overrule Defendants' demurrer.

BACKGROUND

Plaintiffs generally agree with the facts in Defendants' Background section of their brief, (Demurrer, pgs. 7-8), but with one critical exception. Plaintiffs dispute Defendants' statement that the new "assault weapon" definition, effective as of January 1, 2017, includes "a weapon" that " 'does not have a fixed magazine,' " (Demurrer, pg. 7), because that definition only includes certain rifles and pistols. (Pen. Code § 30515) Indeed, while Defendants' immediately following sentence likewise erroneously states that "weapons" that do not have a "fixed magazine" are "assault weapons" if they have certain attributes, the provisions Defendants cite address rifles and handguns only. (*Ibid*.) Shotguns are not included (nor are any other "weapons" other than certain rifles and pistols) in the new "assault weapon" definition. (*Ibid*.) In fact, Defendants expressly acknowledge such later on in their demurrer. (Demurrer, pgs. 13-14.)

It is noteworthy that since the filing of this demurrer, on November 24, 2017, DOJ published a notice of proposed rulemaking to adopt a new regulation for definitions of terms for identifying "assault weapons" as described in Penal Code section 30515.[1] The proposal would

[1] California Department of Justice, *Notice of Proposed Rulemaking*, https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/notice-proposed-rulemaking-11-17.pdf? (Nov. 17, 2017).

simply apply the definitions of terms included in Cal. Code Regs, tit. 11, § 5471—which was adopted on a File and Print basis—to the identification of "assault weapons" for all purposes under Penal Code section 30515. (Req. for Jud. Not. Ex. D.)

ARGUMENT

I. PLAINTIFFS STATE VALID CLAIMS AGAINST DOJ's "ASSAULT WEAPON" REGULATIONS

A. Scope of Agency Rulemaking Authority

The APA prohibits an agency from enforcing any regulation not adopted in compliance with APA mandates, unless the legislature specifically exempts the agency from having to do so. (*Winzler & Kelly v. Dept. of Indus. Relations* (1981) 121 Cal.App.3d 120, 126-127.) Any such exemption must be expressly provided for in statute. Gov. Code § 11346. Even where an agency enjoys such an exemption, it still has "only as much rulemaking power as is invested" to it "by statute." (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal. 4th 287, 299.) It is established that "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." (*California Sch. Bd.s Ass'n v. State Bd. Of Educ*. (2010) 186 Cal.App.4th 1298, 1328; *Morales v. California Dept. Corrections and Rehabilitation* (2008) 168 Cal.App.4th 729, 736; *see also United Sys. of Ark. v. Stamhon* (1998) 63 Cal.App.4th 1001, 1010 ["When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language."].) And, regardless of whether adopted in compliance with APA procedures or through and exemption to the APA, "no regulation adopted is valid or effective unless consistent and not in conflict with existing statute." *Agnew v. State Bd. Of Equalization* (1999) 21 Cal.4th 310, 321. This is because

B. The Challenged Regulations Are Illegal and Void Because They Either Do Not Qualify for DOJ's Limited APA Exemption or Alter the Scope of Statutes

DOJ adopted the challenged regulations on a "file and print" basis, on the premise that they qualify for the APA exemption in Penal Code section 30900, subdivision (b) ("Subdivision (b)"). But that exemption is, as Defendants concede, limited to regulations implementing the "registration process," (Demurrer, pg. 7.), i.e., the provisions of Subdivision (b). (*See* Pen. Code § 30900, subdiv. (b)(5)). And, none of the challenged regulations reasonably relates to any of

Subdivision (b)'s four provisions, which only include: (1) registration procedures; (2) the process requiring registration submissions via the internet; (3) the requirements for providing description and source information of the firearm as well as the personal information of the individual registrant; and (4) the registration fee. (*See* Pen. Code § 30900, subdiv. (b)).

In other words, DOJ's APA exemption is limited to regulations concerning how to register, not *what* to register. And, while DOJ might have some leeway to "fill up the details" (Demurrer, pg. 10.). for certain matters—like what information a registrant must provide to identify *the firearm* being registered, the format for providing all registration information, and the process for doing so—it remains constrained to regulations that facilitate the registration process. It does not have carte blanche to adopt any regulation that may tangentially relate to the general subject matter of Subdivision (b).

And while government agencies enjoy some leeway with respect to the scope of their authority to fill in details when making regulations that comply with the APA, no such deference is given to agencies in determining *whether* their regulations fall within the scope of an APA exemption. Any doubt as to whether the APA applies is resolved in favor of its application. (*Morales*,168 Cal. App.4th at 736.)

Finally, even if an agency has authority to adopt regulations without going through the APA, such regulations still cannot expand or contract the scope of other statutes. Virtually every one of the challenged provisions does so. Defendants have little answer for this, other than to say its helpful for DOJ.

1. Definitions Expanding "Assault Weapon" Law (Third Cause of Action)

The APA exemption afforded to DOJ pursuant to Subdivision (b) does not contemplate defining any terms Section 30900 is not a definitional statute. In fact, Subdivision (b) requires the registration of "assault weapons" "***as defined*** in Section 30515," ***not*** as DOJ defined by Defendants claim the challenged definitions only apply for registration purposes and thus do not affect Section 30515. But this is a false distinction for a number of reasons.

When originally proposed in December 2016 and subsequently in May 2017, DOJ's regulations stated the "definitions apply to terms used in the identification of assault weapons

pursuant to Penal Code section 30515, and for purposes of Articles 2 and 3 of this Chapter." But after the Office of Administrative Law ("OAL") rejected those regulations, DOJ amended this section to read "[f]or purposes of Penal Code section 30900 and Articles 2 and 3 of this Chapter the following definitions shall apply." Other than amending the deadline to register newly classified "assault weapons," this was the only substantive change to the regulations which were ultimately approved by OAL and now the subject of this lawsuit.

Despite this amendment, Defendants admit that their defined terms "appear in the statutory provisions" of Penal Code section 30515, ***not*** Subdivision (b). (Demurrer, Pg. 11.) And because DOJ has dictated that the definitions only "apply '[f]or purposes of Penal Code section 30900,' " they "fall within DOJ's rulemaking authority" as they are "related to, and apply only during, the registration process." (Demurrer, Pg. 12.) But by enacting definitions that specifically contemplate what can and cannot be registered, DOJ has effectively enacted definitions for terms applicable to Penal Code section 30515.

Prior DOJ rulemaking activities for past "assault weapon" registration periods also illustrate this point. Following the enactment of Senate Bill 23 in 1999, which created the statutory definitions of an "assault weapon" now found in Penal Code section 30515, DOJ enacted a number of regulations pursuant to the APA. All of these regulations were equally applicable for the purposes of Penal Code section 30515 ***and*** Penal Code section 30900's registration requirements. As a result, any suggestion by Defendants that the challenged regulations somehow only apply to "registration" and are therefore exempt from APA rulemaking requirements is purposely misleading.

Defendants also argue that because their definitions only apply "for the purpose of this registration process, they will not impact weapons registered during previous registration periods and so will not 'redefine' what constitutes an 'assault weapon.' " (Demurrer, Pg. 12.) But this is also patently false, as demonstrated by DOJ's recently proposed regulation expanding these same definitions to apply in all circumstances. (Req. for Jud. Not. Ex. A-C.)

Per DOJ's recently proposed regulation—which has been introduced in accordance with APA rulemaking procedures—DOJ seeks to apply all of the challenged definitions "to the

identification of assault weapons pursuant to PC section 30515, ***without limitation to context of the new registration process***." (Req. for Jud. Not. Ex. B.) Notably, no actual definitions are being proposed. Instead, DOJ seeks to re-insert the language that it was originally forced to remove by OAL. If enacted, the challenged definitions will apply "for all purposes under the assault weapons law," which most certainly includes "weapons registered during previous registration periods."

2. Repeal of Definitions (First Cause of Action)

DOJ replaced the content of 11 CCR § 5469, which had previously provided definitions for five "assault weapon" terms, thereby repealing them. (Req. for Jud. Not. Ex. D.) Defendants assert that these definitions were not repealed but just "transferred to a new section containing all of the registration definitions." (Demurrer pg. 13.) That description is misleading.

While it is true that a definition for each of the terms from former section 5469 appears in DOJ's newly adopted definitions regulation, 11 CCR § 5471, only two of them ("forward pistol grip" and "thumbhole stock") remain unchanged. (11 C.C.R § 5469 subd. (c), subd. (e), 11 C.C.R. 5471 subd. (t), subd. (qq).) The other three ("detachable magazine," "flash suppressor," and "pistol grip") have been substantively amended. (*Compare* former 11 C.C.R. § 5469 subdivisions (a), (b) and (d) with new 11 C.C.R. § 5471, subdivisions (a), (r) and (z).) Defendants' claim that the definitions were merely "transferred" to a new section is, therefore, factually erroneous.

More importantly, former Section 5469 expressly stated that those "definitions apply to terms used in the identification of assault weapons pursuant to Penal Code section 30515." (Req. for Jud. Not. Ex. D.) And, DOJ has now "transferred" those definitions to 11 CCR § 5471, which only applies "[f]or purposes of Penal Code section 30900 Articles 2 and 3 of this Chapter," i.e., for registration, *not* identification purposes. (Demurrer, pg. 12.) So those definitions no longer apply to terms used in Section 30515, as they previously did, i.e., they have been repealed. DOJ concedes as much in its own statement supporting its recent rulemaking proposal to apply all "assault weapon" definitions in Section 5471 to Section 30515, stating: "Aside from the registration definitions set forth in section 5471, there currently are no definitions of the terms

used in PC section 30515 to identify a firearm as an assault weapon."[2] There certainly were before DOJ amended Section 5469, i.e., repealed those definitions.

This is relevant because DOJ's APA exemption is limited to implementing Subdivision (b) of section 30900. (Pen. Code § 30900, subd. (b).) That provision only affords DOJ the authority to "adopt" regulations, not to "repeal" them. *Id.* And, the repealing of regulations is subject to APA requirements. (Gov. Code, § 11346.5.) But, even if repealing regulations were within the scope of DOJ's APA exemption, it would be limited to regulations implementing Penal Code section 30900, subdivision (b).

As such, DOJ has zero authority to repeal *any* regulations under its APA exemption, let alone regulations implementing Section 30515. Nevertheless, Defendants deleted these definitions without going through the APA by relying on Subdivision (b). To make matters worse, those definitions were previously adopted in compliance with the APA and underwent extensive revisions prior to being officially adopted.[3] (Req. for Jud. Not. Ex. E.). That the legislature intended for DOJ to be able to repeal these longstanding definitions adopted under the APA on a file and print basis with such vague language is highly unlikely.

Therefore, even assuming DOJ's APA exemption extends to regulating some definitions (which it does not), it certainly does not extend to repealing definitions found in regulations that were adopted under the APA to implement statutes other than Penal Code Section 30900 subdivision (b). Because that is precisely what Section 5469 does, Plaintiffs have stated a valid claim challenging it.

3. Illegal Requirement to Register Shotguns (Second Cause of Action)

Plaintiffs challenge 11 C.C.R. §§ 5470, subd. (a) and 5471, subd. (a), because those provisions illegally expand the scope of Penal Code section 30900(b)(1) by requiring that certain shotguns be registered thereunder. Penal Code section 30900(b)(1) provides, in pertinent part:

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[2] California Department of Justice, *Initial Statement of Reasons*, https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/initial-statement-reasons-11-17.pdf? (Nov. 17, 2017). (Req. for Jud. Not. Ex. C.)

[3] A copy of the "Final Statement of Reasons," which summarizes the rulemaking proceedings for each of these definitions, is available on the California Attorney General's website at https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/fsor.pdf.

> "[a]ny person who . . . lawfully possessed 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, shall register the firearm before July 1, 2018."

Defendants read "including those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool" as requiring the registration of *any* such "weapons," even if not "assault weapons"—but curiously DOJ only applied that reading to certain semi-automatic shotguns. (Demurrer, Pg. 14.) Not only is Defendants' reading contrary to the plain language of the statute, as well as legislative intent, but it would lead to absurd results.

Defendants' reading construes the word "including" to mean "in addition to." But here, "including" clearly modifies the phrase "assault weapon that does not have a fixed magazine," i.e., it is merely *clarifying* what weapons are included in that phrase, it is not adding weapons that fall outside of it. And to be included in that phrase something must first be an "*assault* weapon," not simply a "weapon," as Defendants assert. Because Section 30900(b)(1)'s exclusive application to "assault weapons" is "clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature." (*Lungren v. Deukmejian* (1988) 45 C.3d 727, 735.) And, because Defendants readily concede that the shotguns they contend must be registered are *not* "assault weapons," (Demurrer, pg. 13.) ,11 C.C.R. §§ 5470, subd. (a) and 5471, subd. (a) do not qualify for Subdivision (b)'s APA exemption are thus void.

Even if this Court were to analyze "whether the literal meaning of [Section 30900(b)(1)] comports with its purpose or whether such a construction . . . is consistent with other provisions of the statute," (*Lungren* 45 C.3d at 735.), the Court would readily find that it does. Tellingly, Defendants avoid a discussion of legislative history or statutory context. They have good reason to, as *nothing* in either supports their view.

AB 1135 and SB 880, the bills that created Penal Code Section 30900 subdivision (b), were both titled "Assault Weapons." (Sen. Bill No. 880 (2015-2016 Reg. Sess.), Assem. Bill No. 1135 (2015-2016 Reg. Sess.).) Those bills also amended Penal Code § 30515 and created Penal Code § 30680. Section 30515 exclusively concerns definitions for "*assault* weapons." Section

30680 is titled "Exception to assault weapon prohibition for possession of assault weapon prior to January 1, 2017" and every one of its provisions applies exclusively to "*assault* weapons." Section 30900, which contains Subdivision (b), is part of Article 5, which is titled "Registration of Assault Weapon*s* and .50 BMG Rifles and Related Rules." (Pen. Code art. 5?). And all three of these statutes appear in a Chapter titled "*Assault Weapons* and .50 BMG Rifles." (Pen. Code ch. 2)

> Moreover, SB 880's Assembly Floor Analysis states that the bill:
> Requires that any person who, from January 1, 2001, to December 31, 2016, lawfully possessed *an* ***assault weapon*** *that does not have a fixed magazine, as defined,* register the firearm with the Department of Justice (DOJ) before January 1, 2018.[4] (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 880 as amended, May 7, 2016.)

Notably absent from this statement is any mention of other "weapons" not statutorily defined as "assault weapons," let alone shotguns that do not have fixed magazines.

In light of all the express references to "assault weapon" in these provisions, the notion that Subdivision (b) somehow extends to firearms which are not "assault weapons" is not only clearly contrary to the legislative intent, but would lead to an absurd result that should be avoided. (*See Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698.) If the Court were to accept the position that other weapons not statutorily defined as "assault weapons" should be registered, it would mean that every firearm lacking a fixed magazine should be registered as an "assault weapon." This would include potentially millions of firearms, including commonly-owned semi-automatic pistols and bolt-action rifles with detachable box magazines, just to name a few. It would also mean that certain "featureless" firearms, and firearms which are not "fully assembled and fully functional," neither of which are statutorily defined as "assault weapons," should also be registered, if they have "an ammunition feeding device that can readily be removed from the firearm with the use of a tool." Yet DOJ has specifically stated in its own regulations that such firearms will ***not*** be registered. (11 C.C.R., § 5472, subd (c), § 5472, subd (e).)

/ / /

[4] It should be noted that the reference to the date "January 1, 2018," is no longer applicable as a result of AB 103 extending the registration deadline to July 1, 2018.

4. Requirement for Serial Numbers (Fourth Cause of Action)

Defendants claim that the DOJ-issued serial numbers on homebuilt weapons serve as an essential component of establishing the registration process is ridiculous because the DOJ does not even have the ability to issue these types of serial numbers as of the date of this brief. The requirements for a firearm owner to receive a DOJ-issued serial number for homemade guns does not go into effect until July 1, 2018 and July 1, 2019 respectively (Pen. Code 29180.) Even if the DOJ had the authority develop a plan to issue these serial numbers immediately, the statute for issuing the serial numbers is not yet effective and DOJ cannot impose this requirement upon registrants in the current registration scheme. The regulations for inscribing a DOJ-approved serial number on a firearm will require additional regulations that are not afforded the APA exemption under the current registration section. (*See*, e.g., Pen. Code § 29182, subd. (f).) Clearly, DOJ is attempting to enact a portion of Pen Code 29180 before it is legally able to do so and is acting outside of the APA exemption for Subdivision (b) registration section.

Even if the use of Pen. Code 29180 dates are not determined to be in violation of the regulatory process, forcing serial numbers onto homebuilt firearms is not essential to the registration process. There is a clear difference in forcing a person to take additional steps in the registration process (i.e. placing a number on the firearm) and being able to adequately provide a description of a weapon that can be identified uniquely. Subdivision (b) does *not* require a serial number and only requires the registrant to provide a description of the firearm as it already exists.

5. Eligibility Check and Supporting Information (Fifth and Seventh Causes of Action)

Defendants argue that they are "required" to perform background checks on "assault weapon" registration applicants pursuant to Penal Code section 30950. (Demurrer, Pg. 18.) But nothing about this section specifically requires DOJ to perform a background check. Instead, it simply makes clear that under California law, no person who is prohibited from owning or possessing firearms may register or possess an "assault weapon." (Pen. Code, § 30950.) It is therefore a proscription on certain activity by individuals, and places no mandate on Defendants

to conduct a background check like other provisions of the Penal Code involving specified firearm transaction.

For similar reasons, Subdivision (b) does not require individuals to provide U.S. citizenship information. Nevertheless, Defendants argue that Plaintiffs opposition to this challenged requirement is somehow inconsistent. (Demurrer, Pg. 18, footnote 19.) They suggest that because the Plaintiffs do not object to various pieces of information being required regarding the firearm to be registered (such as the type, make, model, etc., all of which are not expressly required under Subdivision (b)), Plaintiffs' arguments with respect to the required U.S. citizenship information is without merit. Such information, however, provides "a description of the firearm that identifies it uniquely," which is expressly required pursuant to Subdivision (b). There is no such similar provision of Subdivision (b) requiring information for a background check.

6. Clear Digital Photos (Fifth Cause of Action)

In support of the challenged regulations requiring applicants to provide clear digital photographs, Defendants simply state that such photos will assist DOJ in "uniquely" identifying the firearm and to confirm the "accuracy" of its description. (Demurrer, Pg. 19.) But a photograph is a *depiction*, note merely a *description* of the firearm. Subdivision (b) only calls for the latter. In other words, DOJ is once again requiring applicants to *create*, rather than *describe*, the information to be provided in the registration application, which also necessarily requires access to expensive equipment. As a result, the challenged regulation unlawfully expands the scope of Subdivision (b)'s APA exception and is therefore void.

7. Joint Registration (Sixth Cause of Action)

With regards to the challenged regulations limiting who may jointly-register a firearm as an "assault weapon," Defendants argue this is a "quintessential" issue that should be included in their registration regulations. (Demurrer, Pg. 19.) Like many of DOJ's other definitions, however, this term is found in an entirely different Penal Code section, and therefore cannot be subject to DOJ's limited APA exception.

Defendants' argument that prior rulemaking activity concerning joint-registration is irrelevant is also without merit. As a so-called "quintessential" issue, DOJ has already "spelled

out" the matter in prior rulemaking activity subject to the APA. And as stated by Plaintiffs, Defendants may be able limit the term if they so choose. But they must do so subject to the requirement of the APA, as they cannot shoehorn the restriction into their limited exception. For any doubts should be resolved in favor of the requirements of the APA applying. (See *California Sch. Bd.s Ass'n v. State Bd. Of Educ*. (2010) 186 Cal.4th 1298, 1328; *Morales v. California Dept. Corrections and Rehabilitation* (2008) 168 Cal. App.4th 729, 736; *see also United Sys. of Ark. v. Stamhon* (1998) 63 Cal.App.4th 1001, 1010 ["When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language."].)

8. Post-Registration "Bullet Button" Removal Restriction (Eighth Cause of Action)

Defendants support their regulations regarding post-registration activities by arguing they somehow help "maintain the integrity of the current registration process." (Demurrer, Pg. 16.) Notably, however, Defendants do not oppose Plaintiffs' arguments that such restrictions are entirely unrelated to registration. Instead, Defendants merely state that the "Court should defer to DOJ's judgment" on the matter. (Demurrer, Pg. 17.) For this reason, the challenged regulation intentionally enlarges the scope of the APA exception afforded to DOJ, and is therefore void and unenforceable.

Regarding the arguments raised by Defendants in support of the regulations necessity, it is at best unclear if the AWCA prohibits the type of activity DOJ seeks to control. It is clear, however, that the challenged regulations expand the scope of the AWCA and its provisions. As a result, any such regulation must be subjected to the rulemaking requirements of the APA.

9. Non-Liability Clause (Ninth Cause of Action)

In their Demurrer, Defendants' sole argument in support of the challenged regulation establishing a non-liability clause as part of the terms of use for the mandatory electronic registration system is that it "directly supports the registration process." (Demurrer, Pg. 20.) Defendants also argue that the challenged regulation does not conflict the California Constitution or the Information Practices Act because it applies "[e]xcept as may be required by law." (*Ibid*.) If that is the case, the requirement is therefore meaningless and entirely unnecessary. But in any

case, DOJ cannot exempt itself from liability through mere regulation, nor can it attempt to do so through the limited APA exception afforded to DOJ.

II. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF AND NEED NOT SEEK MANDAMUS

Plaintiffs are entitled to seek declaratory relief as to the validity of DOJ's "assault weapon" regulations. Under the APA, an interested person has the right to "obtain a judicial declaration as to the validity of any rule, regulation, order or standard of general application adopted by any State agency to implement, interpret or make specific, any law enforced or administered by it or to govern its procedure." (*Bess v. Park* (1955) 132 Cal.App.2d 49, 281 P.2d 556; *see also* Gov. Code § 11350.) Defendants nevertheless argue that before Plaintiffs can seek such relief, they "must first establish that the regulations should have been promulgated under the APA, through a writ petition challenging DOJ's administrative decision to use an APA exempt process." (Defs.' Mem. Supp. Demurrer, p. 9.) Defendants are wrong.

First, Plaintiffs are not challenging an administrative decision, but rather Defendants' adoption and enforcement of illegal regulations. Not a single case Defendants cite as examples of administrative decisions that courts have held must be challenged in a writ proceeding involves a challenge to the validity of regulations. (*See Id.* [State *of California v. Superior Court* (1974) 12 Cal.3d 237 (challenge to denial of a California Coastal Commission permit denial); *City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461 (challenge to State Department of Finance refusal to disperse funds from a dissolved public redevelopment program to an interested City); *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149 as modified on denial of reh'g (Feb. 14, 2014) (seeking clarification of the meaning of Department of Water and Power Rules, especially when the petitioner had not even received a final determination under those rules)].) And for good reason. Challenges to the validity of *any* regulation are entitled to review under Government Code section 11350. Because the APA exemption that DOJ attempts to rely on is a statutory creation, the question of whether or not that statute shields DOJ's regulations is a question of statutory interpretation. Courts have explicitly held "that statutes are inherently proper subjects of declaratory relief". (*Bess v. Park* (1955) 132 Cal.App.2d 49, 52.) In sum,

Defendants cannot insulate their regulations from a declaratory relief action by simply labeling their circumvention of the APA an "administrative decision."

In any event, even if the Court were to construe Plaintiffs' claims that DOJ acted outside the scope of its APA exemption as a challenge to an administrative decision, declaratory relief is still appropriate here. Indeed, an administrative agency's decision is properly reviewed through declaratory relief where the lawsuit has a more fundamental purpose that challenges numerous violations that are "symptomatic of the much broader problem the action is designed to relieve." (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 24 Cal. App. 4th 1547, 1565-1567, citing *Bess v. Park* (1955) 132 Cal.App.2d 49, 52 [finding declaratory relief appropriate because the city's interpretation of its responsibilities under the law was a "recurring problem and one involving the interpretation of a statute"].) "[T]he purpose of a declaratory judgement is to either serve some practical end in quieting or stabilizing an uncertain or disputed jural relation" or "to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation .... " (*Venice Town Council, Inc. v. City of Los Angeles*, 47 Cal. App. 4th 1547, 1565-67, citing *Bess v. Park* (1955) 132 Cal.App.2d 49,52.) The interpretation of a statute is a judicial function—not an administrative one. (*Bess v. Park* (1955) l32 Cal.App.2d 49,53.)

Notably, Defendants recently failed to advance a similar argument in Los Angeles Superior Court. (*Llanos v. Harris*, (Oct. 5, 2017) BS163796 [nonpub. opin].) In *Llanos*, DOJ attempted to improperly expand its authority to regulate "assault weapons" based on its interpretation of the AWCA. There, as here, Defendants argued that declaratory relief is not appropriate because petitioners seek review of administrative determination. (*Ibid.* at p.34.) The court summarily rejected that argument, finding that the broader application of Defendant's policy interpretation of the AWCA was the proper subject of a declaratory relief action. (*Ibid.* at p.35.) The same result should follow here.

Plaintiffs are challenging "an overarching, quasi-legislative policy set by an administrative agency," i.e., the adopted regulations of widespread application, not merely a specific administrative order or decision. (*Californians for Native Salmon etc. Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1429, citing *Venice Town Council*, supra, 47 Cal.App.4th at p. 1566

and *Simi Valley Adventist Hosp. v. Bonta* (2000) 81 Cal.App.4th 346, 354-355.) "Declaratory relief directed to policies of administrative agencies is not an unwarranted control of discretionary, specific agency decisions." (*Ibid*.)

DOJ's policy decision to stray from the APA is precisely the type of agency action that Government Code section 11350 intended to be challenged through declaratory relief actions. "Where a party challenges a regulation on the ground that it is in conflict with the governing statute or exceeds the lawmaking authority delegated by the Legislature, the issue of statutory construction is a question of law on which a court exercises independent judgment." *(PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, citing Cal. Gov't Code § 11342.2; *(*See also *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 234 Cal.App.4th 214 [declaratory relief under section 11350 appropriate to challenge alleged "underground regulation."].

Because Plaintiffs' claim that DOJ's regulations are subject to the APA is properly before this Court, Defendant's demurrer should be denied. With respect to Plaintiffs' separate claims that DOJ's regulations illegally alter the scope of existing statutes, Defendants never argue that these claims are not subject to a declaratory relief action. As to these claims, Defendants' demurrer must be denied.

CONCLUSION

For the foregoing reasons, this Court should overrule Defendant's demurrer, or grant Plaintiffs leave to amend, if necessary and not futile.

Dated: January 17, 2018

MICHEL & ASSOCIATES, P.C.

/s/Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF FRESNO

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

On January 17, 2018, I served the foregoing document(s) described as:

PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy

thereof by the following means, addressed as follows:

P. Patty Li *Attorneys for Defendants*
Deputy Attorney General
California Department of Justice
Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

___ (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission through OneLegal. Said transmission was reported and completed without error.

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

/s/Laura Palmerin
LAURA PALMERIN